

FILED

MAY 31 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JAMES JUNIOR WHITED II,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed May 31, 1988

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8-63
86-1728

Appeal from the Iowa District Court for Page County (No. 21371), James M. Richardson, Judge.

Petitioner appeals from the district court's denial of postconviction relief.

AFFIRMED.

James Cleary of Drake Law School, Des Moines, for the petitioner-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Stephen Patrick O'Meara, Page County Attorney, for respondent-appellee.

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

DONIELSON, J.

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The petitioner appeals from the district court's denial of postconviction relief, contending his 1983 guilty plea to a charge of first-degree robbery should be held invalid because his trial counsel rendered ineffective assistance and because he was denied due process by prosecutorial misconduct. We affirm.

In August 1983, a convenience store was robbed and its clerk was abducted and sexually abused by two men. James Whited, the petitioner here, and Leonard Osborn were implicated as suspects in the crime. There was also some degree of suspicion directed at a second pair of men, Randall Lee and Joseph Dirisio. During the investigation, bodily fluid tests eliminated Dirisio, but not Lee, as a sexual abuse suspect; in fact, Lee's blood type was present on the relevant vaginal swabs and smears.

The investigation culminated when Osborn gave a statement implicating himself and Whited. Osborn's statement was confirmed by Mary Haffner, who was apparently a friend of Osborn.

Whited subsequently entered a plea of guilty to a charge of first-degree robbery. Pursuant to a plea bargain, the State dismissed a charge of first-degree kidnapping. There was evidence that Whited's guilty plea was motivated in large part by a desire to avoid a life sentence on a first-degree kidnapping charge. Whited also argues that his guilty plea was induced in part by his trial attorney's mistaken advice that he would be eligible for immediate parole from the robbery sentence.

After his guilty plea, Whited was convicted of first-degree robbery and was sentenced to imprisonment for up to twenty-five years, with a five-year mandatory minimum term because of the involvement of a firearm. He filed a notice of appeal; however, he later dismissed this direct appeal, apparently on the advice of counsel.

In 1986 Whited filed the present application for postconviction relief. The district court denied postconviction relief, and Whited has appealed.

Postconviction relief actions pursuant to Iowa Code Chapter 663A are law actions and are ordinarily reviewed only on error. Bear v. State, 417 N.W.2d 467, 469 (Iowa App. 1987). However, when there is an alleged violation of a constitutional safeguard, we will make an independent evaluation of the totality of the circumstances under which the postconviction ruling was made. Id.

I. Whited contends that his trial attorney rendered ineffective assistance in several respects and that his guilty plea is therefore invalid. The petitioner, in order to prevail on a claim of ineffective assistance of counsel, must show by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defendant. Bear, 417 N.W.2d at 472. If, however, the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. Id. In deciding the first prong, we require more than that trial strategy backfired or that another attorney would have prepared the case somewhat differently. Id. Counsel is presumed competent. Wycoff v. State, 382 N.W.2d 462, 471 (Iowa 1986). Defendant is not entitled to perfect representation, but only that which is in the range of normal competency. Bear, 417 N.W.2d at 473.

Whited complains that his attorney inadequately investigated the case by failing to pursue evidence implicating Randall Lee, failing to learn of the chemical test results showing that Lee could have committed the sexual abuse, failing to learn that witness Mary Haffner had tried to recant her testimony implicating Whited, failing to obtain a sworn statement of Roy Stanley given to the DCI, failing to obtain Department of Criminal Investigation lab results, and failing to learn about the plea bargain made in exchange for Leonard Osborn's testimony.

Counsel's failure to investigate can result in ineffective assistance of counsel in a plea situation. Tinlin v. Parratt, 680 F.2d 48, 50 (8th Cir. 1982). However, there are no requirements that defense counsel follow any specific investigatory procedures. See Kellogg v. State, 288 N.W.2d 561, 564 (Iowa 1980). The duty to investigate is not limitless. Schrier v. State, 347 N.W.2d 657, 662 (Iowa 1984). The extent of investigation required turns on the facts and circumstances of each case. Id. Counsel's duty to investigate may be curtailed and exonerated if avenues of discovery are judged professionally irrelevant due to the overall facts or a client's statements/admissions. Strickland v. Washington, 466 U.S. 688, 691, 104 S. Ct. 2052, 2066-67, 80 L. Ed. 2d 674, 695-96 (1984).

We have reviewed the record and agree with the district court that Whited's counsel adequately investigated and researched the facts of this case prior to Whited's plea. Any further discovery efforts were curtailed due to Whited's decision to plead guilty. We find counsel's performance was within the range of normal competency. Counsel testified he did a lot of investigation on the case. He met with Whited, visited with Whited's witnesses, and filed motions. For over twenty years counsel's practice consisted of eighty percent criminal defense work.

The fact Lee had the same blood type as Whited was inconclusive to exculpate Whited. The district court found Haffner not to be a truthful witness at the postconviction relief hearing when she stated she was retracting her prior testimony: the district court noted approximately six other occasions wherein Haffner's statements were consistent and reaffirmed to other acquaintances and authorities. Stanley's statement to the DCI is shown to be cumulative of the statement he made to the local police which counsel had reviewed. Counsel testified he told Whited he felt Osborn had possibly received a plea bargain.

We find Whited's counsel's performance was not deficient nor was Whited prejudiced from any alleged failure to investigate his claims.

Whited alleges his counsel misadvised him concerning the availability of immediate release following sentencing. Counsel informed Whited that "he could serve two years and ten months to ten years and four months, unless paroled earlier" (emphasis added). We find this is not misadvice: "unless paroled earlier" refers to Whited's being paroled earlier than the period of ten years and four months, rather than two years and ten months. Furthermore, such advice was not given to Whited until after he pleaded guilty. Neither do we find defendant was prejudiced by his counsel informing him a motion to reconsider (shock probation) could be filed even though defendant was ineligible for shock probation; this statement made by counsel was after defendant had already pleaded guilty and been sentenced.

Whited argues that his counsel recommended accepting the plea bargain because if he did not, "then there is a strong likelihood you will not get out of prison until you are an old man; and then only because it would be too expensive to keep you." He contends this suggestion is a coercive threat. We find otherwise; the statement appears to be sage advice, given the fact if Whited did not accept the plea agreement, he could potentially face a life sentence for kidnapping.

Based on the previous discussion, we affirm the district court and find Whited has failed to prove any allegations of ineffective assistance of counsel.

II. Whited also contends that his guilty plea should be held invalid on the ground he was denied due process by prosecutorial misconduct. He complains that the State intimidated and manipulated witness Haffner into withdrawing her attempted recantation. He also complains that the State withheld potentially exculpatory evidence, namely bodily fluid tests and other evidence pointing

suspicion toward Randall Lee and the circumstances surrounding Leonard Osborn's plea agreement.

After review of the record, we do not find witness Haffner was intimidated or manipulated by the prosecutor or police. The district court found Officer Jewell, who was alleged to have intimidated Haffner, to be a more credible witness than Haffner. The district court observed the parties; we defer to the district court's assessment on the credibility of witnesses.

The record discloses the State offered a plea bargain to Whited conditioned on the abandonment of formal discovery. There is no general constitutional right to discovery in a criminal case. State v. Anderson, 410 N.W.2d 231, 233 (Iowa 1987). The State can choose to conduct formal reciprocal discovery under Rule of Criminal Procedure 13(2)(b) (discretionary discovery) in order to provide the State with information concerning defendant's expected witnesses. Witness statements are not constitutionally required to be provided to defendant until after the witness has testified for the State. State v. Kase, 339 N.W.2d 157, 159 (Iowa 1983). There is no duty for the State to disclose evidence which is available from a nonprosecutorial source. Spratt v. State, 315 N.W.2d 844, 846 (Iowa App. 1981).

As previously noted in division I, Stanley's statement to the DCI agents was cumulative. Defendant's counsel testified he knew of the circumstances surrounding the plea agreement with Osborn. The DCI laboratory reports were inconclusive in implicating or eliminating defendant. We agree with the district court that there was no prosecutorial misconduct denying defendant exculpatory evidence and intimidating a witness. Whited's plea of guilty was not prejudiced: charges of arson in the first degree, kidnapping in the first degree, and sexual abuse in the second degree were all dismissed against the defendant.

Accordingly, we affirm the conviction.

AFFIRMED.