

IN THE COURT OF APPEALS OF IOWA

No. 9-069 / 97-1931
Filed March 31, 1999

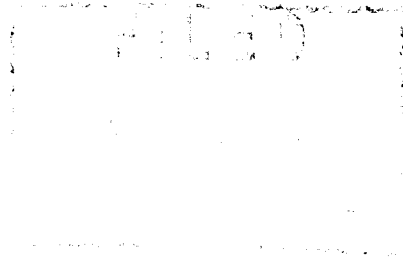
STATE OF IOWA,

Appellee,

vs.

DARRELL SMITH,

Appellant.



Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Darrell Smith appeals his convictions for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and Jeffrey K. Noble and Jamie D.
Bowers, Assistant County Attorneys, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Darrell Smith appeals his convictions for first-degree murder. We affirm.

Background facts. On the evening of November 27, 1996, Des Moines police officer Joe Widlowski was attempting to execute an arrest warrant at an apartment building near Drake University when he observed two people running down a nearby alley. Another officer arriving to assist Widlowski drove through the alley and came upon a car with the engine still running and the body of a man hanging out of it. The man, who later died from his gunshot wounds, was identified as Victor Blakely. The body of another victim, later identified as Darryl Jenkins, was found nearby.

Following an investigation, police charged Smith with two counts of first degree murder. A jury convicted Smith on both counts.

I. Hearsay testimony. Smith first argues that the trial court erred in not allowing testimony by Des Moines police officer Brian Vance concerning a portion of a cellular phone conversation he picked up on his police scanner more than three hours after the bodies were discovered.¹

¹ Outside the presence of the jury, the defense called Officer Vance to make an offer of proof with regard to this evidence. Vance testified that:

A: What I heard on the scanner is a male voice, possibly African American, and the first voice stated, "You got to pick me up. I need to get away. You know that house on 25th across from the diner?

SECOND VOICE: "Yeah."

FIRST VOICE: "The shit went down. There was three of them, two brothers and this white dude. There was an argument, and the dude shot him, and there is a brother dead at the side of the house. Man, you got to get me a ride.

SECOND VOICE: "Where are you at?"

FIRST VOICE: "I'm at --"

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Iowa R. Evid. 801(c). Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rules. *See* Iowa R. Evid. 802 & 803. The admission of hearsay evidence is reviewed for corrections of errors at law. *See State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

Smith argues the conversation was admissible as nonhearsay because it was relevant to impeach the police investigation and explain the subsequent actions of Officer Vance and because it contradicted the State’s theory of the case.² Despite these arguments, we agree with the trial court’s determination that the statement was hearsay. We find no error by the court in excluding the evidence. Smith alternatively argues that his counsel was ineffective for failing to argue that the statement fell within the penal interest exception to the hearsay rule. *See* Iowa R. Evid. 804(b)(3). However, we conclude that the statement does not fall within this or any other exception the hearsay rule. We therefore find no ineffective assistance.

II. Conflict of interest. Smith was originally appointed two public defenders to represent him. During their representation, Smith filed two pro se motions for the

At this point, Vance lost the signal and heard no more of the conversation.

² All other arguments advanced by Smith on this issue were not raised before the trial court and have therefore been waived on appeal. *See State v. Rains*, 574 N.W.2d 904, 914 (Iowa 1998) (citations omitted) (“It is elementary that we do not consider issues not presented to or decided by the district court.”).

appointment of new counsel which were denied. However, Smith was ultimately appointed two new public defenders after he spit on his original counsel during a conference and they were allowed to withdraw. Smith also unsuccessfully sought the removal of his new counsel prior to trial. At the end of the second day of trial, a deputy purportedly overheard Smith express dissatisfaction with the performance of one of his attorneys, and state something to the effect that his attorney had better watch it or he was going to “whack” him. The deputy relayed this information to the court and suggested moving Smith away from the counsel table in the courtroom. After discussing the matter with defense counsel and Smith, the court determined that Smith would sit a few feet behind counsel and could communicate with them by passing notes back and forth.³ Smith now argues that his removal from counsel table indicates that counsel were so obviously afraid of him that they should have withdrawn because this conflict of interest impaired their ability to effectively and zealously represent him.

A criminal defendant’s Sixth Amendment right to counsel includes the correlative right to representation that is unimpaired by conflicts of interest or divided loyalties. *See Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. N.W.2d 1097, 1103, 67 L. Ed. 220, 230 (1981). As constitutional issues are involved, our review of this matter is de novo. *See State v. Spencer*, 519 N.W.2d 357, 359 (Iowa 1994). When

³ When trial resumed, the court informed the jury that Smith was sitting where he would be more comfortable.

a seemingly substantial complaint is raised before the trial court regarding defense counsel's conflict of interest or divided loyalty, the court must make a thorough inquiry into the factual basis for the complaint. *See Atley v. Ault*, 21 F. Supp. 2d 949, 955 (S.D. Iowa 1998) (citing *Holloway v. Arkansas*, 435 U.S. 475, 488-91, 98 S. Ct. 1173, 1180-82, 55 L.Ed.2d 426 (1978)). The inquiry should be on the record and must be of the kind to ease the defendant's dissatisfaction, distrust, or concern. *Id.* at 956 (citing *Smith v. Lockhart*, 923 F. 2d 1314, 1320 (8th Cir. 1991)). If the trial court fails to make a sufficient inquiry, prejudice is presumed and reversal is automatic. *Id.* (citing *Holloway*, 435 U.S. at 488-89, 98 S. Ct. at 1181). If after inquiry good cause is shown for substitution of defense counsel and none is made, prejudice is again presumed and reversal is automatic. *Id.*

After being informed of the potential conflict, the trial court conducted a hearing outside the presence of the jury. After questioning the deputy about Smith's statements, the court stated: "I would ask defense counsel at this time if they have any concerns, and I would ask them if they would continue their representation of Mr. Smith." Both attorneys indicated that they could continue to represent Smith but had some concerns about being distracted by him during the trial. Both attorneys agreed that removing Smith from the counsel table would promote their diligent representation of him. Attorney Hitchcock explained:

[W]e have stated we are not frightened of him. I don't believe that Mr. Johnson [co-counsel] or I are frightened of Mr. Smith. There is sufficient security in the courtroom. What the concern is we are trying to do our job. We cannot do our job with him constantly writing and

talking while we are trying to listen to testimony as it is going on. By him being removed one space back, he is not going to be excluded. We are not prohibiting him from having any conversation with us. We will make sure that we have an opportunity to discuss any questions or issues that he may have prior to finishing up with any witness.

Smith complains that the court did not conduct a sufficient inquiry to explore the potential conflict. However, while the court itself did not ask many questions, it conducted an open forum which allowed defense counsel and Smith to discuss this situation at some length. Although Smith maintains that the reason his counsel wanted him removed from the counsel table was because they were afraid of him, we are satisfied with the court's inquiry and determination that there was no conflict of interest and no need to substitute counsel. We note that there were no further concerns regarding conflict or security raised by Smith or his counsel during the four remaining days of trial.

III. General claims of ineffective assistance of counsel. Finally, Smith contends: "that his trial attorney continued his arraignment beyond his wishes; that the medical examiner lacked the proper credentials, and that his trial attorney failed to call alibi witnesses on his behalf." He contends that the record is inadequate to address these issues on direct appeal and that they should be preserved for postconviction relief. However, we find these claims are too general in nature to allow us to address the allegations or preserve them for postconviction proceedings. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Smith fails to state why the medical examiner's credentials were insufficient, does not identify the alibi witnesses who he alleges

should have been called, and does not suggest what their testimony might have been. *See Id.* Moreover, Smith does not explain how a challenge to the medical examiner, the calling of these witnesses, or a noncontinuance of the arraignment might have changed the outcome of this trial. *See Id.*; *see also State v. White*, 337 N.W.2d 517, 519 (Iowa 1983) (stating the court should at a minimum be provided with enough information to make an initial assessment of a defendant's ineffective assistance contentions). We preserve none of these claims for postconviction relief.

Having considered all issues properly before us on appeal, we hereby affirm Smith's convictions and sentences.

AFFIRM.