FILED
AUG 26 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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MICHAEL OTTO GILROY,

Petitioner-Appellant,

vs.

STATE OF IOWA and CRISPUS C. NIX, WARDEN, IOWA STATE MEN'S PENITENTIARY,

Respondents-Appellees.

Filed August 26, 1987

7-153
86-644

Appeal from the Iowa District Court for Johnson County (No. 47875), Max R. Werling, Judge.

The petitioner appeals from the district court's denial of his application for postconviction relief, alleging violations of his right to fair trial and effective assistance of counsel; that the trial court erred in admitting testimony that had allegedly been altered by suggestive hypnosis; and that he was denied his right to confront the witness because the hypnosis prevented effective cross-examination. **AFFIRMED.**

James P. Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Linda A. McGuire, Assistant Johnson County Attorney, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM

On November 15, 1979, the appellant, Michael Otto Gilroy, was charged by trial information with murder in the first degree. See Iowa Code §§ 707.1, 707.2 (1979). Following a venue change from Johnson to Jones County, Gilroy was tried, convicted, and sentenced to life imprisonment. On direct appeal, his conviction was affirmed by the Iowa Supreme Court. State v. Gilroy, 313 N.W.2d 513 (Iowa 1981). On April 18, 1983, Gilroy filed an application for post-conviction relief. Several amendments were subsequently made to the application, which came on for hearing on April 8, 1986. The district court denied the application, and Gilroy brings this appeal in order to challenge that denial. As Gilroy's several claims are grounded in what he characterizes as violations of his constitutional rights, our review is de novo. Hackett v. State, 354 N.W.2d 247, 249 (Iowa App. 1984).

I.

Gilroy alleges violations of his right to effective assistance of counsel and to a fair trial. His right to counsel was violated, he contends, when trial counsel failed to present evidence of the State's "incessant efforts" to obtain the testimony of Michael Murphy, an acquaintance of Gilroy and a key prosecution witness. He argues his fair trial right was violated by the State's alleged nondisclosure of its grant of prosecutorial leniency to Murphy in exchange for his testimony.

(A)

In order to succeed on a claim that he was denied effective assistance of counsel, Gilroy must show that his counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Gilroy has the burden to prove both of these elements by a

preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Gilroy must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Gilroy must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, Gilroy must show that counsel's failure to perform an essential duty worked to his actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, he

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; Taylor, 352 N.W.2d at 685.

Gilroy argues his trial counsel possessed investigative summaries of the State's attempts to secure Murphy's testimony and that the sixth amendment requires trial counsel to disclose these attempts in detail to the jury. The premise of Gilroy's contention is that these summaries disclose, contrary to the assertions of Murphy and the State, that Murphy was granted leniency by the prosecution in exchange for his testimony. Gilroy concedes, however, that absent concrete

evidence our courts are not willing to assume that a deal was struck for a witness's testimony. See State v. King, 256 N.W.2d 1, 16 (Iowa 1977). We have examined the investigative summaries and are unable, even giving them the most generous of inferences, to characterize them as anything approaching concrete evidence of such a deal. These summaries are a collection of the investigative officer's preliminary discussions with involved parties. At several points the possibility of conditional grants of immunity to Murphy are mentioned; at no point is there any mention that this possibility was communicated to Murphy. Murphy testified that it was not discussed with him as did the county attorney and the investigative officer. There is no evidence that a bargain was made for Murphy's testimony. Absent such evidence, counsel's decision to not engage the jury in baseless speculation can in no way be characterized as ineffective assistance.

We also reject Gilroy's claim of ineffective assistance based upon counsel's failure to impeach Murphy with his then-recent felony conviction in Minnesota. The record discloses Murphy was thoroughly impeached during cross-examination including references to his prior convictions and perjury. The possibility of cumulative impeachment will not serve as grounds for postconviction relief in the case at bar. See Frank v. State, 376 N.W.2d 637, 641-42 (Iowa App. 1985).

(B)

Our analysis in part (A), supra, also disposes of Gilroy's contention that the State failed to disclose its grant of leniency to Murphy in exchange for his testimony. This claim is controlled by State v. King, 256 N.W.2d 1, 15-16 (Iowa 1977). As in King, Gilroy has failed to produce evidence of such an agreement. As in King, Gilroy's claim is accordingly without merit.

II.

Gilroy maintains the testimony of a State's witness, Zita Frantz, was

altered in a way detrimental to him as the result of pretrial hypnosis. Gilroy contends the admission of her allegedly-altered testimony resulted in violations of his rights to confrontation, effective assistance of counsel, and fair trial as secured by the federal constitution.

We are willing to assume, for the purposes of this appeal, that Gilroy has demonstrated sufficient reason for his failure to earlier raise this issue as well as resulting prejudice. See Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code § 663A (1985).

Our supreme court stated in State v. Seager, 341 N.W.2d 420, 431 (Iowa 1983), that "if the trial testimony of the witnesses . . . is substantially the same as that provided in statements to police . . . prior to their being hypnotized . . . such testimony should be deemed admissible." See also State v Groscost, 355 N.W.2d 32, 38-39 (Iowa 1984). Gilroy maintains that Frantz's post-hypnotic testimony was not substantially the same as that provided earlier to the police and that, consequently, the district court erred in admitting the post-hypnotic testimony. Gilroy contends that whereas in her statements to police Frantz was certain she had not seen Gilroy at the crime scene, her post-hypnotic testimony related only that she was uncertain as to whether a man she saw at the scene was Gilroy. The Seager court expressly stated, however, that

> [b]ased on those principles of practicality and necessity which we have previously alluded to, we do not believe that differences in degrees of certainty should prevent a finding that the testimony is reasonably comparable to that which would be produced by the witness's memory uninfluenced by hypnosis.

341 N.W.2d at 431. While the Seager court was presented with a situation in which the witness had become more certain following hypnosis, the reverse of the present situation, we see no reason why that court's guiding principle should be limited to its particular fact pattern. The only evidence of Frantz's

pre-hypnosis testimony is a paraphrased summation made by two investigative officers that during their interview Frantz stated neither of two men she saw at the crime scene was Gilroy. Frantz, at Gilroy's trial, did not deny making that statement but added she had qualified the statement by admitting her uncertainty. We find no error in the district court's decision to admit the testimony. See Groscost, 355 N.W.2d at 39.

Gilroy's claims based upon his constitutional rights to confrontation and assistance of counsel were raised, and decided adversely to his present contentions, in Seager. 341 N.W.2d at 432.

The district court is affirmed.

AFFIRMED.