

IN THE COURT OF APPEALS OF IOWA

No. 0-212 / 89-820

FILED

AUG 30 1990

LEK SUPREME COURT

DOUGLAS E. KURTZ,

Appellant,

394

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Richard J. Vipond, Judge.

Petitioner Kurtz appeals the denial of postconviction relief challenging his 1987 conviction for second-degree sexual abuse. Kurtz contends the trial court erred in: (1) finding no prejudice resulted from trial counsel's failure to preserve petitioner's confrontation claim; (2) finding trial counsel's representation of Kurtz was unhampered by a conflict of interest; (3) applying "de facto" doctrine to unsworn prosecutor; and (4) concluding no suppression of exculpatory evidence occurred. **REVERSED.**

Duane E. Hoffmeyer of Vakulskas & Hoffmeyer, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

In 1986 Douglas Kurtz was accused of sexually molesting his six-year-old stepdaughter, K.B. He was charged with second-degree sexual abuse and his jury trial commenced on February 17, 1987. At trial, the State presented the videotaped testimony of K.B. which was taken on February 12, 1987. K.B. testified that there were times when she and the defendant would be alone and he would touch her and lick her on her "private parts." When asked where that was, she pointed to her thighs, stomach, and groin area. K.B. was cross-examined by Kurtz's trial counsel.

The State then called Dr. Greco, who testified he had conducted a physical examination of K.B. on August 18, 1986. He testified the exam had been unremarkable as there was no evidence of any present injuries. He also testified K.B.'s hymen was perforated. On cross-examination, Kurtz's attorney elicited testimony that there were a number of ways perforation of the hymen could occur and that the doctor could not definitely state what caused the perforation in this instance. Lastly, the State called Sergeant Bean who testified that he had spoken to Kurtz in regard to the alleged sexual abuse of K.B. Bean testified Kurtz denied the allegations.

Kurtz testified on his own behalf, denying any sexual abuse. The defense also introduced two videotapes: one taken on February 16, 1987, where K.B. was further

cross-examined by Kurtz's counsel concerning the variations in her allegations; and another taken on August 18, 1986, when K.B. was being interviewed by a social worker and a police officer. The defense also presented the testimony of Kurtz's father, mother, brother, and Kurtz's wife. Additionally, the defense recalled Dr. Greco and Sergeant Bean.

The videotaped testimony was taken pursuant to the child witness protection procedures of Iowa Code Chapter 910A. The State moved for a protective order and at a hearing on the matter offered the testimony of Dr. Schmitz, K.B.'s counselor. Kurtz's attorney resisted the protective order and objected on several grounds, including the sixth amendment confrontation clause. The trial court overruled counsel's objections and sustained the protective order.

During the taking of K.B.'s testimony, Kurtz was present but shielded from the victim by a one-way mirror, as authorized by 910A.14(1). K.B. was told Kurtz was in the next room and able to see her and hear her. Kurtz and his attorney were able to communicate at all times via telephone. As we indicated earlier, K.B. was cross-examined by Kurtz's attorney.

The jury found Kurtz guilty of second-degree sexual abuse. Kurtz was then convicted and sentenced for that crime. In 1988, we affirmed Kurtz's conviction after reviewing his challenges to the sufficiency and admissibility of evidence. Although Kurtz claimed the

videotape testimony violated his sixth amendment right to confrontation, we held the issue had not been preserved because trial counsel had failed to object at the time the tape was offered into evidence.

Kurtz then challenged the 1987 sexual abuse conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and Kurtz has appealed.

Kurtz contends his trial attorney rendered ineffective assistance by failing to make adequate objections to the use of the videotape in lieu of the victim's personal testimony. Kurtz contends that under principles announced subsequent to his trial in Coy v. Iowa, 487 U.S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), the use of the videotape described above was a violation of his right to confront the witness unless there was an individualized showing of a need for protective measures. He argues that no need for protective measures could have been shown in the present case, that the use of the videotape therefore violated his right to confront the witness, and that he could have prevailed on this issue on appeal if his trial attorney had made proper objections.

Kurtz also contends he was prejudiced because his trial attorney, when previously employed as an assistant county attorney, had represented the State in a CINA proceeding arising from Kurtz's alleged sexual abuse of the same child. (The attorney apparently filed a petition for the

child's emergency removal from Kurtz's home, and then represented the State in the hearing on that emergency removal petition.) Kurtz argues his trial attorney rendered ineffective assistance by representing him in spite of this conflict of interest. Kurtz also argues the conflict of interest was "compounded" because the attorney, while representing Kurtz, continued to have a relationship with the county attorney's office by serving as a special prosecutor at a sentencing hearing concerning a criminal case he had started while still employed by the county attorney's office.

Additionally, Kurtz contends his conviction cannot stand because the prosecuting attorney had not taken an oath of office as an assistant county attorney. He also argues his attorneys in the 1987 trial and the 1988 direct appeal rendered ineffective assistance by failing to raise this issue.

Finally, Kurtz contends he is entitled to postconviction relief because the State failed to disclose exculpatory material prior to trial. He complains that the State failed to disclose a change in the statements made by the six-year-old victim concerning the nature of the sexual activities in question.

I. General Principles. Postconviction proceedings are law actions, triable to the court, and ordinarily are reviewed on error. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). However, when petitioner alleges violation of

constitutional rights we make our own evaluation of the totality of circumstances equivalent to de novo review. Id.

When claiming ineffective assistance of counsel, the postconviction petitioner has the burden of proof to establish the claim by a preponderance of the evidence. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). There is a presumption that counsel is competent and the general test is "whether under the entire record and totality of circumstances counsel's performance was within the range of normal competency." Id.

In claiming that failure to preserve error constitutes ineffective assistance of counsel, petitioner Kurtz will be granted relief only if he shows he was denied a fair trial because: (1) counsel failed to perform an essential duty, and (2) counsel's failure resulted in prejudice. Id. To show counsel failed in an essential duty, defense counsel's error must be of a type "a reasonably competent attorney acting as a diligent and conscientious advocate would not have made." Id. To establish that prejudice resulted from counsel's failure, petitioner must show there was a reasonable probability that performance of the essential duty would have led to a different result. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986).

II. Failure To Preserve Confrontation Clause Claim.

The district court was very reluctant to hold that Kurtz's trial attorney had failed to perform an essential duty.

However, the district court concluded that finding was necessitated by this court's determination that Kurtz's confrontation claim had been waived. We do not share the trial court's conclusion that breach of an essential duty necessarily flows from counsel's failure to preserve the confrontation claim in this instance.

When Kurtz's trial took place in 1987, Iowa case law held the protective measures of Chapter 910A did not violate an accused's right of confrontation and no individualized finding of necessity for the protection of the witness was required. State v. Coy, 397 N.W.2d 730 (Iowa 1986). The United States Supreme Court had not yet held that a legislatively imposed presumption of trauma to a victim-witness violated an accused's right of confrontation. See Coy v. Iowa, 487 U.S. ___, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). While both attorneys in Kurtz's criminal case were aware State v. Coy had been appealed, "[c]ounsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel." Snethen, 308 N.W.2d at 16 (where case law at time of trial held the physician-patient privilege inapplicable to court-ordered evaluations it was not ineffective assistance to fail to object to admission of testimony on due process grounds). We therefore conclude that under the totality of the circumstances Kurtz's trial counsel was not ineffective in failing to object to the videotape on the basis that its

admission would violate Kurtz's right to confrontation. Counsel's performance can not be considered beyond the range of normal competency for failing to raise an issue rejected the previous year by the Iowa Supreme Court.

Even if we were to assume that waiver of the issue constituted a failure of an essential duty, we conclude petitioner Kurtz has not shown prejudice resulted from such a breach.

We first note that the United States Supreme Court has very recently decided the case of Maryland v. Craig, 58 U.S.L.W. 5044 (U.S. June 27, 1990). There, the Court stated the right of an accused to a face-to-face confrontation with witnesses is not absolute and recognized an exception to the face-to-face confrontation requirement where "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." Id. at 5407 (citations omitted).

Important Public Policy. In Craig, the Supreme Court upheld a Maryland statute which authorized the taking of the testimony of a child abuse victim outside the presence of the defendant where the trial judge determines in-court testimony "will result in the child suffering serious emotional distress . . ." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii)(1989). The Supreme Court reiterated its recognition that "a State's interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one." Id. at 5048.

Reliability. The Craig Court found it significant that

Maryland's procedure preserves all of the other elements of the confrontation right: the child witness must be competent to testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation--oath, cross-examination, and observation of the witness' demeanor--adequately ensure that the testimony is both reliable and subject to rigorous adversarial testing . . .

Id. at 5047.

Our supreme court has recognized that reasonable protection of child witnesses in sex abuse cases furthers an important public policy. See State v. Hoversten, 437 N.W.2d 240, 242 (Iowa 1989), cert. denied, ____ U.S. ____, 110 S. Ct. 212, 107 L. Ed. 2d 165 (1989); In Interest of J.D.S., 436 N.W.2d 342, 345 (Iowa 1989). We also point out Iowa's statutory procedure, found in Chapter 910A, is very similar to that upheld in Craig. We conclude the procedure employed here preserved all of the elements of the confrontation right except the face-to-face meeting. K.B. was found to be competent to testify under oath, she was subjected to cross-examination, and her demeanor was subject to observation by the judge, jury, and defendant.

Kurtz argues the trial court made no individualized finding of necessity and no such finding can be justified by the record. Following our de novo review of the record we reject petitioner's arguments.

Again, the law of Iowa at the time of Kurtz's criminal trial held Chapter 910A was not violative of an accused's right of confrontation. No individualized finding of necessity for the use of protective measures was required by the statute. However, the prosecution did present evidence in anticipation of a necessity requirement.

MR. RIGG: Well, we had these people come. If it's -- I'm trying to remember what the language of the statute is. According to 910A.3, "The Court may, upon its own motion or upon motion of any party, order that the testimony of a child, as defined in Section 702.5, be taken in a room other than the courtroom."

There is no specific requirement of the Code section, that I see, which would necessitate or require a finding of necessity. However, to be careful, I did ask the people to come just in case that the Court would add that requirement.

The trial judge in Kurtz's criminal case ruled on the prosecution's motion for protective measures pursuant to Chapter 910A prior to the reversal of State v. Coy. It is not surprising then, that the trial judge did not make a detailed finding of necessity. However, it is clear the trial court understood the hearing on the State's motion was to determine the appropriateness of protecting K.B. from testifying in open court. The trial court would not have ordered the protective measures if it had not found them to be necessary.

In State v. Hoversten our supreme court noted that the critical inquiry involved in Chapter 910A confrontation clause challenges, in light of the United State Supreme Court's reversal of State v. Coy, is "whether a de novo

review of the record justifies the trial court's finding that the child needed protection." Hoversten, 437 N.W.2d at 241-42. Maryland v. Craig, supra, does not undermine the Hoversten decision and, in fact, reinforces it. ("The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest." Craig, 58 U.S.L.W. at 5048.) This record does justify such a finding.

At the time of trial, K.B. was six years old. Her mother testified that K.B. suffered from an increased number of nightmares after the sexual abuse, that K.B. cried whenever talk of the trial came up, and that K.B. was very afraid to "get up and face" Kurtz. Dr. Schmitz, K.B.'s psychologist, testified at the hearing that K.B. was fearful and intimidated by Kurtz. Dr. Schmitz testified protective measures were "absolutely necessary" to avoid emotional trauma to K.B. We conclude the protective measures taken pursuant to Chapter 910A were supported by necessity in this case. Therefore, no prejudice to Kurtz resulted from counsel's alleged ineffective assistance of counsel.

III. Unsworn Prosecutor And Failure To Disclose. We first note that petitioner's remaining contentions were not raised on the direct appeal of his conviction. In Polly v. State, 355 N.W.2d 849 (Iowa 1984), the supreme court enunciated the rule that a postconviction applicant attempting to raise issues for the first time in

postconviction proceedings must "not only show 'cause' (or Iowa Code section 663A.8 'sufficient reason') for failure to challenge the alleged errors in [the appellate] court, but also show actual prejudice resulting from these errors." Id. at 856.

Kurtz contends that the prosecutor lacked jurisdiction to prosecute him because he had not taken his oath of office. We simply reiterate the following and conclude the subject-matter jurisdiction of the district court was not affected by the prosecutor's failure to take the oath of office prior to trying Kurtz's criminal case:

it is because officers have failed to comply with similar directory provisions, and while acting in good faith in the discharge of their official duties, have transacted business materially affecting the public and third parties, that public policy has dictated the distinction between an officer de facto and one de jure, and given validity to the acts of the former, until his right to discharge the duties is by some direct proceeding denied.

State v. Sheets, 291 N.W.2d 35, 37 (Iowa 1980) (subject-matter jurisdiction of district court was not affected by fact that county attorney who signed information filed against defendant had failed to accompany bond with written oath); see also State v. Graham, 291 N.W.2D 345 (Iowa 1980) (failure of county attorney to file written oath of office did not affect the trial court's subject matter jurisdiction).

Kurtz also contends that the State failed to disclose allegedly exculpatory material prior to trial. Ordinarily

there is no constitutional right to discovery of a prosecution witness' prior statements. State v. Cuevas, 282 N.W.2d 74, 82 (Iowa 1979). During cross-examination of K.B. (at the initial videotaping of testimony), Kurtz discovered that K.B. no longer was willing to testify that Kurtz had sexual intercourse with her. Kurtz's attorney sought and received the opportunity to further cross-examine K.B. on this change in her allegations and introduced this testimony at trial. This is not a case where exculpatory material was suppressed by the State and discovered after trial and conviction of the defendant. See United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). No suppression of exculpatory evidence has been demonstrated. State v. Oppelt, 329 N.W.2d 17, 19-20 (Iowa 1983); State v. Epperson, 264 N.W.2d 753, 756 (Iowa 1978). We conclude this contention is without merit.

IV. Conflict Of Interest. Because Kurtz has alleged a violation of his right to counsel we make an independent evaluation of the totality of the circumstances. Cosgrove v. State, 304 N.W.2d 184 (Iowa 1981). When alleging a denial of effective assistance of counsel because of attorney's conflict of interest ". . . it is enough if there is 'substantial possibility' that a conflict of interest affected the lawyer's representation." Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981).

Upon review of the record we conclude the evidence of a conflict of interest is so overwhelming, there is a substantial possibility that a conflict of interest affected Kurtz's trial attorney's representation, denying Kurtz of effective assistance of counsel.

At trial, Kurtz was represented by Peter Van Etten. Van Etten had previously been employed with the Woodbury County Attorney's office and while there, had filed the petition in juvenile court alleging K.B. was a child in need of assistance. He also filed the application for emergency removal. At the emergency removal hearing, Van Etten appeared as the County Attorney. Furthermore, in his deposition submitted to the postconviction court, Van Etten indicated that he acted as the prosecutor in a criminal sentencing either while representing Kurtz or a "matter of just a few days" before representing Kurtz. The potential for divided loyalty is readily apparent to this court and the Iowa Code of Professional Responsibility for Lawyers specifically cautions attorneys against divided loyalties. See Code of Professional Responsibility Canon 5; Code of Professional Responsibility EC 5-14. The Code of Professional Responsibility also prohibits county attorneys and assistant county attorneys from engaging in criminal defense work while holding office. Code of Professional Responsibility DR 8-101(B).

Kurtz would not be unreasonable in questioning Van Etten's ability to zealously defend him after Van Etten had

been obligated to argue Kurtz was an imminent threat of danger K.B.'s life or health in a prior proceeding. When Van Etten did disclose his involvement in the juvenile court proceedings to Kurtz, Kurtz objected to Van Etten's continued involvement in his defense. While we do not doubt that Van Etten attempted to competently represent Kurtz, we find indications that that representation may have been hampered. Van Etten told Judge Walsh that he treated K.B. "with kid gloves in order to show that there wasn't any harassment." However, we cannot help but question whether other subconscious considerations were involved and our concerns are not alleviated by the series of questions Van Etten put to K.B. during cross-examination concerning the inconsistencies in her allegations. Defense counsel introduced K.B.'s prior allegations of sexual penetration which had not been elicited by the prosecution. A sample of this line of questioning is as follows:

Q. Okay. Now, your mother testified that you told her that Doug put his -- his thing in you thing, his dick in you thing; is that -- did you tell your mother that? A. I don't know.

Q. If your mother was to testify that you said that, would that -- that would be the truth of what you said, isn't it? A. Yeah.

Q. All right. A. But I was -- I don't really know because it just, like, went up -- He was rubbing it between by legs; and it just went up halfway, I think.

Q. Okay. But back then you would have -- you would remember more than you remember now, don't you? A. Yeah, I suppose so.

This series of questions while perhaps intended to point

out that K.B.'s allegations had been inconsistent and, therefore, less credible, was likely very damaging to Kurtz. We have grave questions concerning the adequacy of Kurtz's representation.

Because we conclude that there is a substantial possibility that Van Etten's representation was affected by a conflict of interest, we must further conclude that Kurtz was denied effective assistance of counsel during his trial for sexual abuse in violation of his right to counsel. It was error to deny his application for postconviction relief.

Because we find merit in the conflict of interest contention, the trial court erred in denying Kurtz's application for postconviction relief.

REVERSED AND REMANDED.