

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

HARRY YAW,)

Defendant-Appellant.)

FILED JUNE 25, 1986

6-110
85-645

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Appeal from the Iowa District Court for Polk County (No. 26677), Gene L. Needles, Judge.

Defendant appeals his conviction of two counts of sexual abuse in the second degree in violation of Iowa Code section 709.1 and 709.3. **REVERSED AND REMANDED.**

Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; Gregory Biehler and Kirk McCormick, Assistant Polk County Attorneys, for plaintiff-appellee.

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

SCHLEGEL, J.**213**

Defendant appeals his conviction of two counts of sexual abuse in the second degree in violation of Iowa Code section 709.1 and 709.3. We reverse and remand.

Defendant is a grandfather charged with having sexual contact with two of his granddaughters who were both under age twelve. Prior to trial, defense counsel arranged to take the depositions of several of the State's witnesses, including the two granddaughters and their mother. The depositions took place at the Polk County Courthouse in the grand jury room. Immediately prior to the deposition of the mother of the victims, defendant told his attorney that he did not wish to be present if it was not necessary. He was assured by his attorney that he could remain outside, so defendant and his wife waited in the hall outside the grand jury room. After the mother's deposition ended, defense counsel proceeded to take the girls' depositions. Defendant was not present for these depositions.

After the depositions, defendant's counsel expressed concern about the strength of the girls' testimony and how closely their answers corresponded to the minutes filed by the county attorney. At no time, however, was defendant given a copy of the depositions, or had the girls' depositions read to him.

Defendant waived his right to a jury trial and trial commenced with all of the State's witnesses ready to testify. During trial, rather than have the girls testify, defense counsel agreed to introduce the depositions into evidence, with the stipulation that the trial court, on its own, strike the irrelevant, immaterial and objectionable material from the consideration. Based largely upon the testimony in the girls' depositions, the trial court found defendant guilty of sexual abuse in the second degree.

Defendant obtained new counsel shortly thereafter. Based upon new counsel's oral motion for a new trial, an evidentiary hearing was held on February 25,

1985. A formal written motion for new trial was filed later on March 1, 1985, but was denied by written ruling on March 7, 1985. Defense counsel then filed a motion to reconsider the denial of his new trial motion and enlarge the trial court's finding and conclusions of law. The trial court enlarged its finding and conclusions but reached the same result. Defendant now appeals the trial court's decision.

On appeal, the sole issue raised by defendant is whether he was denied effective assistance of counsel when his trial counsel stipulated to the use of the children's depositions at trial without a waiver of defendant's right to confront witnesses against him.

I. Ineffective Assistance of Counsel

The State argues that defendant waived the issue of ineffective assistance of counsel by not raising the issue in his motion for new trial. The State cites State v. Kellogg, 263 N.W.2d 539 (Iowa 1978), and Washington v. Scurr, 304 N.W.2d 231 (Iowa 1981), for its authority. We point out that the authority cited by the State are factually based upon postconviction proceedings. Such is not the case before us today. And yet, the principles applicable to postconviction proceedings are applicable to the unique factual matters in this case.

As was noted in Kellogg, the reason for relaxing the general rule that issues not raised in the trial court cannot be raised on appeal, is that usually the alleged ineffective attorney may represent the defendant on direct appeal also. And it is understandable that counsel will not generally raise the issue against himself. See State v. Kellogg, at 543. If the allegation of ineffective assistance of counsel is not raised until postconviction proceedings, the defendant must establish "sufficient reason" for not having raised the issue on direct appeal. See Iowa Code section 663A.8; see also State v. Turner, 345 N.W.2d 552, 558 (Iowa App. 1983). It has been generally held, however, that original counsel's natural unwillingness

to raise the issue is "sufficient reason" why it was not raised earlier. See, State v. Turner, at 558.

In this case, trial counsel was replaced by a new attorney after the verdict was rendered and before the motion for new trial was requested. Defendant was found guilty on December 19, 1984, and on February 25, 1985, an evidentiary hearing was held in response to defense counsel's oral motion for new trial. At the hearing, defendant's trial counsel testified about his actions and decisions both during the depositions and trial. In addition, defendant and his wife testified concerning their understanding of the events that transpired at the depositions and at trial. It was not until after defense counsel had participated in the evidentiary hearing and was fully aware of trial counsel's actions and decisions, that he filed a written motion for new trial. And yet, on March 1, 1985, defense counsel failed to raise the issue of ineffective assistance of counsel. No mention of anything resembling such allegation was made by defendant until the motion to reconsider the denial of his motion for new trial and enlarge findings of fact and conclusions of law.

It is true, as defendant asserts, that the State raised the issue of ineffective assistance of counsel at the close of the evidentiary hearing. However, this does not absolve defense counsel of his duty to raise the issue formally in his written motion for new trial on March 1, 1985. It is clear from the record that the trial court did not rule on the ineffective assistance of counsel issue at the evidentiary hearing. It is also clear that no ruling was made on this issue in response to defendant's motion for new trial because the issue was not raised. In his motion to reconsider, defendant specifically stated:

6. That the Conclusions of Law do not disclose what standard of review the Court used in reaching its decision; specifically, whether the Court applied the tests and standards utilized in a post-conviction relief proceeding alleging ineffective assistance of counsel or those standards

employed in reviewing the denial of a constitutional right in the absence of an allegation of ineffective assistance of counsel.

7. That if the Court applied the standard utilized in cases alleging ineffective assistance of counsel, the State did not introduce any evidence to show that the constitutional error was harmless beyond a reasonable doubt; and, that prejudice did not result therefrom by a preponderance of the evidence.

The trial court responded in its ruling on April 1, 1985, by stating:

...if defendant's complaint is that he was denied his confrontation right under the Sixth Amendment, the Court believes the only method he could bring this now to the Court's attention after the trial would be to complain that his trial counsel was ineffective. He did not do this in his motion for new trial filed March 1, 1985. However, if he would have, the Court would have employed the tests and standards utilized in a post-conviction relief proceeding alleging ineffective assistance of counsel.

Thus the record shows that the specific issue of ineffective assistance of counsel was not considered raised at the appropriate time by the trial court. We hold the trial court was correct in its decision and defendant's claim of ineffective assistance of counsel is waived.

II. Right of Confrontation.

While we agree with the trial court in its April 1 ruling that the issue of ineffective assistance of counsel was waived, we do not agree that the only way to preserve the issue of the denial of his sixth amendment right of confrontation was to attach it to the ineffectiveness claim. From the outset, in his oral motion for an evidentiary hearing, and in his written motion for new trial, defense counsel alleged that defendant was denied his right to confront the witnesses against him. Therefore, this issue is preserved, and for reasons set out below, we conclude defendant was denied his sixth amendment right to confront the witnesses against him at trial.

The State must show the defendant's waiver of the right of confrontation was knowing, intelligent, and voluntary. State v. Moore, 276 N.W.2d 437, 440

(Iowa 1979). The burden is on the State to show a valid waiver by a preponderance of the evidence. State v. Hillpipe, 242 N.W.2d 306, 309 (Iowa 1976). Since the assignment of error presents federal constitutional issues, we make an independent evaluation of the totality of the evidence from which the assertions of unconstitutionality arise. We review the evidence de novo. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976).

Despite conflicting testimony as to what exactly was said immediately prior to the depositions of the children and their mother, it is certain that defendant at least knew the depositions were going to take place. The State argues that because he did not assert his right to be present, he waived his right to confront the witnesses at the deposition. In State v. Turner, 345 N.W.2d 552, 560 (Iowa Ct. App. 1983), we said:

At the very least, the trial record should affirmatively show that defendant was advised of the proposal to take the deposition to be used at trial, and given an opportunity to approve or disapprove the procedure, and to approve or disapprove his presence or absence from the taking of the deposition.

The State argues that Turner implies that a defendant must "personally" waive his right to be present at a deposition, "in advance" of the time it is taken. Contrary to the State's position, Turner does not imply anything new and unsettling in the area of waiver of constitutional rights. It merely reasserts the well-known principles that, "[t]he State must prove by a preponderance of evidence that the defendant (1) understood the right and (2) intentionally relinquished it." State v. Jackson, 380 N.W.2d 420, 424 (Iowa 1986). "The right does not depend on a request by the defendant, and courts indulge every reasonable presumption against waiver." Id.

Defendant's trial counsel admitted that he did not make it clear to defendant that he had a constitutional right to confront the witnesses at the deposition

and to refuse to do so at that time would potentially constitute a waiver. We certainly cannot place the responsibility of knowing the consequences of his acts upon the defendant without legal advice.

More important, however, the record shows that this was merely a discovery deposition. Trial counsel stated that at that point in time (immediately after the deposition) "No thinking process was going on between myself and my client that this would in fact be used as evidence during the trial." Thus even if defendant intentionally relinquished his right to confront the witnesses at the depositions, both he and his attorney were proceeding with the strategy that a second opportunity to confront the witnesses would occur at trial.

Discovery depositions are not normally used in toto as evidence, and the facts show that the depositions of the girls were not initially intended to be so used in this case. In Turner we held that a defendant must be shown to have intentionally, knowingly, and voluntarily waived his right to be at a deposition "where testimony is taken for introduction at trial. . . ." State v. Turner, at 559. It is obvious the depositions were not intended to be used at trial when the State argues defendant waived his right to confront the witnesses. Even if defendant's conduct in removing himself from the room during the taking of the discovery depositions constituted a waiver of his right of confrontation during those depositions, it does not follow that he knowingly and voluntarily waived his right of confrontation at trial through the use of those depositions.

It was not until the crucial moment at trial, that defendant realized that the depositions were going to be admitted rather than have the girls testify. The State argues that this was merely a strategic move by trial counsel and that defendant is bound by counsel's strategic decisions. We disagree. Here, plain and simple, the depositions taken out of the presence of the defendant were presented as evidence, without his consent, before the trier of fact. The

defendant must be allowed to have his right of confrontation protected when evidence is presented from which the trier of fact determines guilt. Cf. Turner, at 559. The defendant's right of confrontation is one of those decisions of constitutional magnitude that cannot be waived by his attorney. Cf. Turner, at 559. The facts of Turner are similar but not sufficiently on point to be controlling in this case. However, we concluded in Turner "[t]hat defendant himself be at least afforded the opportunity to be present at all stages of his trial is an elemental corollary of the constitutional rights of due process and confrontation, subject to waiver, if at all, only in the most extraordinary situations. Id. at 560; see also, State v. Snyder, 223 N.W.2d 217, 222 (Iowa 1974). We cannot hold, upon our review of the totality of the circumstances, that the defendant knowingly, intentionally, and voluntarily waived his right to confront the witnesses against him. We therefore reverse and remand this case for a new trial.

REVERSED AND REMANDED.