IN THE COURT OF APPEALS OF IOWA

No. 5-551 / 94-1566

SWAN CHARLES MAGNUSON,

Plaintiff-Appellant,

vs.

STATE OF IOWA,

Defendant-Appellee.

FILED
DEC 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Swan Magnuson appeals the district court's denial of his motion for new trial pursuant to Iowa Rule of Criminal Procedure 23. **AFFIRMED.**

Keith G. Engel and Craig M. Dreismeier, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Richard Crowl, County Attorney, and Daniel McGinn, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., Cady, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

HABHAB, P.J.

In April 1980, Swan Magnuson was convicted of the first-degree murder of his mother, Clara. In April 1992, Magnuson's sister, Deborah Calek, discovered a letter in Clara's bible. The typed letter, which appeared to be written and signed by Clara, indicated there had been an incestuous relationship between Clara and Magnuson.

In April 1993, Magnuson filed a motion for new trial based on newly discovered evidence pursuant to Iowa Rule of Criminal Procedure 23(2)(b)(8). The district court found the incestuous relationship was not newly discovered evidence and questioned the authenticity of the letter. Moreover, the court found the matter of the incestuous relationship would not have changed the result of the murder trial. Therefore, the court denied the motion.

Magnuson filed a timely motion for new trial pursuant to Iowa Rule of Civil Procedure 244 and a motion to supplement the record arguing the court's ruling was not sustained by sufficient evidence and he should be allowed to present additional evidence showing his counsel did not know about the incestuous relationship at the time of his murder trial. The court denied Magnuson's motions.

Magnuson appeals.

I. ***Motion for New Trial.*** Magnuson contends the district court erred in denying his motion for a new trail. Magnuson argues he is entitled to a new trial based upon newly discovered evidence.

The district court has wide discretion in ruling upon a motion for new trial based upon newly discovered evidence. *State v. Jones*, 511 N.W.2d 400, 409 (Iowa App. 1993); *State v. More*, 382 N.W.2d 718, 723 (Iowa App. 1985). We will uphold the district court's ruling unless it is clearly erroneous. *Id.* We also recognize new trials based upon newly discovered evidence should be looked upon with disfavor and granted sparingly. *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994); *Cornell v. State*, 430 N.W.2d 384, 387 (Iowa 1988); *State v. Farley*, 226 N.W.2d 1,3 (Iowa 1975); *State v. Davis*, 442 N.W.2d 134, 135 (Iowa App. 1989).

An applicant must show the following to prevail on a motion for new trial based upon newly discovered evidence: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *State v. Allen*, 348 N.W.2d 243, 246 (Iowa 1984); *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991); *State v. White*, 530 N.W.2d 77, 84 (Iowa App. 1994). We find the district court did not abuse its discretion because Magnuson failed to show all of the elements.

The evidence at issue is the letter found in the family Bible which Magnuson contends was written by his mother and provides evidence of an incestuous relationship between Magnuson and his mother. In his deposition, Magnuson testified his father, his sister, and Philip Calek all knew of the relationship between Magnuson

and his mother at the time of Magnuson's trial. Magnuson also testified his attorney at his trial was aware of the incestuous relationship and chose not to use the information in his defense.

> Q. So did you tell your lawyer who was representing you at that time that your mother had admitted having an incestuous relationship with you? A. After I came back from the Oakdale pretrial evaluation, I think I wrote Elizabeth Otte [trial counsel], and I told her, you know, that I thought that, you know, that may have had something to do with everything that happened and why I flipped out, and all that stuff. But I may have told her in person, but I do think I wrote and told her about it. I'm not -- you know, I do know I mentioned it one time to her.
>
> Q. You think you might have mentioned it one time to her, but -- A. I wrote her and I told her in person because we talked about it and she -- the decision was, you know, not to use it.

While the letter may not have been available to Magnuson at his trial, evidence of the incestuous relationship was available. In addition to being available, Magnuson's trial counsel was aware of the relationship and made, as a part of trial strategy, a conscious choice not to use the information.

We find the letter is merely further evidence of the relationship between Magnuson and his mother. Evidence of this relationship existed at trial and was considered by trial counsel. Thus, the letter cannot truly be considered evidence discovered after trial.

Judge McGee's findings were substantially reproduced and relied upon in Magnuson's direct appeal in *State v. Magnuson*, 308 N.W.2d 83, 87-88 (Iowa 1981). The evidence was substantial. In fact, it is certainly possible this letter could have actually worked in the State's favor by providing a motive for the homicide. We find

there was no abuse of discretion by the district court in denying the motion for new trial.

II. ***Ineffective Assistance of Counsel.*** Magnuson contends his counsel at the hearing on the motion for new trial, Alfredo Parrish, provided ineffective assistance of counsel. Specifically, Magnuson argues counsel failed to provide adequate testimony, including expert testimony, at the hearing.

In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. O'Donnell*, 533 N.W.2d 576, 578 (Iowa App. 1995). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, the defendant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

As a general rule, claims of ineffective assistance of counsel are not adjudicated on direct appeal. *State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993). However, since the defendant must show both ineffective assistance and the resulting prejudice, we will affirm on direct appeal if the defendant cannot show one the prongs. *See id.*

We find Magnuson's claim must be denied on direct appeal because he has not met the prejudice prong. The district court in its decision stated, "Even assuming that the letter was written by defendant's mother, this court, being the trial court, is not persuaded that this information if presented and if believed would have changed the result. The evidence in the trial established that defendant with premeditation and with specific intent killed his mother Clara Magnuson, and the matter of an incestuous relationship would have not changed that evidence." We conclude no matter how many people testified, the district court's decision would not have been any different. As we have found this decision by the district court to have been properly reached, we find no prejudice. We deny Magnuson's claim of ineffective assistance of counsel.

AFFIRMED.

Cady, J., concurs; Schlegel, S.J., specially concurs in the result only.