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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROGER ALLEN MORTON,)
Petitioner-Appellant,) Filed November 24, 1981
vs.)
STATE OF IOWA,) 1-334 / 2-65568
Respondent-Appellee.)

Appeal from Scott District Court - James Havercamp, Judge.

Petitioner appeals from denial of his application for postconviction relief from his conviction for robbery with aggravation in violation of section 711.1, The Code 1975. AFFIRMED.

Michael A. Woods of the Munson Law Offices, P.C., Bettendorf, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner, Roger Allen Morton, appeals from denial of his application for postconviction relief from his conviction for robbery with aggravation in violation of section 711.1, The Code, 1975. He asserts that: 1) trial court erred in admitting evidence of an out-of-court identification because circumstances of the identification violated his rights to due process of law; 2) the evidence was insufficient to show his use of a weapon; 3) his waiver of Miranda rights was not knowing and voluntary and, as a result, his subsequent inculpatory statements should not have been admitted into evidence; 4) trial court erred in sustaining the State's hearsay objection to testimony concerning another person's alleged confession; and 5) he was denied effective assistance of counsel both on direct appeal and in postconviction proceedings. We affirm.

On January 18, 1975, an eleven year old paper boy was robbed of approximately $43. The victim gave the police a physical description of the alleged perpetrator and, after some investigation, the police went to the home of the defendant, a 17 year old juvenile of subnormal intelligence. Upon their arrival, petitioner was immediately placed under arrest and, although asked, petitioner's stepfather refused to accompany the petitioner and police officers to the home of the victim for a visual identification. En route to the victim's home, petitioner was read his Miranda rights. At the victim's home, the victim observed petitioner in the light of the patrol car's dome light while the petitioner was seated in the back of the car. Another suspect also was in the car, but the victim identified petitioner as the perpetrator of the crime. Petitioner subsequently made incriminating statements and was taken back to his home where he produced some money which he gave to the arresting officer. Petitioner was then taken to the police station where the officers again read petitioner's Miranda rights to him; petitioner signed a waiver of his rights, without counsel of an attorney, and made further incriminating statements.

Petitioner subsequently was charged, by county attorney's information, with aggravated robbery in violation of 711.2, The Code, 1973, convicted by a jury, and sentenced to a term not exceeding 25 years. On September 20, 1976, after his direct appeal was dismissed as frivolous, petitioner filed a pro se application for postconviction relief. For more than three years, no action took place in petitioner's case, other than the withdrawal of his first two appointed counsel and the appointment of new counsel. On April 16, 1980, petitioner filed an amended application for postconviction relief in which he asserted the various grounds now alleged as error on appeal. A hearing was held, but trial court denied the requested relief. This appeal followed.

I. Scope of Review. Generally, our review of a criminal action is for correction of errors only, not de novo. Iowa R. App. P. 4. However, where a constitutional issue is raised, we make an independent determination of the facts, State v. Farrell, 242 N.W.2d 327, 329 (Iowa 1976).

II. Out-of-Court Identification. Petitioner argues that the identification procedure used at the victim's residence violated the due process clause of the fifth and fourteenth amendments in that it was unnecessarily suggestive and conducive to irreparably mistaken identification. We disagree.

> The due process test to be applied, articulated in Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972, 18 L. Ed. 2d 1199, 1206 (1967), prohibits identification testimony where the confrontation conducted is "unnecessarily suggestive and conducive to irreparable mistaken identification." This rule has been consistently recognized by both United States Supreme Court and this court. [citations]

State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973). "It is generally conceded that one-on-one confrontations are inherently suggestive." Id. However, because of policy considerations, on the scene identification procedures, held shortly after the crime, are not violative of due process unless the confrontation is unnecessarily suggestive. Id. at 493-94.

Petitioner contends that the fact he was identified while seated in the squad car, in light emitted only from the squad car's dome, by an emotionally upset eleven-year-old boy, were such circumstances as to make the identification procedure unnecessarily suggestive. We disagree. Proximity to a police car does not support a claim of unnecessary suggestiveness. Salazar, 213 N.W.2d at 494; State v. Schaffer, 182 N.W.2d 413, 414 (Iowa 1970). We believe that the age of the victim and the lighting circumstances were properly left to the jury in its assessment of the credibility of the identification and certainly are not grounds for holding that the totality of the circumstances were unnecessarily suggestive. We further believe that the fact another suspect was in the car with the defendant renders the circumstances less suggestive than a one-on-one showup. Petitioner further argues that a one-on-one showup has been widely condemned as likely to result in mistaken identification and indicates in his brief that such procedures should be limited to the type of emergency situations that existed in Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 67 (1967). We have already stated that such an argument is of no avail because, despite the suggestive nature of a one-on-one confrontation, contravailing policy considerations necessitates its use. As stated in State v. Wisniewski, 171 N.W.2d 882, 885 (Iowa 1969):

> Far from encouraging false identification, the quick viewing of defendant by the witness would minimize such a possibility. . . . As pointed out in the Stovall case, an early identification procedure, if properly carried out, serves just as well to free a suspect from unjust suspicion as it does to fasten the accusation of guilt upon him.

From our review of this record, we find no circumstances which renders the identification procedures in this case unnecessarily suggestive.

III. In-Court Identification. Petitioner next argues that the in-court identification made by the victim at trial was tainted by illegal procedure at the scene. We note first, that petitioner failed to challenge the in-court identification in his amended application for postconviction relief. Thus, that issue was not before the postconviction court and may not be raised for the first time on appeal. § 663A.8, The Code. See also Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973). Moreover, as we stated above, the out-of-court identification procedure was not violative of due process and therefore did not taint an in-court identification.

IV. Use of a Weapon. Petitioner also argues that there was insufficient evidence to show his use of a weapon and his conviction of aggravated robbery is, accordingly, without basis. We will first enumerate some general principles important to our review on this issue. When the sufficiency of the evidence is challenged, we view the evidence in the light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). On factual issues, the credibility of the witnesses and the weight to be given to their testimony is for the jury. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979).

Applying these principles to the evidence in this case, we conclude that the evidence was sufficient. The victim testified that a person, who he later identified as petitioner, approached him and had a conversation about the victim's paper route. When the victim started to leave, petitioner called him back, grabbed him from behind, demanded his money, took it out of his pouch, told him to walk around a building, and said not to look back or else "you will feel the steel of this knife on your neck." Although the victim did not recall feeling anything at his neck, this testimony was supported by the testimony of petitioner's friend, Sidney Funk. Funk had been with the appellant on the day of the robbery. When the two were at a 7-Eleven store, located across the street from the site of the robbery, petitioner was given a pocket knife, went across the street and around the building to the vicinity where the victim was confronted. He later returned to the store and gave the knife back to the woman who worked there. We believe that a jury, taking this evidence in a light most favorable to the State, could reasonably have found that the appellant used the pocket knife during the robbery of the victim.

V. Waiver of Miranda Rights. Petitioner further asserts that his waiver of his Miranda rights was not knowingly and voluntarily made and, as a result, his subsequent inculpatory statements should not have been admitted into evidence. We disagree.

First, we note that inasmuch as the defendant seeks postconviction relief, he is required to establish the facts asserted by a preponderance of the evidence. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). Ordinarily, "[i]f trial court's findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law, the reviewing court will not disturb the judgment. [citation]." Id. However, where a constitutional issue is raised, we make our own evaluation of the totality of the circumstances under which the postconviction court's ruling was made. Id. That is, our review is **de novo.** Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

Defendant argues that in view of his mental subnormality, age, lack of counsel by a parent or an attorney, and police coercion, his waiver of his rights was neither knowingly, intelligently, nor voluntarily made. We are not persuaded by these arguments.

Mental subnormality, by itself, will not render a confession involuntary if the subnormality has not deprived the person of the ability to understand the meaning and effect of his statement, rather, the subnormality is only one factor to be considered. State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1977); State v. Fetters, 202 N.W.2d 84, 89 (Iowa 1971); State v. Holderness, 191 N.W.2d 642, 645-46 (Iowa 1971). Nor does petitioner's minority, alone, render his statements inadmissible; that too is only a factor to be considered. State v. Allen, 224 N.W.2d 237, 239 (Iowa 1974).

From our review, we do not believe that the record substantiates either police coercion or petitioner's inability to understand the meaning and effect of his statements. Petitioner, in the presence of his stepfather, consented to accompany the police officer for a visual identification. He denied his participation in the crime until he was positively identified. After being identified as the perpetrator of the crime, petitioner made inculpatory statements; after being read his rights a second time at the police station, he again made inculpatory statements. Police officers testified that upon reading petitioner his rights he was asked if he understood those rights and petitioner acknowledged that he did. Under these facts, we do not believe that the mere showing of subnormal mentality and minority satisfy or fulfill petitioner's burden to prove, by a preponderance of the evidence, that his waiver was not intelligently and knowingly made. Nor do we believe that the mere presence of police officers or their questions necessarily produced such a coercive atmosphere that petitioner's statements should be considered involuntary. Further, petitioner's argument that there should have been an adult or counsel present when he was informed of his rights is without merit. This per se requirement was rejected in Interest of Thompson, 241 N.W.2d 2, 5-6 (Iowa 1976),[1] and the rejection was reaffirmed in State v. Aldape, 307 N.W.2d 32, 35 (Iowa 1981).

VI. Third Party Confession. Defendant also argues that trial court erred in excluding, as hearsay, a witness's testimony that a third party had confessed to the crime. After reviewing the record, we conclude that trial court's error, if any, was harmless. From petitioner's offer of proof at the postconviction hearing, it is clear that the proffered evidence was the same as the testimony that Donald Jordan gave during the original trial. As such, the evidence set forth in petitioner's offer of proof added nothing to the testimony that was already in the record. Such evidence is merely cumulative and no basis for prejudicial error. See State v. Hall, 297 N.W.2d 80, 87 (Iowa 1980).

VII. Ineffective Assistance of Counsel. Since no evidentiary hearing was held regarding the actions of petitioner's various counsel, we cannot consider allegations of ineffective assistance of counsel; rather, the attorney whose effectiveness is being challenged must have an opportunity to rebut the allegation of ineffectiveness. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979). We thus refuse to consider this allegation at this time. If appellant can establish sufficient reason for failing to raise this issue in the instant postconviction proceeding, he may raise it in a future postconviction proceeding. § 663A.2 and § 663A.8, The Code 1981; Sims v. State, 295 N.W.2d 420, 422-423 (Iowa 1980).

Having found no error, we affirm trial court's judgment.

AFFIRMED.

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[1] The test for situations involving either adults or minors is the totality of the circumstances. Interest of Thompson, 241 N.W.2d at 5-6.