

IN THE COURT OF APPEALS OF IOWA

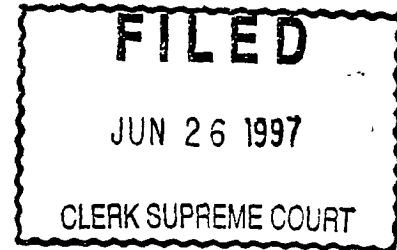
No. 7-131 / 96-292

000107

REEDE MITCHELL DOTY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Butler County, J.W. Frye, Senior Judge.

Reede Mitchell Doty appeals the district order denying his postconviction relief application. **AFFIRMED.**

Bruce J. Toenjes of Nelson & Toenjes, Shell Rock, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Gregory M. Lievens, County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Vogel, JJ.

VOGEL, J.-

Reede Mitchell Doty appeals the district court order denying his postconviction relief application. He contends he is entitled to a new trial based upon newly discovered evidence. Doty also claims an involuntary confession was unconstitutionally admitted into evidence in the first trial.

Scope of review. Our review of postconviction relief proceedings is ordinarily for error. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994). Our review is de novo to the extent Doty alleges his confession was involuntary, implicating his constitutional rights. *See Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

Newly discovered evidence. Reede Mitchell Doty was charged with four counts of second-degree sexual abuse, in violation of Iowa Code sections 709.1(3) and 709.3(2) (1989), after allegedly sexually abusing his daughter on four different days in 1988 and 1989. He was subsequently convicted of three of the four counts. Doty was sentenced to three consecutive, indeterminate twenty-five year terms of imprisonment.

Doty claims he is entitled to a new trial because of alleged newly discovered evidence consisting of a series of checks, the testimony of Roxann Hayes (Doty's ex-wife), and the testimony of Bessie and Rodney Joslin, all for the purpose of corroborating his alibi defense he was on a fishing trip on June 23, 1989, the date of one of the alleged occurrences of sexual abuse.

We are mindful that “motions for a new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly.” *Whitsel*, 525 N.W.2d at 862. In order to succeed on his claim of newly discovered evidence, Doty must prove: (1) that evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. *Id.* at 863.

The evidence at issue involves checks and financial records establishing Doty’s ex-wife, Roxanne Hayes, was on her way to French Creek near Waukon on a fishing trip on June 24, 1989. One of the abuse incidents was alleged to have occurred in Doty’s basement on or about June 23, 1989. Doty’s alibi was that he drove directly from his place of employment to French Creek on June 23, one day earlier than his family. He contends this entitles him to a new trial. We disagree.

Doty has met the first criterion necessary to prevail on a newly discovered evidence claim as the evidence (the financial records and the alibi testimony) was discovered after his guilty verdicts. Doty has not, however, established the remaining three criteria.

Doty has not established the second criterion that the evidence could not have been discovered earlier in the exercise of due diligence. In *State v. Overstreet*, 243 N.W.2d 880, 886 (Iowa 1976), the court’s explanation of what constitutes due diligence is instructive:

The showing of diligence required is that a reasonable effort was made. . . . He must exhaust the probable sources of information concerning his case; he must use that of which he knows, and he must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed.

Id. Discovering the financial information establishing the date of the trip to bolster his alibi claim should have been a logical step in diligently following “all clues” that would have a bearing on his case in its initial stages. Doty failed to timely and diligently pursue this logical and simple avenue of corroborating evidence.

Doty similarly failed to establish the third and fourth criteria. If the checks were admitted into evidence they would only serve to suggest, as per the testimony of Miller and McNair, Doty left alone for the fishing trip of June 23. This is “merely cumulative” evidence which necessarily fails under the third criterion. We find the evidence Doty was en route to French Creek on one of the four dates the abuse occurred does not materially affect his case, nor would it significantly change the outcome. We note the State is not bound by a certain date in proving a defendant guilty of a crime.¹ See *State v. Adams*, 436 N.W.2d 49, 40-51 (Iowa 1989). Further, notwithstanding this evidence, substantial evidence exists establishing Doty’s guilt.

We additionally carefully considered Doty’s newly discovered evidence claim with regard to the testimony of Roxann Hayes and the Joslins. With respect to Roxann Hayes, Doty meets the first criterion, but fails to meet the remaining three.

¹ An amended Trial Information revealed the sexual abuse was alleged to have occurred *on or about* August 6, 1988, March 25, 1989, June 3, 1989, and June 23, 1989.

Doty discovered after the verdict Hayes would have apparently supported his alibi defense. However, this could have been discovered earlier in the exercise of due diligence as she was listed as an alibi witness. This evidence would also have been cumulative regarding his alibi for the fishing trip.

Doty contends the Joslins testified inconsistently as to their presence on certain dates in question. With respect to “new” testimony of the Joslins, this evidence would have been impeachment testimony, thus failing the third criterion of the newly discovered evidence test. We find Doty fails to prevail on his newly discovered evidence claim in this regard.

We accordingly determine Doty is not entitled to a new trial.

Voluntariness of confession. Doty contends the conviction and sentence were in violation of his constitutional rights because they were based on an involuntary confession. He claimed he had taken a “dime bag of acid” before the polygraph examination and subsequent confession. Additionally, Doty testified that at that time he was in the midst of a difficult separation from Hayes, he was suffering from mental illness and substance abuse, he was taking antidepressants, and he was very tired. He also claimed the polygraph examination was unreliable and rendered his subsequent confession involuntary.

The fifth amendment privilege against self-incrimination and the fourteenth amendment due process clause ensure that confessions must be voluntary to be admissible; confessions cannot be coerced, but must be the product of free will. See

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The burden of proof is on the State to show, through a preponderance of the evidence, the statements were voluntarily made. *State v. Reed*, 394 N.W.2d 399, 402 (Iowa 1986). This court must examine the totality of the circumstances and look to both characteristics of the accused and the details of the interrogation process. *State v. Smith*, 546 N.W.2d 916, 926-27 (Iowa 1996).

In this case, we find the postconviction court correctly determined Doty's post-polygraph statements were made voluntarily, bereft of any evidence of coercive activity. He voluntarily consented to the polygraph examination. He was twice given and waived his *Miranda* rights at the time of the interview. The entire process took between three to four hours. Doty was told he was free to leave at any time and that the door was only closed in the interest of privacy. Doty claimed he slept very little the night before the interview, however, this carries little weight as it was not a result of overreaching governmental conduct. See *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

Doty claims his confession was involuntary as he had taken "acid" before making his confession (in addition to taking anti-depression medication). Doty cites *United States v. Kelley*, 953 F.2d 562, 565 (9th Cir. 1992), to support his assertion. The *Kelley* case recognizes "[a] statement may not be admitted if because of mental illness, drugs, or intoxication, the statement was not the product of a rational intellect and free will." *Id.* However, the *Kelley* case ultimately concluded the fact defendant

was experiencing effects of heroin withdrawal did not render his post-arrest statements involuntary. Thus, we do not focus on the fact a person may have been under the influence; rather, the operative inquiry is whether a mental infirmity impedes the *voluntariness* of a statement. Iowa law recognizes the fact that one who is under the influence of a drug while making an inculpatory statement does not per se render it involuntary. *See State v. Wilson*, 264 N.W.2d 614, 614-15 (Iowa 1978); *State v. King*, 492 N.W.2d 211, 215 (Iowa App. 1992).

In this case, Agent McCleary, a former narcotics agent, testified Doty would not have been able to speak as clearly and distinctly as he did for the duration of the interview had Doty actually been on “acid.” Agent McCleary observed Doty gave “intelligent and intelligible” answers to his questions in “every instance.” Even assuming Doty had taken the drug, we agree with the postconviction court’s detailed findings that there was “no proof that this affected his confession and the voluntariness thereof.” We find Doty’s claim untenable both in law and circumstance.

Having considered all arguments on appeal, we affirm the postconviction court’s findings and deny Doty’s application for postconviction relief.

AFFIRMED.