IN THE COURT OF APPEALS OF IOWA

No. 0-431 / 89-1246

FILED
JAN 2 9 1991
CLERK SUPREME COURT

BLAIR JUSTIN GREIMAN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Timothy J. Finn, Judge.

Greiman appeals denial of postconviction relief. **REVERSED AND REMANDED.**

Barbara A. Schwartz of the Clinical Law Program, University of Iowa Law School, Iowa City, and John M. Priester, Robin Lassise, Eartha J. Johnson, Amy Dombrowski, student legal interns for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ., but decided en banc.

OXBERGER, C.J.

In 1981 Blair Greiman, then sixteen years old, was accused of abducting a woman, sexually assaulting her, stabbing her, and leaving her for dead. The juvenile court waived its jurisdiction over Blair, and he was tried as an adult for several crimes. He was convicted in 1982 of first-degree kidnapping, second-degree sexual abuse, and attempted murder. The Iowa supreme court affirmed these convictions on direct appeal in 1984. State v. Greiman, 344 N.W.2d 249 (Iowa 1984).

Blair then filed the present application for postconviction relief to challenge his convictions. The district court denied postconviction relief. Blair has appealed. We reverse and remand for a new trial.

Blair contends his attorneys in the 1981-1982 juvenile court and criminal court proceedings rendered ineffective assistance in several respects. First, Blair complains his attorneys failed, during the juvenile court's waiver hearing, to offer expert testimony regarding his potential for rehabilitation within the juvenile system. Second, Blair contends his attorneys failed to request suppression of his statements to police at the time of his arrest. Finally, Blair complains his attorneys failed to object to certain testimony by a State rebuttal witness. Blair asserts this testimony was objectionable because the State did not disclose the identity of the witness during discovery.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption counsel performed competently. Risdal, 404 N.W.2d at 131. The defendant must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. A defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987).

In Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2069, 80 L.Ed.2d at 699, The Supreme Court articulated the following test for gauging the requisite prejudice necessary to show ineffective assistance of counsel:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

A postconviction applicant usually cannot raise issues not presented on direct appeal. To do so he must show "cause" or sufficient reason for failing to raise the issue on direct appeal and actual prejudice resulting from the

alleged error. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989)(citations omitted). We address Blair's claims because the attorneys representing him on direct appeal also defended him at trial and therefore, understandably, did not raise ineffective assistance of counsel claims against themselves in the direct appeal. Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982).

JUVENILE WAIVER HEARING. Blair asserts his counsel at the juvenile waiver hearing ineffectively represented him by failing to present expert testimony about his personal amenability to rehabilitation within the juvenile system. At his postconviction hearing Blair presented two experts who testified that if called at the waiver hearing they would have testified to Blair's amenability to treatment in the approximately twenty months he could have been held within the juvenile system. Blair couples this testimony with the juvenile court's statement "[a] psychological evaluation of Blair may have beneficial [sic] to this Court, but will probably be sought by counsel at a later date" as proof expert testimony at his waiver hearing would have resulted in a denial of waiver.

Additionally, Blair asserts the district court erroneously found at his postconviction hearing he was professing innocence to his counsel at the time of his waiver hearing. (Blair confessed to the acts before trial and his defense at trial consisted of claims of insanity

and diminished responsibility.) We find this determination irrelevant to our decision. The lack of expert testimony about Blair's amenability to treatment did not prejudice him such that a reasonable probability existed of non-waiver. We base our decision on the heinous nature of the crime and the juvenile court's order stating:

> The Court further concludes Blair is mature for his age and his past record of achievements could result in rehabilitation more rapidly than many other juveniles who are not blessed with an I.Q. of 127 and a record of such achievements. However, twenty months seems an insufficient time to do so even in Blair's case. If this Court retains jurisdiction, in view of the seriousness of the alleged crimes. This Court owes an obligation under [§232.45]6(c) not only to Blair's best interest, but also to the best interest of the community. If Blair were not rehabilitated in twenty months, he could be an extreme danger to the community. This Court concludes the community is entitled to the best protection possible under the circumstances of this case and it is to Blair's best interest also to make certain reasonable time exists for his rehabilitation.

In light of the heinous nature of the crimes charged and the statutory requirement for the court to consider the best interests of the community, we do not find Blair's counsel failed to adequately represent him at his waiver hearing.

We believe testimony of Blair's potential amenability to treatment within twenty months would not have altered the outcome of the juvenile waiver hearing. The issue of rehabilitation is so unpredictable that despite expert opinion of its potential for success we are not persuaded that the trial court's choice would have been any

different. We base our decision on the juvenile court's fears for the community if treatment was not successful.

INCULPATORY STATEMENTS. Blair contends his trial counsel also provided ineffective assistance by failing to move for suppression of statements made by him to the police at the time of his arrest. The statements included various "alibis" of his whereabouts during the time of the crime. Blair contends the statements should have been suppressed because although he confessed to the crime prior to trial, the State used the statements to undermine and negate his defense. The State used the statements along with other conduct by Blair during and after the crime to show Blair understood the consequences of his actions and was able to rationally act to conceal the crime.

Blair's attorneys claimed at the postconviction hearing they did not seek suppression because they did not believe the statements hurt their insanity defense as well as they were unsure if a suppression motion would have been meritorious because, for the most part, the statements were voluntary.

An attorney breaches no duty in failing to seek suppression of a statement if strategic considerations render suppression unimportant, or if research indicates a motion would have no merit. See Kellogg v. State, 288 N.W.2d 561, 565 (Iowa 1980). Further, the fact that a trial court, might in retrospect, hold statements

inadmissible does not justify the conclusion the defendant's attorney was ineffective for deciding not to move for suppression of the statements after conducting an investigation and deciding against a motion to suppress. See Kyle v. State, 364 N.W.2d 558, 562 (Iowa 1985).

We find Blair's counsel's failure to move for suppression of his statements made during his arrest did not prejudice him in such a way as to establish ineffective assistance of counsel. The statements were consistent with Blair's later confession to the crime. Further, the statements appear to be consistent with the descriptions given by Blair's experts about his tendency to lie under stress.

We find the failure of Blair's counsel to move for suppression of his statements to police at the time of arrest does not establish ineffective assistance of counsel such that Blair was denied his Sixth Amendment right to counsel. We need not address whether such a motion would have been meritorious if made since we find their admission did not sufficiently prejudice the outcome of Blair's trial.

SURPRISE EXPERT WITNESS. Lastly, Blair contends his counsel should have objected to the State's presentation of an undisclosed rebuttal expert. Blair relies on Wardius v. Oregon, 412 U.S. 470 (1972), and State v. Walton, 228 N.W.2d 21 (Iowa 1975), for his claim that the reciprocal

discovery requirement in cases involving insanity defenses applies to expert rebuttal witnesses.

The Iowa rule governing reciprocal discovery of expert witnesses where a defense of insanity or diminished responsibility has been noticed states:

> Where a defendant has given notice of the use of the defense of insanity or diminished responsibility and intends to call an expert witness or witnesses on that issue at the trial the defendant shall, within the time provided for the filing of pretrial motions, file written notice of the name of each such witness. Upon such notice or as otherwise appropriate the court may upon application order the examination of the defendant by a state named expert or experts whose names shall be disclosed to the defendant prior to examination.

Iowa Rule of Criminal Procedure 10 (10)(b)(2) (1982).

In State v. Walton, 228 N.W.2d 21, 25 (1975), our supreme court stated:

> Section 777.18, The Code, requires a defendant who proposes to raise insanity as a defense to file written notice setting forth the names of witnesses, together with their addresses and occupations, and a statement of the substance of that which the defendant expects to prove by the testimony of each of the witnesses. The statute imposes the same requirement on a defendant who proposes to rely on a defense of alibi. There is no [statutory] requirement for the State to furnish names of witnesses to be called in rebuttal on either defense.

Walton cited Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) for the holding that "where the State is accorded discovery of defendant's witnesses on a defense of alibi the defendant, in the absence of a strong showing of state interests to the contrary, is entitled to

reciprocal discovery as a matter of due process." Walton v. State, 228 N.W.2d at 25. Walton then went on to hold that Wardius also requires reciprocal discovery in criminal cases where the defendant raises the defense of insanity and the State fails to make a strong showing of state interests to the contrary. Id.

In State v. Fechter, 397 N.W.2d 711, 713 (Iowa 1986), the court again emphasized it is fundamentally unfair, as a matter of constitutional due process, to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence he disclosed to the State. It is true, Fechter was not available to Blair's attorneys at the time of his trial; however, Fechter only re-emphasized a principle enunciated by the United States Supreme Court in 1973 and embraced by the Iowa Supreme Court in Walton in 1975 with respect to insanity defenses. Fechter did not herald an expansion of the reciprocal discovery rule, but rather, recognized an exception to the rule with respect to witnesses refuting alibi evidence "not previously disclosed by the defendant." Id. at 713 (emphasis added).

In Fechter the defendant noticed alibi witnesses who would account for his whereabouts on the day of the robbery he was accused of participating in from the afternoon to approximately 1:00 or 1:30 a.m. Another witness who had not been listed as an alibi witness testified at trial he

had been with the defendant until 10:00 p.m. and then he left the defendant's company, committed the robbery, and picked up the defendant at 3:30 a.m. The State's witness then testified he saw the defendant and the witness together in a car at 1:30 a.m. The State's witness did not rebut any evidence provided by the defendant in his notice of alibi. The court concluded that the defendant's limited compliance with the rule requiring notice of alibi witnesses also limited his protection from unknown rebuttal witnesses.

We find the State's failure to file written notice of the surprise witness, Dr. Larsen's identity as a potential expert witness was a denial of Blair's constitutional due process right and his counsel should have objected to Dr. Larsen's testimony. Dr. Larsen was not a proper rebuttal witness. The law about the State's obligation to notify the defendant of witnesses to be called to rebut the defense of insanity was clear at the time of Blair's trial. Therefore, we find Blair has proven his trial counsel failed to perform an essential duty, i.e., failing to object to Dr. Larsen's surprise testimony, and now we must look at whether prejudice resulted.

In reviewing the totality of the circumstances we find a reasonable probability the result of Blair's trial might have been different without Dr. Larsen's testimony. The State's expert testimony in its case in chief was weak at

best and at times seemed to imply no answers existed to the State's direct questions about Blair's sanity. Blair's experts, in contrast, presented strong basis for their findings that Blair was not sane when he committed the crimes he was on trial for. Additionally, Dr. Larsen, the last witness the jury heard on the issue of Blair's sanity, effectively destroyed the assertions made by the experts presented for the defense. Even though Dr. Larsen's testimony would have been admissible if notice had been given, it does not change the fact that notice was not given and Blair was not ensured the fairness the reciprocal discovery rule seeks to provide.

Accordingly, we find Blair did not receive effective assistance of counsel in his 1982 criminal trial and remand his case for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

Donielson, Schlegel, and Hayden, JJ., concur; Habhab and Sackett, JJ., dissent.

HABHAB, J. (concurring in part and dissenting in part)

I respectfully dissent to that part of the majority's opinion that reverses and remands this cause and concur in the remainder of the opinion.

In dissenting, I adopt the reasoning of the trial court which is as follows:

> The Applicant also argues that State v. Walton, 228 N.W.2d 21 (Iowa 1975), applied the standard to the State in Iowa prosecutions. He cites the following language, to-wit: "We read Wardius to require reciprocal discovery in criminal cases in Iowa where the defendant raises either the defense of alibi or insanity and the State fails to make a strong showing of State interest to the contrary. Just as the State was accorded notice tantamount to discovery of defendant's witnesses under our statute in those cases, so to [sic] must the defendant be accorded discovery of the State's witnesses." The Applicant also relies on State v. Fechter, 397 N.W.2d 711, 712 (Iowa 1986), for the same proposition.
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> There are two problems with the Applicant's contentions, however. First of all, the cases relied upon by the Applicant do not support a requirement that rebuttal witnesses be listed. These cases stand for the proposition that where a statute requires notice of a certain defense (either alibi or insanity), to be given by the defendant, then due process requires the State to reciprocate by listing its witnesses. Clearly, the reciprocal nature of the rule as it existed in 1982 met the due process requirements as outlined and required by Wardius v. Oregon and State v. Fechter.
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> Secondly, as noted above, these cases do not require the notification of rebuttal witnesses. The very nature of rebuttal witnesses would as a practical matter prohibit their prior notification, since they are called not in the case in chief but to rebut evidence presented by the defendant.
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> Just as importantly, even if the Court were to find that the prosecution was under an obligation to list rebuttal witnesses and failed to meet that

obligation, it is necessary for the Applicant to show that the error worked to the Applicant's actual and substantial disadvantage infecting the entire trial with error of constitutional dimension. See, State v. Miles, 344 N.W.2d 231 (Iowa 1984). Here, a reading of the record of the examination of Dr. [Larsen], in the Court's opinion, fails to show that there was any error. The cross-examination of this witness, in the Court's opinion, was not only thorough, but extremely effective. A reading of the transcript revealed that even with notice and pretrial depositions of this witness, and extensive preparation for the witnesses, that in this Court's opinion it would be difficult to prepare a better cross-examination than occurred by the Applicant's attorneys. There simply was no error or harm to the Applicant.

Sackett, J., joins this dissent.