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IN THE COURT OF APPEALS OF IOWA

No. 9-504 / 88-675

FRED LOUIS LAMP,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, A. M. Critelli, Judge.

The defendant appeals from a district court ruling his application for postconviction relief. **AFFIRMED.**

Bruce L. Cook of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, James Smith, Polk County Attorney, and Cathie Thune, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Petitioner Fred Lamp appeals from a district court ruling denying his application for postconviction relief. He contends that the trial court erred in: (1) denying postconviction relief where his sixth amendment right to counsel was violated; (2) denying relief when his fifth amendment right against self-incrimination was violated; and (3) finding no ineffective assistance of counsel. We affirm.

Petitioner was convicted of first-degree murder in connection with the death of sixteen-year-old Melody Oliver. His conviction was affirmed by the Iowa Supreme Court in State v. Lamp, 322 N.W.2d 48 (1982). The district court denied his application for relief. Lamp has appealed.

On appeal Lamp contends that his fifth and sixth amendment rights against self-incrimination and right to counsel were violated on the grounds that inmate Keith Trotter was a police informant planted in the same jail tier in order to induce Lamp to admit he murdered Oliver. Lamp argues that his right to counsel attached the moment he was arrested and that Locke's attempt to circumvent the right to counsel by having Trotter placed in the cell with him intentionally diluted his right to have an attorney present during questioning.

The petitioner has the burden of proving a violation of either fifth or sixth amendment rights by a preponderance of the evidence. See State v. Henderson, 313 N.W.2d 522, 524

(Iowa 1981). Once a defendant's sixth amendment right to counsel attaches, the State is precluded from attempting to "deliberately elicit" incriminating statements from the defendant, absent the presence of counsel or a valid waiver. State v. Nelsen, 390 N.W.2d 589, 592 (Iowa 1986). Further, the State has an "affirmative obligation not to act in a manner that circumvents" the defendant's sixth amendment protections. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496, (1985). The sixth amendment "is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a State agent." Id. The primary concern "is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." Kuhlman v. Wilson, 477 U.S. 436, 459, 106 S. Ct. 2616, 2630, 91 L. Ed. 2d 364, 384, (1986).

The Court in Kuhlman stated:

> a defendant does not make out a violation of . . . [the sixth amendment] right [to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Kuhlman, 477 U.S. at 459, 106 S. Ct. at 2360, 91 L. Ed. 2d at 384-85. The key issue is the extent of State

involvement. United States v. Surridge, 687 F.2d 250, 254 (8th Cir.), cert. denied, 459 U.S. 1044, 103 S. Ct. 465, 74 L. Ed. 2d 614 (1982).

In order to find a violation of petitioner's sixth amendment right to counsel he must prove: (1) whether the informant was a State agent; and (2) whether the information was deliberately elicited. United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986).

On the morning of May 10, 1980, Lamp was arrested and placed in the Polk County jail. Keith Trotter had been in the county jail prior to the time Lamp was brought in and did not know Lamp before meeting him in the jail. Lamp came to know Trotter after another inmate known by Lamp vouched for Trotter. Trotter was not deliberately placed in the same cell block area as Lamp. Lamp entrusted Trotter to the point where he began to converse freely about his role in the murder.

On May 13, 1980, police detective James Locke met with Trotter at the suggestion of Trotter's father to discuss Trotter's pending theft charges. Trotter told Locke about what he had heard Lamp say about Lamp's activities surrounding Oliver's death. After this meeting Locke testified that he told Trotter:

> Don't go up and start pumping Fred about information to get yourself killed. I didn't ask him to go up there and pump Fred for any information. I told him to go up there and keep his mouth shut and keep his ears open and that if he heard anything else, to get ahold of me.

Through subsequent conversations with Lamp, Trotter eventually gathered further information about Lamp's involvement in the murder, and forwarded all such information to Locke. Lamp ultimately told Trotter that he killed Oliver.

Lamp asserts that Trotter received consideration for being the State's informant in the form of favorable treatment concerning his criminal charges.

The determination whether an individual is a State agent must be made under the facts and circumstances of each case. United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986). Again the key issue is the extent of involvement on the part of the State. An informant's receipt of a payment, promise or guarantee of lenient treatment are factors to consider in determining whether an informant is an agent of the State. Id. at 1015-16.

Trotter testified that he did not bargain or receive any leniency for his cooperation. The district court found that Trotter was not paid for obtaining the information. We agree. Under the facts of this case, we hold that Trotter was not a State agent. There was no agreement made between Trotter and Locke and no benefits accrued to Trotter for his cooperation. In the absence of any express or implied quid pro quo underlying the relationship between Locke and Trotter, we hold that Trotter was not an agent for the State. Id. at 1015-16.

There is no dispute that Lamp's sixth amendment right to counsel had attached at the time that Trotter reported the statements that Lamp made. The district court found that Trotter voluntarily told government officials about Lamp's incriminating statements and agreed to continue to listen and report what he heard. Our review of the record reveals no deliberate elicitation by Trotter on behalf of the State. We agree with the district court's decision finding that Lamp failed to carry his burden to prove either a fifth or sixth amendment violation.

Lamp also argues that he was denied effective assistance of counsel because his defense attorney failed to file a motion to suppress Trotter's testimony once he was aware of Trotter's role.

Since Lamp is asserting that his constitutional right to a fair trial was violated, we make an independent evaluation of the totality of the relevant circumstances which is the equivalent of a de novo review. Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988). 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). We presume counsel was competent and a postconviction petitioner has the burden of establishing by a preponderance of the evidence that trial counsel was ineffective. Id. To establish an ineffectiveness claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performing [sic] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Cuevas, 415 N.W.2d at 632 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980).

Lamp's trial counsel John Wellman testified that he considered filing a motion to suppress Trotter's testimony but did not file the motion because he felt that there was no factual basis for the motion. Attorney Wellman's testimony makes it clear that he was familiar with the area of law and the factual requirements necessary to support a motion to suppress an informant's testimony. He stated that he was skeptical of the testimony of Trotter and Locke denying any benefit Trotter received for his cooperation. However, he "had no evidence to the contrary." Additionally, he stated:

> I made the decision that filing that type of motion would be of no benefit and would be of some potential harm in that the publicity connected with just emphasizing the alleged statements in the press prior to trial would be of some negative benefits, and I think that's before the change of venue was granted.

Wellman instead attempted to impeach Trotter's testimony at trial by suggesting that Trotter could have obtained all of the information from newspaper or television reports about the crime.

Petitioner is only entitled to representation within the range of normal competency, not perfect representation. We find that Lamp's trial counsel's decision to pursue impeachment of Trotter's testimony and credibility to be a reasonable strategical decision. We find that Lamp has failed to meet the burden on this issue.

The record does not support petitioner's claim his trial counsel failed to perform an essential duty. Petitioner has failed to show counsel's performance was outside the range of normal competency.

Finding no grounds for postconviction relief, we affirm the decision of the district court in all respects.

AFFIRMED.