IN THE COURT OF APPEALS OF IOWA

FILED
SEP 29 1992
CLERK SUPREME COURT

No. 2-409 / 91-1873

KLINE EDWARD GOEDERS,

Applicant-Appellant,

vs.

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STATE OF IOWA,

Defendant-Appellee.

Appeal from the Iowa District Court for Pocahontas County, Newt Draheim, Judge.

Applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Gary G. Mattson of LaMarca & Landry, P.C., West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett and Charles N. Thoman, Assistant Attorneys General, and Ann E. Beneke, County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

PER CURIAM

Applicant-appellant Kline Edward Goeders appeals the trial court's denial of his application for postconviction relief. He contends the trial court erred in ruling his trial counsel was effective in representing him and in finding his constitutional rights were not violated. We affirm.

Goeders was convicted of first-degree murder following a jury trial, and his conviction was affirmed by this court. State v. Goeders, 423 N.W.2d 901 (Iowa App. 1988). Goeders contends his trial counsel breached an essential duty during the trial in allowing a juror to remain on the panel. Goeders contends the juror should have been excluded because the juror knew a prosecution witness, had been a neighbor of the victim, went to the victim's funeral, and had been married to a niece of the victim. The juror and the victim's niece were divorced at the time of trial.

The State contends this issue was not raised on direct appeal and Goeders does not contend his appellate counsel was ineffective, thus, the issue was not preserved for postconviction relief. The State further argues trial counsel did not breach a duty in allowing the juror to remain on the panel and even if the State did, Goeders has failed to show he was prejudiced by the decision.

Goeders first contends his claim for ineffective assistance of counsel was properly presented for review on direct appeal and was preserved for postconviction relief by this court. Goeders makes no reference as to where in the record this issue was preserved. Iowa Rule of Appellate Procedure 14(a)(5) requires appellant to state how the issue was preserved for review with references to the places in the record where the issue was raised and decided. In Goeders, 423 N.W.2d at 904, we acknowledged Goeders claimed his trial counsel was ineffective for the failure to suppress or object to a statement Terri Goeders made to law enforcement persons. Id. Goeders asked that this claim be preserved for postconviction proceedings. Id. We determined Goeders had not been able to develop this claim and trial counsel had not had an opportunity to be heard on this issue. Id. We affirmed on all issues except we did preserve Goeders' ineffective assistance of counsel claim. Id.

The State contends Goeders has not preserved the issue of the juror being allowed to remain on the panel for postconviction review. We agree. Our opinion in Goeders, id., only reserved the issue of the effectiveness of trial counsel as to Terri Goeders' statements for postconviction review.

The issue of the juror's relationship was the issue before the postconviction court. Goeders did not show his appellate counsel was not effective in failing to

raise the issue on direct appeal. The State did not advance that challenge at the trial court level. The trial court ruled on the issue of leaving the juror on the panel and decided the issue adversely to Goeders. While we question whether under this record the issue was properly preserved for review, we find Goeders has failed to meet the requirement of showing his trial counsel was not effective on this issue.

To establish ineffective assistance of counsel Goeders must show that the counsel did not perform an essential duty and that he was prejudiced as a result of his counsel's failure. See Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989); State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). Goeders must establish both of these requirements by a preponderance of the evidence. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Goeders contends he was denied an impartial jury because juror, Lyman Hurlburt, was related to the victim within the fourth degree of affinity and Hurlburt should have been challenged for cause. Hurlburt was related to the victim by marriage at the time of the offense but, by the time of trial, his marriage to the victim's niece had been dissolved and the martial relationship no longer existed. However, Hurlburt and the victim's niece had children together and these children were living at the time of the trial. Goeders contends because of the surviving children the juror's relationship to the victim's

niece has in some jurisdictions been determined to survive. See Stringfellow v. State, 61 S.W. 719 (Tex. 1930); Shamberger v. State, 130 So. 70 (Ala. 1930); Peques v. Baker, 17 So. 943 (Ala. 1885). However, there are other jurisdictions that have taken a contrary view. See Kelly v. Neely, 12 Ark. 657, 660 (1852); Blodget v. Brinsmaid, 9 Vt. 27, 30 (1837).

Iowa has not addressed the issue of whether the relationship by affinity ceases with a dissolution of a marriage when there are children of the marriage surviving. Goeders contends because the Iowa courts have indicated with respect to challenges to individual jurors that the accused should be given the benefit of the doubt that the challenge if made would have been sustained. Goeders is correct that the Iowa courts have suggested the accused be given the benefit of the doubt with respect to challenges for cause. See State v. Beckwith, 242 Iowa 228, 238-39, 46 N.W.2d 20, 26 (1951); State v. Woodyard, 414 N.W.2d 654, 657 (Iowa App. 1987); State v. Hatter, 381 N.W.2d 370, 372 (Iowa App. 1985). However, a juror's mere acquaintance with a prosecution witness does not necessarily render the juror incompetent or subject to a successful challenge for cause. See State v. McClain, 256 Iowa 175, 182, 125 N.W.2d 764, 768 (1964). Furthermore, trial courts are vested with broad discretion in acting on challenges to a jury for cause. See State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974). The murder had occurred in

1977. The trial did not occur until 1986. Hurlburt's marriage to Goeders' niece was dissolved in 1983. A decision whether to leave the juror on the panel would have been a discretionary call by the trial court. See id. Furthermore, the juror testified he told the judge during selection at one time he was related to the victim by marriage. Goeders would have heard this testimony and yet made no effort to have trial counsel pursue a challenge to the juror.

The State additionally contends Goeders has failed to show prejudice. Goeders contends prejudice should be presumed. In Wright-Bey v. State, 444 N.W.2d 772, 776 (Iowa App. 1989), we found the applicant in a postconviction proceedings had established the State improperly had used preemptory challenges to exclude nonwhite jurors but we rejected the applicant's claim that trial counsel was ineffective in not objecting to the practice because the applicant had failed to prove the required prejudice. Id. That is, but for this failure to object, the result of the preceding would have been different. Id. Goeders advances no reasonable possibility or even a probability that the presence of Hurlburt on the jury had any effect on the outcome of the proceedings. Goeders has failed to show his counsel ineffective. We affirm.

AFFIRMED.