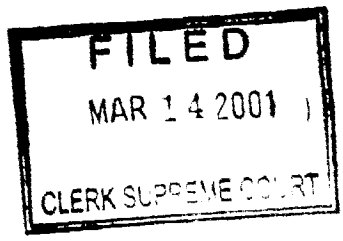
IN THE COURT OF APPEALS OF IOWA

No. 0-693 / 99-0560
Filed March 14, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY EUGENE BOTTS,
Defendant-Appellant.

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

Defendant appeals from the judgment and sentence entered following his conviction of attempted murder and first-degree kidnapping. *See* Iowa Code §§ 707.11 and 710.1 (1995). Defendant contends he received ineffective assistance of counsel. **AFFIRMED.**

Rush C. Nigut of Hook & Nigut, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt and Jamie Bowers, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Defendant-appellant Larry Eugene Botts appeals following his conviction of attempt to commit murder and first degree kidnapping in violation of Iowa code sections 707.11 and 710.1 (1995). Defendant seeks reversal of his conviction based on claims of ineffective assistance of two attorneys. We affirm.

Defendant's conviction stems from the shooting death of Dawue Stigler. Stigler disappeared in the summer of 1996 and his body was found in a rural field in the fall of that year. Meanwhile, defendant, charged with a number of offenses unrelated to the Stigler murder or kidnapping, entered into a plea bargain with Polk county prosecutors. The State dropped certain charges and defendant pled guilty to operating a motor vehicle without the owner's consent, an aggravated misdemeanor, and terrorism, a Class "D" felony. Though defendant sought probation as a part of the bargain, the State intended to ask the judge to sentence defendant to prison. At that time no arrest had been made concerning Stigler's murder or kidnapping.

Defendant, most interested in not going to prison, told Kevin Kirlin, the lawyer then representing him, that he had information relating to Stigler's death. Defendant was of the opinion he could exchange this information for a recommendation of probation on the aggravated misdemeanor and class "D" felony. Kirlin was to later testify that he talked to defendant about these facts twice but asked him little about what he knew. Knowing that the prosecutor would not change the plea recommendation, Kirlin realized the only relief from the pending sentence was to involve the police department. Consequently, on

August 11, 1997, Kirlin picked defendant up and drove him to the police station, where, in Kirlin's presence, defendant gave a statement.

According to the tape recording, prior to defendant giving the statement, the following occurred:

> Police officer: OK. Obviously you've talked to my Lieutenant, and there has been some sort of deal stuck, obviously with the County Attorney. *I don't know about that...I really don't care.*[1]
>
> Kirlin: No detective, actually there were some pending charges which have been disposed of without reference to any cooperation in this case. Mr. Botts is not speaking to you as a condition of any sentencing recommendation. We do hope that if . . . you're able to make use of the information he's providing to you to obtain arrest warrants or search warrants that you would be willing to recommend that he receive probation in connection with the charges he's pleaded guilty to.

After Kirlin's statement the defendant answered the officer's questions. He related that he went to a house at 900 Lyon Street in Des Moines on the night Stigler was killed. There he found four men in the basement torturing Stigler as they interrogated him about his involvement in the murder of Rafael Robinson.[2] Defendant said the men were going to kill Stigler in the basement, but he told them it would be stupid to do so in the house. Then defendant saw the men put Stigler in the trunk of a car and drive away. Defendant also related that these men later told him they had taken Stigler to a field where they shot him in the head three or four times with a 357 magnum. Defendant also stated one of the men said he dropped a ring in the field where Stigler's body was found.

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[1] The emphasized portion of the officer's statement was attributed to defendant in a written transcript of the proceedings utilized at the time of the hearing on the suppression motion. It is now conceded from a review of the tape of the hearing that defendant did not make these statements.

[2] Robinson, who had been previously murdered, apparently had been a member of a gang identified as the "Crips." There was evidence defendant was a member of the same gang as Robinson.

Defendant also told the officer another of these men was concerned about what was on the television news after Stigler's body was found.

The next day, August 12, 1997, in response to a telephone call from a Des Moines police officer, defendant gave further prejudicial statements concerning Stigler's kidnapping and death. Defendant's attorney was not present at the time he gave these additional statements. Defendant was subsequently charged with the kidnapping and murder of Dawue Stigler.

Prior to trial on these charges the defendant, who by then had a new attorney, claimed both the August 11th and 12th statements were given in violation of his Sixth Amendment right to counsel. Defendant sought suppression of both statements. The district court denied the motions to suppress, finding defendant's counsel was not ineffective as defendant was the one who elected to speak to the police on both dates.

On appeal defendant contends Kirlin was ineffective in a number of ways in advising him to give the August 11th statement to the police. Defendant further contends that Kirlin was ineffective in failing to advise the police no further statements could be taken from him without his attorney present. In addition defendant claims his trial counsel, Addington, was ineffective in a number of ways in representing him at the suppression motion and at trial.

We review claims of ineffective assistance of counsel novo. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The Sixth Amendment to the Federal Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Fourteenth Amendment to the Federal Constitution makes this

provision binding on the states. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975). The purpose of the Sixth Amendment provision is to ensure a criminal defendant receives a fair trial. *Wheat v. United States*, 486 U.S. 153, 158, 108 S. Ct. 1692, 1696-97, 100 L. Ed. 2d 140, 148 (1988). The standard for reviewing ineffective-assistance-of-counsel claims are set forth in *Strickland v. Washington*, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674, 695-99 (1984). A defendant must show his or her attorney's performance fell below minimum professional standards and that his or her attorney's poor performance was so prejudicial that it probably changed the outcome of his or her trial. *See id.* The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691-92, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696.

Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to respond. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa Ct. App. 1987). We consider claims of ineffective assistance of counsel on direct appeal if the record is sufficient to evaluate the claims. *See State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982); *State v. Smith*, 543 N.W.2d 618, 619 (Iowa Ct. App. 1995).

We consider defendant's challenges to Kirlin's representation because the record here is sufficient to allow us to do so. The issues were raised in the motion to suppress. Kirlin was a witness at the hearing on the motion and was able to testify to what he remembered of the facts surrounding his representation

of defendant. Defendant was represented at this hearing by Addington, who was able to investigate defendant's claims. Defendant makes the following allegations concerning Kirlin's representation: (1) Kirlin gave him no written warning not to talk to the police, (2) Kirlin did not request immunity or reduced charges before he gave the statement to the police, (3) Kirlin failed to advise him during the interview or to stop the interview before he made damaging statements, (4) Kirlin had him go to the place of the alleged kidnapping and beating for purpose of identification, (5) Kirlin failed to investigate the facts of the Stigler murder before scheduling an interview for him with the police.

There was no written warning given defendant nor was there a request for immunity or reduced charges made. There is no evidence Kirlin made any investigation of the crime. Kirlin made no attempt to stop defendant from talking to the police even when defendant indicated he was a witness to a beating of Stigler and to threats to kill Stigler, that he suggested Stigler be killed somewhere other than the basement, and that he later learned Stigler had been killed.[3] It was at Kirlin's suggestion that defendant took the police to the scene of the crime.

The fighting factual issue is whether defendant gave the statement on Kirlin's recommendation or whether Kirlin verbally advised defendant not to talk to the police. Defendant testified at the suppression hearing that Kirlin insisted he

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[3] Kirlin testified as to the interview:

> A. . . . I had concerns as we went along about the possibility that Mr. Botts might be exposed to liability as a result of that conversation. Q. You had concerns that he might be incriminating himself? A. Yes, sir. Q. Did you ever advise Mr. Botts to stop the conversation? A. Did I ever advise him to what? Q. To stop the interview and not continue? A. No, sir.

talk to the police. He said Kirlin called on August 11th demanding he do so and, when he told Kirlin he had no automobile, arranged to pick him up to take him to the station. Conversely, Kirlin testified at the suppression hearing he verbally advised defendant not to speak to the police. He indicated he had no more than two conversations with defendant about the Stigler murder.

The district court found defendant articulate, thoughtful, and attentive; a man not easily controlled and manipulated by others, who had sufficient self-assurance to make his own decisions. The court rejected defendant's claim he was easily led, finding Kirlin to be the more credible witness. Instead, it determined defendant, in giving the statement, chose to ignore Kirlin's warning and made his own decision to speak to the police.

In determining the weight given this credibility assessment as a factor in our determination of whether defendant received effective representation we note that defendant also claims that Addington, in representing him at the suppression hearing, was ineffective for failing to discover and have corrected the error in the transcript attributing to defendant the statement actually made by the interviewing police officer. Defendant contends this statement could be taken as evidence he did not know or care about a deal, making it impossible for the district court not to believe he relied on Kirlin's advice in talking to police.

Defendant was confronted with the erroneous statement on cross-examination at the suppression hearing and it was one of a number of factors on which the district court relied in finding defendant not credible.

The State, while conceding the statement as transcribed was an error, alleges that the defendant was not prejudiced because the district court relied on a number of additional other factors in reaching its decision.

We agree with defendant that the district court considered that defendant said, in response to the police officer's question concerning a deal, "I really don't care." We also agree that the officer, not the defendant, actually made that statement. While the district court relied on fifteen other reasons to support its decision, the erroneous statement was the first of the court's reasons. There is a probability that but for the statement erroneously attributed to the defendant the credibility assessment made by the district court in ruling on the suppression motion might have been different.

Defendant has shown he suffered prejudice because of the erroneous transcript. We cannot, however, on this record determine that defendant's counsel was ineffective in his treatment of the transcript. The matter is best reserved for post conviction proceedings to allow counsel an opportunity to respond. *See State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998). We therefore preserve this issue for postconviction proceedings.

In assessing the district court's credibility assessment we look only at the record that was before it and on that basis we affirm its ruling on the suppression motion.

The defendant also argues that in denying his suppression motion the district court incorrectly relied on *State v. Smith,* 543 N.W.2d 618 (Iowa Ct. App 1995). The district court said of *Smith*, 543 N.W.2d at 620 that it demonstrates an attorney suggesting a pre-arrest un-immunized statement be made to the

police is not per se an ineffective attorney. We agree with the district court that *Smith* fails to find an attorney ineffective who allowed his client to confess to the police that he killed someone. *See Smith*, 543 N.W.2d at 620. However, in *Smith* the attorney was called by a woman who said Smith had told her of the killing and that she would go to the police if Smith didn't turn himself in. The attorney was aware at the time he counseled with Smith that Smith had admitted he was the killer to three other people. The attorney testified it was his hope that Smith, in confessing he killed because he believed the victim was making sexual advances, would have a chance for a manslaughter charge. Unlike *Smith*, defendant here was not facing a murder charge when he went to the police. There was no evidence defendant at any other time had admitted he had a part in the Stigler murder and kidnapping. Defendant at that time was facing a five-year sentence not a life sentence. While *Smith* is distinguishable in a number of respects from the case here, we do not find the district court misapplied it.

The district court found the defendant may have suffered prejudice because of giving the August 11th interview. Relying on a number of factors, including the statement at the interview incorrectly attributed to defendant, the district court found defendant gave the interview as a result of his decision to ignore Kirlin's warning for him not to speak to the police. Giving the required deference to the factual findings made by the district court we arrive at the same conclusion and affirm.

As to the August 12th statement, defendant contends Kirlin was ineffective in failing to tell police they should refrain from talking to him outside Kirlin's presence. There was no evidence that Kirlin either advised the police they could

not talk to defendant unless he was present or that he advised defendant not to make any further comments about the events to the police. The district court also found it was defendant's decision to speak with police on the 12th. Again, giving the required deference to the finding of facts of the district court we affirm on this issue.

The defendant also contends that his trial attorney Steve Addington was ineffective in a number of ways. Defendant's claim Addington should have discovered the error in the transcript of the police interview has already been discussed and is preserved for postconviction proceedings. Defendant further contends that Addington should have (1) investigated and called alibi witnesses; (2) investigated alleged witness tampering; (3) kept evidence of his bad acts out of the trial; and (4) seen that the jury reheard certain trial testimony.

Defendant contends Addington should have investigated and called alibi witnesses because of testimony at trial regarding a meeting of the Crips, the defendant's gang. A witness testified at trial that during this meeting the question of retaliating for the murder of Rafael Robinson was discussed and when asked who was going to take care of the Robinson situation, defendant said he and his "Locs" would. Locs are Crip members of lesser stature in the organization.

Defendant contends in his brief that he gave Addington the names and addresses of people who would testify that he had not attended the meeting. Defendant contends that had Addington conducted an investigation and interviewed those witnesses they would have corroborated his alibi and the result of his trial would have been different. Defendant does not name or identify any

alleged alibi witnesses nor does he claim that one or more of them would be available to testify.

When complaining about the adequacy of an attorney's representation, it is not enough for defendant to simply claim that counsel should have done a better job. *See State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). Defendant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *See Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985); *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969). The allegations made here are too general in nature to preserve them for postconviction proceedings. *See Schertz*, 380 N.W.2d at 412. Defendant does not propose what an investigation would have revealed or how anything discovered would have affected the result obtained below. Defendant has not shown where the witnesses would be or what their testimony would have been or how it would have supported his application. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Nor does he show that the witnesses would have testified in a manner helpful to him. *Luke v. State*, 465 N.W.2d 898, 902 (Iowa Ct. App. 1990).

This court should be provided at a minimum with enough information to make an initial assessment of defendant's contentions. *White*, 337 N.W.2d at 519. Whether the specific issue can be disposed of on appeal or must be reserved for resolution in postconviction proceedings is a determination that should be made by the appellate court, not by defense counsel. *Id.* We cannot base our holding on the bald assertion in a brief that counsel provided ineffective assistance in some undisclosed fashion. *Id.* Defendant has not specifically

identified where counsel's deficiency occurred or how competent representation would have changed the outcome of his trial. We therefore do not preserve this issue for postconviction proceedings. *See State v. Astello*, 602 N.W.2d 190, 198-99 (Iowa Ct. App. 1999).

Defendant next contends that a potential alibi witness, identified only as Ms. Brooks, was told by prosecutors she better not testify for defendant or she would be locked up. Defendant contends he told his attorney about the situation and trial counsel did nothing. Defendant has not shown what alibi this person would have provided so there is no way to determine if or how defendant was prejudiced. The allegation is not specific enough to preserve the issue for post conviction proceedings. *See Dunbar*, 515 N.W.2d at 15.

Defendant's next claim is that his attorney should have objected to testimony from Shauntell Brown, with whom defendant had a relationship, that defendant hit her with his hands and beat her with a plastic baseball bat several times. Defendant contends the evidence was both inadmissible and unfairly prejudicial and there is a reasonable probability the result of the trial had been different had the evidence been excluded. The State contends the evidence was admissible and was not unfairly prejudicial. The evidence was not unduly prejudicial. Defendant testified he had been convicted of several felonies including a firearms offense and terrorism. Defendant is not entitled to relief on this ground. *See State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998) (Counsel is not incompetent for failing to pursue a meritless issue.).

Defendant next contends his trial counsel was ineffective in not urging the district court to grant a jury request to rehear Shauntell Brown's testimony.

During jury deliberations the jury foreperson asked to hear Brown's testimony as to when defendant entered the house and his activities in the basement. The district court told the jurors in a note to rely on their recollections of the testimony. Defendant does not allege how he was prejudiced by his counsel's failure to urge the reading. Defendant has no basis for relief on this ground. *See Mark v. State*, 370 N.W.2d 609, 612 (Iowa Ct. App. 1985) (Defendant must demonstrate prejudice to succeed on an ineffective assistance of counsel claim.).

We affirm the defendant's conviction but reserve his right to challenge the effectiveness of his trial attorney in failing to discover the statement erroneously attributed to defendant in the transcript of the tape of his statements.

AFFIRMED.