IN THE COURT OF APPEALS OF IOWA

No. 0-222 / 99-491
Filed May 31, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSPEH ANTHONY HOUSTON,
a/k/a "Crazy Eye",
Defendant-Appellant.

FILED
MAY 31 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert Blink, Judge.

The defendant appeals from the judgment and sentence entered following his conviction of first-degree kidnapping. **AFFIRMED.**

Maria Ruhtenberg of Ruhtenberg Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, Daniel Voogt and Jamie Bowers, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Joseph Anthony Houston of kidnapping and assault with intent to inflict serious physical injury. On appeal, Houston contends his counsel was ineffective in (1) failing to adequately challenge the voluntariness of his inculpatory statement to police and (2) failing to retain an expert witness to explain a break in the tape recording of his statement. We affirm Houston's conviction and sentence but preserve his second claim for postconviction relief proceedings.

I. Background Facts and Proceedings

In September 1996, a Des Moines farmer discovered a skull, some clothing, and a bone in his cornfield. He contacted police, who determined the remains were that of Dawue Stigler. The medical examiner concluded Stigler had been shot in the head.

On August 18, 1997, and again on June 11, 1998, Des Moines Police Officer Rowley interviewed Houston in connection with Stigler's death. During the first interview, Houston waived his *Miranda* rights and denied any involvement in the murder. The second interview took place following a conversation between Houston and Lieutenant Dawson, also of the Des Moines Police Department. Houston made self-incriminating comments during that interview.

The State charged Houston with one count of first degree murder and one count of first degree kidnapping. Houston's attorney moved to suppress his statement from the second interview. The court denied the motion and the case proceeded to trial. The jury convicted Houston of assault with intent to inflict

serious injury and first degree kidnapping. The district court adjudged him guilty and sentenced him to an indeterminate prison term not to exceed two years on the assault count and life imprisonment on the kidnapping count, to be served concurrently and consecutively with a sentence in an unrelated case. This appeal followed.

II. Preservation of Error

The State contends Houston waived his claim on appeal because he did not (1) state whether and how he preserved error for appeal as required by Iowa Rule of Appellate Procedure 14(a)(5), and (2) cite authority for any claim of error preservation. We have recognized an exception to the error preservation rules for ineffective assistance of counsel claims. *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999). Therefore, we decline to conclude Houston waived error.

III. Ineffective Assistance of Counsel

As ineffective assistance of counsel claims implicate constitutional rights, our review is de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). While we generally preserve such claims for post conviction relief proceedings, we will consider them on direct appeal when the record is adequate to address the issue. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). To prevail, Houston must prove by a preponderance of the evidence (1) his trial counsel breached an essential duty, and (2) he was prejudiced by the breach. *State v. Homess*, 600 N.W.2d 294, 298 (Iowa 1999). We may affirm on appeal if either element is lacking. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of

competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). To establish prejudice, Campbell must prove that, but for the errors, the trial outcome would have been different. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999).

A. Voluntariness of Statement

Houston contends his trial counsel failed to argue that his inculpatory statement was involuntary and, therefore, was obtained in violation of due process. This claimed omission, he urges, deprived him of effective assistance of counsel. On our de novo review of the record, we find trial counsel in fact asserted the statement was involuntary. In her motion to suppress, counsel stated, "[t]he statements Mr. Houston gave were the product of duress. The accused was involuntarily compelled to make a statement when but for the improper influences he would have remained silent." Trial counsel additionally averred that use of the statements would violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1 section 10 of the Bill of Rights of the Iowa Constitution.

Houston nevertheless contends these statements by counsel did not preserve the due process challenge he now raises because trial counsel focused on the voluntariness issue as it applied to custodial interrogations rather than due process concerns applicable to all coerced confessions, whether custodial or not.

The United States Supreme Court has stated, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 521, 93 L. Ed. 2d 473, 484 (1986). We ask "whether the defendant's will was overborne at the time he confessed."

Haynes v. Washington, 373 U.S. 503, 513, 83 S. Ct. 1336, 1343, 10 L. Ed. 2d 513, 520-21 (1963) (quoting *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 920, 9 L. Ed. 2d 922, 926 (1963)). We examine the totality of the circumstances to make this determination. *Arizona v. Fulminante*, 499 U.S. 279, 285-86, 111 S. Ct. 1246, 1251, 113 L. Ed. 2d, 302, 315 (1991). A statement resulting from "a promise of help or leniency by a person in authority" is not voluntary and is inadmissible. *State v. Hodges*, 326 N.W.2d 343, 348 (Iowa 1982). This voluntariness issue is distinct from the question whether the defendant's waiver of constitutional rights was voluntary. *Id.* at 347.

We conclude that trial counsel raised and the district court addressed the issue of whether Houston's statement was coerced. Although the district court discussed custodial interrogations and the voluntariness of waivers of constitutional rights, the court ultimately characterized Houston's challenge as one based on "promissory leniency." Applying a totality of the circumstances test, the court concluded the police officer's denial that he made a promise of lenient treatment was more credible than Houston's assertion that such a promise was made. The court reasoned,

> This is not a close question. The court believes Officer Rowley, and relies on a number of factors, including their demeanor at the hearing as compared to the Defendant's, their respective motives, the tone and nature of the interviews as evidenced by the tape-recording, the content of the interviews, the criminal record of the Defendant, and the court's disbelief in the substance of the Defendant's claims, i.e. that he was too "ill" to appreciate his rights in August of 1997, that Dawson called about a topic Defendant knew nothing about, that he never asked to talk with a detective, that he was "surprised" to see Rowley on the morning of June 11th, that Dawson said that it was his last chance to cooperate and that the prosecutor would charge only him if he did not, that Rowley would try and get his sentence reduced, and that he was threatened while the tape recorder was turned off. The Court also

> considers the Defendant's experience with the criminal justice system, that there is no evidence of any physical force having been exacted, that Defendant appeared to understand all of the questions, and the absence of any proof he had been deprived of sleep or food. His testimony in the suppression hearing indicated a nimble, if less than candid mind and manner.
>
> In rejecting the Defendant's version of events surrounding the interviews, the Court concludes that the police neither deceived him nor placed him under duress. They made no promises, but simply told him what was going to take place: he would be charged with kidnapping and murder, and left it to Defendant to talk or not.

The court, therefore, addressed and resolved the precise issue that Houston now contends his trial attorney should have raised but did not: whether his statement was coerced. Accordingly, we conclude trial counsel breached no essential duty and we reject this ineffective assistance of counsel claim.

B. Break in Tape

Houston contends trial counsel was ineffective in failing to retain an expert witness to determine whether the tape of the second interview was turned off during questioning. Our appellate courts have expressed a preference to preserve a claim for postconviction relief where "the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues." *Rubino*, 602 N.W.2d at 563. We deem the record inadequate to resolve this issue and, accordingly, we preserve this claim for postconviction relief proceedings.

IV. Disposition

We affirm Houston's conviction and sentence, reject his claim that trial counsel failed to adequately challenge the voluntariness of his inculpatory statement to police, and preserve for postconviction relief proceedings his claim

that an expert should have been retained to explain the break in the tape recording.

AFFIRMED.

000442