IN THE COURT OF APPEALS OF IOWA

No. 0-307 / 99-0540
Filed July 26, 2000

FILED
JUL 26 2000
CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

DEAMOND JOSEPH SICKLES,
Appellant.

Appeal from the Iowa District Court for Allamakee County, John Bauercamper Judge.

Deamond Joseph Sickles appeals the judgment and sentence entered following a bench trial finding him guilty of second-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hal and Thomas H. Miller, Assistant Attorneys General, and William Shafer, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Deamond Joseph Sickles appeals his conviction and sentencing for second-degree murder. Because we find his *Miranda* waiver was voluntary, knowing and intelligent, his confession was voluntary and he was not prejudiced by the alleged ineffectiveness of his trial counsel, we affirm.

Background facts. Sickles was convicted in a bench trial on the minutes of testimony of the second-degree murder of Francis Pettit. He was sentenced to a term of incarceration not to exceed fifty years. Sickles is sixty-four years old and intellectually low functioning. He has worked as a logger for twenty-eight years and lives independently. Although his reading ability is on a first-grade level, he is good with numbers and handles his own finances. He is also licensed to drive a vehicle.

The incident giving rise to this conviction occurred on June 10, 1998. On that evening, Sickles was arrested for operating while intoxicated. At 11:15 p.m., the Intoxilyzer test administered to Sickles resulted in a reading of .194. Just prior to his arrest, Sickles made several voluntary statements that indicated he had some personal knowledge as to whether the victim might be hurt. Sickles was jailed for the night and retrieved the next morning around 8:13 to be questioned regarding the murder. He drank some coffee but refused the offered breakfast, stating he didn't usually eat that meal. Sickles appeared sober and was friendly and alert. Before beginning any questioning of Sickles, Department of Criminal Investigation (DCI) agent, Jeffrey Jacobson, went through his

Miranda[1] rights with him, following a standard written form. Sickles was asked to read the first line and did so, reading all but two words correctly. Agent Jacobson, noting the misread words, read the first sentence correctly and proceeded to read the rest of the rights, stopping after each for Sickles to explain what he had just heard in his own words. Agent Jacobson testified he did not remember the exact answers given by Sickles but that he responded appropriately and appeared to understand each of the rights. Sickles then waived his rights, and proceeded with the interview conducted by both Agent Jacobson and Deputy Heiderscheit. During the interview, Sickles made statements implicating himself in the murder of Francis Pettit. Later, Sickles moved to have his statements suppressed and, following a hearing on the matter, the motion was denied. Sickles appeals.

Scope of review. In assessing alleged violations of constitutional rights, our standard of review is de novo. *State v. Washburne,* 574 N.W.2d 261, 263 (Iowa 1997). We conduct an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Astello,* 602 N.W.2d 190, 195 (Iowa App. 1999). In reviewing the district court's ruling on a motion to suppress, we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Orozco,* 573 N.W.2d 22, 24 (Iowa 1997). An adverse ruling on a motion to suppress will preserve error for our review. *State v. Breuer,* 577 N.W.2d 41, 44 (Iowa 1998).

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[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) requires certain warnings be given to apprise a person of his rights before a statement given during custodial interrogation can be admitted into evidence.

Motion to suppress confession.

A) Voluntary, knowing and intelligent waiver. Sickles contends the waiver of his *Miranda* rights was invalid because he has poor reading skills and was not able to fully understand the rights as read to him. "[T]o permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . ." *See Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 1624, 16 L. Ed. 2d 694, 719 (1966); *see also State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989). The State asserts Sickles had the *Miranda* rights read to him by Agent Jacobson and answered questions appropriately after each right was read and explained, indicating his comprehension. At the suppression hearing, Sickles presented several expert witnesses testifying as to his first grade reading level and his doubtful understanding of the *Miranda* rights. The experts also opined that if Sickles answered appropriately, it was not because he understood the rights but rather that he was attempting to mask his low level of functioning, which they estimated to be on a par with an eight year old child. One of the experts also testified that a seventh grade reading level was required to fully comprehend the *Miranda* rights. Sickles asserts he does not possess the ability to comprehend the Miranda warnings and, therefore, could not have voluntarily, knowingly and intelligently waived those rights.

The state offered the testimony of Dr. Michael Taylor who took issue with the conclusions of the defense experts. While he agreed Sickles has a low reading level, Dr. Taylor opined Sickles life skills and abilities far exceed that of

an eight-year-old. Evidence of Sickles' skills include his ability to live independently for decades, handle his own finances, drive a car, and maintain full employment for twenty-eight years at a saw mill. Sickles explained his job responsibilities to Dr. Taylor, which included calculating log footages in his head and tallying them at day's end, typically a four-digit number. Dr. Taylor suggested Sickles greatly exaggerated his claimed confusion of the *Miranda* rights. This was spawned in part by Sickles' explanation to Dr. Taylor of the first two *Miranda* rights, then alternately claiming he did not remember his rights being read or he did not understand what the officers had read and explained to him. Dr. Taylor opined that Sickles was intentionally trying to appear impaired and befuddled with inconsistent answers to his questions. He also testified Sickles' level of abstract thinking supported his opinion that Sickles was capable of a much higher level of thinking than that of an eight-year-old. Dr. Taylor also offered the following example of Sickles' ability to think in the abstract and to problem solve. After some confusion with the jail laundry system, Sickles suggested a more concise fashion in which to sort the laundry so as to minimize the risk of inmates receiving incorrectly returned clothing.

While Dr. Taylor endorsed the credentials of one of defense experts, Dr. Eva Christensen, he testified that Dr. Christensen was making broader conclusions about Sickles' "mental age" and ability than was allowed under the intelligence tests performed. While the defense experts conducted many intelligence, reading and psychological tests, Dr. Taylor was the only expert to fully go through the *Miranda* warnings, the charges and the nature of the trial

proceedings in conjunction with the tests previously performed, in order to accurately determine how much Sickles was able to understand. Therefore, we find the trial court could have found Dr. Taylor's testimony more credible and, thus, given it more weight than the defense experts. Under our de novo review, considering the totality of the circumstances, we find the state carried its burden of proving by a preponderance of the evidence that Sickles knowingly and intelligently waived his rights under *Miranda.*

B) Voluntariness of the confession. Next, Sickles argues that his confession should have been suppressed as it was not voluntarily given. Both the Fifth and the Fourteenth Amendments to the United States Constitution, by the right against self-incrimination and the principles of due process respectively, require confessions must be voluntary to be admitted into evidence. In order for the statements to be deemed voluntary, they must be "the product of a free and unconstrained choice." *State v. Alspach,* 524 N.W.2d 665, 667 (Iowa 1994). "In order for a statement to be considered free and voluntary, 'it must not be extracted by any sort of threats, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" *State v. Davis, 446 N.W.2d 785, 787 (Iowa 1989) (citation omitted); see also Alspach,* 524 N.W.2d at 667. The burden of proof is on the State to show the statements were voluntary. *State v. Payton,* 481 N.W.2d 325, 328 (Iowa 1992). The burden must be met by a preponderance of the evidence. *Id.* We give considerable weight to the findings of the trial court regarding voluntariness. *Id.*

Sickles claims his confession was not given voluntarily because of the inappropriate actions of the interrogators in depriving him of adequate sleep, food, and questioning him while he was still intoxicated. The State has taken the position that there was no coercive police conduct. On the morning of the interview, the State asserts Sickles had awakened on his own, was alert, reported he had slept six to seven hours the night before, had coffee to drink but refused breakfast as per his usual habit. Sickles stated several times throughout the interview that he felt fine. He stated once that he "maybe felt a little woozy" but then stated that he felt fine to continue. Sickles was allowed to smoke and have breaks as he wanted during the three hour interview and was told he could return to his cell at any time. Further, both of the officers testified he did not appear intoxicated, and any alcohol potentially remaining in his system from the previous evening was negligible.

Our supreme court has delineated numerous factors to consider when determining whether a statement is voluntary, including the defendant's age, the level of the defendant's prior experiences with law enforcement, whether the defendant was intoxicated at the time of the statement, whether the defendant was provided Miranda warnings, the intellectual capacity of the defendant, whether officers acted in a deceptive manner, whether the defendant appeared to understand and respond to questions, the length of time of the detention and interview, the defendant's physical and emotional reaction to the interrogation, and whether the defendant was subjected to any physical punishment such as the deprivation of food or sleep. *State v. Smith*, 546 N.W.2d 916, 926 (Iowa

1996) (citations omitted). Although Sickles is older and functions at a lower intelligence level, he has an extensive history of contact and arrests with the police. In addition, the transcript of the taped portion of the interview seems to indicate he was able to understand the questions that were asked of him.

Sickles further alleges the officer interrogating him coerced him into confessing by making statements indicating leniency if he confessed and offering flattery of hope[2]. These statements included phrases such as "it will help you to tell the truth," "maybe there's some reason why this thing happened," and that they "would notify the County Attorney of any cooperation." However after each of such statements, one of the officers followed up with a statement similar to, "we cannot guarantee as far as leniency for sentence or anything as far as the outcome of this." Sickles delivered his confession after these statements and caveats were made. Ordinarily, this type of police statement is not considered to be coercive unless specific statements defining the leniency are made or promises are made. *State v. Whitsel,* 339 N.W.2d 149, 154 (Iowa 1983); *compare State v. Hodges,* 326 N.W.2d 345, 349 (Iowa 1982) (holding officer's statement that a lesser charge would be much more likely if defendant gave his side of the story was clear inducement by the officer). There is no claim such promises were made to Sickles. Sickles also asserts the statement made by

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[2] "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected." *King v. Parratt,* 4 Car. & P. 570, 172 Eng. Rep. 829 (N. P. 1831); *Queen v. Garner,* 1 Den. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Hopt v. Territory of Utah,* 110 U.S. 574 (1884); *Pierce v. United States,* 160 U.S. 355, 357 (1896); *Dickerson v. United States,* 2000 WL 807223, 4 (2000).

Agent Jacobsen regarding having a "good reason" for the attack was indicative of suggesting a lesser charge. "A statement to a criminal suspect that implies empathy or understanding for the suspect does not amount to improper inducement or coercion." *State v. Jennett,* 574 N.W.2d 361, 366 (Iowa App. 1997).

In addition, Sickles claims a statement made to him that the officers had some physical evidence implicating him in the murder rendered his confession involuntary. Agent Jacobsen testified as follows:

> I confronted Mr. Sickles and advised him that I thought that he was the one that was involved in this and told him that we had what I believed to be physical evidence on his boots, and the possibility existed that that evidence could come back to the victim, Mr. Pettit.

On cross examination, Agent Jacobsen restated this as: "I told him we had some tissue on this boot and asked him what would happen if, in fact, that came back as being Mr. Pettit's after doing DNA testing." At the time, Agent Jacobsen testified he believed there was evidence on Sickles boot. That proved to be wrong, but blood found on Sickles' jeans did match the victim's DNA. While deceptive statements indicating evidence of which there is no proof amount to trickery, statements made under honest, though mistaken belief or in the form of a hypothetical question are not. *See State v. Reid,* 394 N.W.2d 399, 404 (Iowa 1986); ***see also Jennett,*** 574 N.W.2d at 364-65.

Further, the State alleges that even if the confession was given involuntarily, it was a harmless error as Sickles would have been convicted on the basis of the large amount of direct and circumstantial evidence of his guilt. *State v. Mortley,* 532 N.W.2d 498, 503 (Iowa App. 1995). The record included

the time of the death of Francis Pettit, the cause of death as multiple blows to the head with a blunt instrument, witnesses who saw Sickles with a baseball bat prior to the incident, evidence of Sickles' animosity toward the victim, witnesses placing him in the area at the time of the death, Sickles' incriminating statements at the time of his arrest, Sickles' statements about the victim to another inmate, and the blood matching the victim's found on Sickles' clothing. In light of this overwhelming evidence independent of the confession, we agree any error that occurred was harmless to Sickles.

Competency. Sickles next appeals the decision of the pre-trial ruling of the district court, finding him competent to stand trial. Our scope of review is for the correction of errors at law. Iowa R. App. P. 4; *State v. Rieflin,* 558 N.W.2d 149, 151-52 (Iowa 1996). We do not review the evidence de novo where a determination of competency has been made by the district court. *State v. Aswegan,* 331 N.W.2d 93, 95 (Iowa 1983). Therefore, our inquiry is limited to whether there is support in the record for the competency finding. *State v. Jackson,* 305 N.W.2d 420, 425 (Iowa 1981). The basic test to determine if a defendant is competent to stand trial is whether the defendant has the present ability to understand the charges against him or her and communicate effectively with defense counsel. *State v. Mann.* 512 N.W.2d 528, 531 (Iowa 1994).

Sickles, although functioning with a low I.Q., was able to state the charge against him, explain who the victim was and what the state claimed he did to kill Francis Pettit. He was able to correctly identify, during an interview with Dr. Michael Taylor, the roles of the parties involved in the trial process, including the

judge, jury, witnesses, prosecutor and his own defense attorney. He also refused to speak freely about his version of the incident, stating his attorney had instructed him not to discuss that topic with Dr. Taylor. However, he was able to suggest to the arresting officers that there were other people who may be responsible for any harm to the victim. This "spinning of diversionary stories" is cited by Dr. Taylor as example of Sickles higher level of thinking than defense witnesses opined. The act of offering alternative suspects and suggesting their motives to kill the victim supports the trial court's conclusion that Sickles was competent to stand trial. Therefore, we find substantial evidence to affirm.

Ineffective assistance of counsel. Sickles claims his trial counsel was ineffective because he failed to have the DNA evidence tested by an independent expert. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder,* 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger,* 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain,* 356 N.W.2d 237, 238 (Iowa App. 1984).

A defendant has the burden of proving by a preponderance of the evidence that his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell,* 557 N.W.2d 908, 913 (Iowa App. 1996). A reviewing court can deny postconviction relief based on the failure to prove

prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

Sickles contends his attorney had a duty to order an independent DNA test performed on the blood found on Sickles' clothing. The State expert testified DNA testing confirmed the blood was consistent with that of Francis Pettit. The State asserts Sickles failed to demonstrate prejudice by a failure to perform a test for which there is merely a possibility of obtaining a different result than the test performed by the State expert. Because Sickles has not demonstrated a second DNA test would have established the blood did not belong to the victim and considering the strength of the remaining evidence supporting the finding of guilt, we find he has failed to prove he was prejudiced by his counsel's alleged ineffectiveness. *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994). Accordingly, we affirm.

AFFIRMED.