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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

168

JEROME LEROY STANFORD,

Appellant,

vs.

THE IOWA STATE REFORMATORY, ANAMOSA, IOWA, CALVIN AUGER, Warden,

Appellee.

Filed November 22, 1978

288
2-60201

Appeal from Black Hawk District Court - Carroll E. Engelkes, Judge.

Defendant appeals trial court's order denying his application for post-conviction relief asserting a new trial was required. Affirmed.

W. H. Gilliam, of Mattson & Gilliam, P.C., Waterloo, for Appellant.

Richard C. Turner, Attorney General of Iowa, Richard H. Doyle, IV, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner Jerome Leroy Stanford appeals the trial court order denying his application for post-conviction relief pursuant to chapter 663A, The Code. After an initial hearing before this court, we issued an order of limited remand ordering the trial court to conduct an in camera inspection into the records of the Department of Public Safety, Narcotics and Drug Enforcement Division, for information concerning their confidential informant Roosevelt Nabors a/k/a Alvin Banks. The purpose of the inquiry was to determine whether Nabors' testimony at petitioner's trial was secured in whole or in part by the failure to prosecute Nabors and whether the State withheld exculpatory evidence.

After conducting the in camera investigation, the trial court found there was nothing in the records of the Department of Public Safety, Narcotics and Drug Enforcement Division, to indicate Nabors's testimony against petitioner was secured in whole or in part by a promise not to prosecute. It also found there was nothing in the record tending to indicate the State withheld exculpatory evidence. The transcript of the in camera hearing together with the files of the Department of Public Safety have been certified to this court for our examination. We take petitioner's claims as they were originally submitted taking into consideration the results of the in camera hearing.

I. Petitioner's initial argument on appeal is that the trial court erred in holding petitioner's claim that the prosecution withheld exculpatory evidence was not supported by the facts or the law. Unquestionably, the State may not suppress exculpatory statements or other evidence which is favorable to the accused and material to the issue of guilt or punishment. Brady v. Maryland, 373 U.S. 83, 104, 83 S. Ct. 1194, 10 L.Ed.2d 215, 218 (1963); State v. Hall, 235 N.W.2d 702, 721 (Iowa 1975); State v. Peterson, 219 N.W.2d 665, 674 (Iowa 1974).

However, Brady does not require the prosecution to make a complete and detailed accounting to the defendant of all police investigatory work. The defendant is not permitted broad and blind fishing expeditions into the State's evidence. The defendant's request for exculpatory evidence must be for what exists. State v. Hummell, 228 N.W.2d 77, 81 (Iowa 1975). In the instant case, Stanford alleges the State withheld evidence of the nature and background of Roosevelt Nabors including at least one instance of prior misconduct. At the least,

Stanford argues the State knew or reasonably should have known of Nabors' background including the "Muskegon Affair" and the failure to disclose this exculpatory evidence deprived petitioner of a fair trial.

The evidence at the post-conviction hearing fails to support Stanford's allegation. The trial court did not err in holding petitioner failed to support his claim that the State withheld exculpatory evidence. State v. Paulsen, 265 N.W.2d 581, 588 (Iowa 1978); see also State v. Epperson, 264 N.W.2d 753, 756-57 (Iowa 1978).

II. Petitioner's second claim on appeal is that the post-conviction court erred in not finding Nabors' testimony was secured in whole or in part by a failure on the part of the State to prosecute Nabors on charges arising out of the "Dunkerton shootout". The post-conviction court found the trial court record indicated the jury was permitted to hear considerable evidence relating to the filing and pendency of charges against Nabors. It found the jury was permitted to weigh the credibility of Nabors as it might have been influenced by those charges against him and the position of the police and prosecutors relating to those charges.

Petitioner argues however, that it is the subsequent failure to prosecute Nabors and the inference of collusion which constitutes the 'new evidence' and requires post-conviction relief. In State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976), the supreme court held the elements which must be established to sustain a motion for new trial under § 787.3(8) based upon newly discovered evidence set out in State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975), also apply to post-conviction proceedings. The one exception is the requirement that the evidence be discovered after trial but before judgment, which is inconsistent with a post-conviction—post judgment proceeding. Instead, the applicant must show the evidence was discovered after judgment.

In the instant case, the charges against Nabors were not dismissed until two years after the trial of petitioner. The post-judgment requirement of Sims is thus satisfied. However, Sims also requires the newly discovered evidence be 1) material to the issue, not merely cumulative or impeaching, and 2) that it would probably change the result if a new trial were granted. 239 N.W.2d at 554-55. The post-conviction court found the possibility that those charges might later be dismissed

within the scope of proper argument to the jury and that it could have been and in fact may have been considered by the jury. Petitioner has failed to show this evidence is other than cumulative or impeaching or that a different result would have occurred. Sims, supra.

III. Petitioner's third contention claims he was entitled to postconviction relief because of the original trial court's refusal to grant petitioner's motion to reopen after the evidence was closed and the case was about to go to the jury. The State contends petitioner is precluded from raising this ground by reason of § 663A.8, The Code, because he failed to raise the issue by direct appeal. Petitioner did appeal his conviction but before the issues were stated the appeal was dismissed under Supreme Court Rule 16 (now R. App. P. 104).

Petitioner cites State v. Boge, 252 N.W.2d 411 (Iowa 1977) for the proposition that the dismissal of an appeal pursuant to former Supreme Court Rule 16 is not an adjudication for purposes of a later postconviction proceeding. In the instant case the issue presented does not involve prior adjudication. It relates to preclusion of certain grounds for relief as a result of failure to raise them on a direct appeal. A postconviction applicant has the burden to establish sufficient reason why any ground for relief has not previously been asserted on direct appeal. Bledsoe v. State, 257 N.W.2d 32, 33-34 (Iowa 1977). For purposes of applying this requirement, appeals dismissed pursuant to Supreme Court Rule 16, have been treated as if no appeal has been taken. Bledsoe v. State, supra.

The situation presented in the present case is dissimilar from that involved in Bledsoe v. State, supra, only to the extent that in two significant particulars, the present record presents a stronger case for application of a § 663A.8 preclusion than did the record in Bledsoe. The trial court in Bledsoe applied § 668A.8 sua sponte when it had apparently not been raised by the State. Yet, a majority of the supreme court in an en banc decision upheld such action. In the present case, the preclusive effect of § 663A.8 was specifically raised in an amendment to the respondent's answer filed June 23, 1976.

The ground which was determined to be precluded in Bledsoe, arguably related to an issue (coercion from extra-judicial sources) requiring for its determination evidence outside of the trial court record. Arguably, this situation necessitated collateral rather

than direct attack as found by the dissenting justices in Bledsoe. But the majority in Bledsoe nevertheless held that the claim was precluded for failure to pursue the grounds relied upon on a direct appeal. In the present case, the issue now being considered is the alleged wrongful denial of petitioner's motion to reopen the original criminal trial made after the evidence was closed, but prior to the submission of the case to the jury. (See paragraph three of Application for Postconviction Relief). Proper resolution of that issue can be made on the basis of the record which was before the trial court at the time the motion to reopen was made and overruled. Indeed, this is the only record upon which such determination can properly be made. Therefore, there is no basis for inferring that the matter could not have been asserted on direct appeal.

The trial court in the postconviction proceedings made a finding of fact that "Defendant [petitioner] appealed to the Supreme Court of Iowa and ultimately said appeal was ordered dismissed by the Supreme Court on February 6, 1974. In that appeal, the Defendant did not pursue the complaint raised in these proceedings, although in a position to do so." With respect to the issue now being considered, this finding is fully supported in the evidence. This case is therefore controlled by the majority opinion in Bledsoe. Moreover, for reasons just advanced the two points relied upon by the three dissenting justices in Bledsoe are not present in the instant case. We hold that petitioner is precluded from raising the ground which forms the basis for his third assignment of error by reason of § 663A.8, The Code.

IV. Nor can we find on the merits any basis for setting aside petitioner's conviction as a result of the court's refusal to reopen the evidence. The significant portion of the record made in support of the oral motion to reopen is as follows:

> MR. MASON: Now, may it please the Court, I have a matter to bring to the attention of the Court on behalf of the defendant, I would like to bring this up for what value it might have. There has been brought to my attention just a matter of a few minutes ago an article in the Muskegon Chronicle, which I will ask, the Court has a copy of it, and I would like to have it stamped for this file in this case, which brings into issue the corruptible nature of Mr. Nabors. It has been the contention of the defense all along that Mr. Nabors is a man of corrupt nature, and this is evidence which is just brought to our attention, which if we were able to follow it up in the way of witnesses and testimony along this line, we think would give more due process to the trial of this case. Therefore, we would move at this time that the case be reopened and we have the opportunity to follow up this new evidence which we think is very crucial in this case, due to the nature of the entire case that has been presented so far by virtue of our offers of proof and the like.

MR. RAUSCH: Let me look at it?
MR. MASON: Yah.
[Document handed to Mr. Rausch.]
MR. MASON: We would like the record to show that the Court has a copy of this and have it marked as filed in this case, in support of our motion at this time. Is that agreeable with the Court as far as filing it in the file? Because if we could follow this up, and this is important, we think this goes to the due process and the defense of this man. And we had absolutely no knowledge of it until just a few minutes ago.
THE COURT: Well, for the purpose of the record on appeal, the Court will permit a copy of this article to be preserved in the record in this case.
MR. RAUSCH: I don't know what you're talking about.
THE COURT: The Court is going to deny the defendant's request to reopen the case, for the reason that on no further showing it is difficult for the Court to conceive that any evidence related to the events referred to in the newspaper article could in any way be made the subject matter of testimony or evidence in the case before us, for all of the reasons previously indicated by the Court in its several rulings along the way in this case. Period. (emphasis supplied).

The trial court stated that it was denying the motion on the basis that the evidence sought to be gathered was not admissible. Whether such conclusion on its part was incorrect is debatable. The dissent assumes that Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975) is controlling. That case was decided by the U.S. Court of Appeals in a 2-1 decision in which only one active member of the court participated. As to the application of the evidentiary principles involved, the result reached in that case is somewhat inconsistent with the decision of our supreme court in the same case. State v. Johnson, 219 N.W.2d 690, 695-96 (Iowa 1974). The trial court at petitioner's criminal trial, in commenting on the admissibility of the evidence sought to be gathered, was only alluding to the principle stated in State v. Johnson that extrinsic evidence of specific misconduct is ordinarily inadmissible to impeach a witness. In State v. Johnson, these principles were applied with respect to the same transactions upon which petitioner's claim in the present case is based. In the later case of Howard v. State, 248 N.W.2d 108, 110 (Iowa 1976), the court did not openly retract from the position taken in State v. Johnson, but distinguished Johnson v. Brewer, as it applied to that case.

We, too, should distinguish Stanford's case from that which was involved in Johnson v. Brewer. Even if it is assumed that the extrinsic evidence sought to be gathered in the present case would have been admissible if given by witnesses with actual knowledge of the facts, it is clear from the record that petitioner had no such witnesses in hand at the time the motion was made. The motion was only a request for

time to pursue the matter further, with no indication given as to how and when this would be done, or within what time frame. The evidence was closed and the case was ready to go to the jury when this request was made. Denial of the motion under such circumstances may not be characterized as a denial of due process as the dissent suggests. In Johnson v. Brewer, the issue was exclusion of evidence offered at trial, not refusal to reopen a case to enable further evidence to be gathered. It is significant that at no time did petitioner assert in his postconviction application that he is now in possession of evidence of Neighbors's prior activities unavailable to him at the time of his trial, which would probably have effected the result and would be admissible upon retrial. He attempts to assert that such is the case on this appeal, but this claim was never made in the trial court and may not be considered here. We are thus concerned only with an issue involving the discretionary ruling of the trial court on the motion to reopen. On this matter, and the other issues raised, the trial court properly denied the application for postconviction relief.

V. Petitioner's final contention on appeal is that the post-conviction court erred in sustaining the State's motion to quash. The purpose of our order of limited remand was to in part remedy this problem by requiring the trial court to conduct an in camera hearing into the files of the Department of Public Safety, Narcotics and Drug Enforcement Division, for information concerning Roosevelt Nabors. From that order, petitioner now claims the trial court erred in conducting the in camera hearing in counsel's presence but without his participation.

We reject petitioner's contention that absent proof by the State as to the privileged nature of the files, petitioner's counsel had an absolute right to see the files and participate in the in camera inspection. The court was informed of the nature of the files, the ongoing nature of the drug traffic investigations in the Waterloo area and the agency's desire that the records remain confidential. The trial court did not err in deciding not to allow counsel to actively participate in the inspection.

We have considered all issues presented and find no basis for reversal.

AFFIRMED.

Donielson and Carter, JJ., concur. Johnson, J., concurs in Divisions I, II, III, V and result. Oxberger, C.J., and Snell, J., dissent.

SNELL, J. (dissenting)

I respectfully dissent. The post conviction court should have granted relief on the ground it was an abuse of the trial court's discretion in refusing to reopen the trial upon petitioner's request based upon newly discovered evidence of Nabor's prior misconduct.

While considering proposed instructions defense counsel asked the trial court to reopen the case based upon a newspaper article which appeared in the Muskegon Chronicle. The trial court stated that based upon the article alone without any further showing, it was difficult for the court to conceive how the events referred to in the article could be made the subject matter of additional testimony based upon its previous rulings. Defendant then interrogated Special Agent Johnson of the Department of Public Safety, Division of Vice Enforcement, who testified he had been told the Michigan prosecutor had filed charges and at a later date had accused the federal agents, the state agents and Roosevelt Nabors of lying to him. The prosecutor therefore moved to dismiss every case. The trial court then ruled all of this information was remote in point of time from anything involving Nabors in the Waterloo area and would not be exculpatory in nature for the defendant. Defendant's motion to reopen was overruled.

Trial courts have discretion to permit a party to reopen the record and introduce evidence that was previously omitted. State v. Moreland, 201 N.W.2d 713, 714-15 (Iowa 1972). Defendant's counsel stated the information in the Muskegon Chronicle about Nabors' alleged lying in another case was brought to his attention only a few minutes before he informed the court. These matters, though pertinent to character, were also relevant to the motives and bias of Nabors, the chief witness against defendant. Motives, bias and prejudice of witnesess are proper subjects of cross-examination. State v. Bell, 258 Iowa 779, 783, 140 N.W.2d 375, 378 (1966); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960).

Defendant's arguments at the time of his original trial, that failure on the part of the trial court to allow him to effectively cross-examine Nabors deprived him of due process, is the basis upon which Johnson v. Brewer, 521 F.2d 556 (8th Cir. 1975), was decided. In Johnson, where Roosevelt Nabors was also the

government's witness, the court held that the issues of bias and motive were always relevant where a professional, paid, governmental informant is the only witness against the accused. In the instant case, Nabors was the only actual witness to defendant's alleged crime. As such, his biases and motives for testifying were relevant to his credibility and properly explorable on cross-examination.

In Johnson v. Brewer, the circuit court quoted from Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (p. 561) as follows:

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination [citation ommitted]. 415 U.S. at 316-317, 94 S. Ct. at 1110.

The court in Johnson v. Brewer, (pp. 561-62), further stated:

> Of particular applicability to the matter before us, involving allegedly perjured testimony at a former trial, is the Court's observation to the effect that "[A] partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying." 3A J. Wigmore, Evidence, § 940, p. 776 (Chadbourn rev. 1970). (Emphasis in original; footnotes omitted.)" 415 U.S. at 317n 5, 94 S. Ct. at 1111.
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> [3] The exclusion of the testimony proffered as to the attempt by the informant-witness, the only witness to the alleged crime, to frame another defendant in a precisely parallel case went beyond a mere error[14] in the introduction of evidence. What is actually asserted is governmental conduct which, if true, is both inexplicable,[15] and violative of due process.[16]
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> The essential point is that the jury must be given an opportunity to assess the Michigan incident in whatever manner it wishes. It may, indeed, hurt the defendant, if the jury believes that the informant would be more, rather than less, careful and truthful after being compromised in Michigan. But more importantly, the truth shall never be known if one of the two knowledgeable parties to the alleged sale is immune from reasonable scrutiny of his possible relationship with the government.
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> In holding that in a case like this where a government prosecutor confesses in open court that the key prosecution

witness has deliberately lied, where this same witness uses an identical modus operandi to become the key government witness in another case, where the informant is a career informant dependent on a continuing relationship with the government, where several different forms of bias may exist and may exist simultaneously, the State has an obligation to permit an inquiry into the initial deliberate lie, we do not fear that we strike even a modest blow against reasonable state rules of evidence.

Petitioner is entitled to have a new trial.

Oxberger, C. J., joins in this dissent.