

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 31 1987

CLERK SUPREME COURT

317

LARRY MICHAEL SMITH,

)

Petitioner-Appellant,

)

Filed March 31, 1987

vs.

)

STATE OF IOWA,

)

7-09
85-1867

Respondent-Appellee.

)

Appeal from the Iowa District Court for Mills County (No. 19929) - Paul H. Sulhoff, Judge.

The defendant appeals from the postconviction court's denial of his application for postconviction relief, contending that the trial court's denial of his motion for a continuance to depose a State's witness denied him procedural due process and that the postconviction court erred in refusing to grant him a new trial based upon newly-discovered evidence tending to show that he had been framed. **AFFIRMED.**

John F. Sprole of Morris, Sprole & Morris, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Kenneth Whitacre, Assistant Mills County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

PER CURIAM

On February 18, 1982, the appellant, Larry Michael Smith, was charged by trial information with robbery in the first degree. This trial information also charged Smith's codefendant, Michael J. Hardisty. The trials were subsequently severed with Hardisty's trial set for April 13, 1982, and Smith's set for April 28, 1982. On April 5, 1982, Smith filed an application for an order allowing him to depose both the alleged victim and Hardisty. The application was granted by the district court and the county attorney was ordered to make Hardisty available for the deposition. A notice of the taking of deposition was subsequently filed setting April 20, 1982, as the date for the depositions. Both deponents were properly served with subpoenas.

Hardisty was convicted on April 14, 1982 of robbery in the second degree. Two days later he was added by notice of additional witnesses as a State's witness for Smith's trial. Hardisty did not appear for his deposition. On April 26, 1982, Smith filed a motion for a continuance seeking additional time in order to depose Hardisty. The district court denied the motion and the case proceeded to jury trial. Smith was convicted on April 29, 1982, and sentencing was set for May 19, 1982.

Prior to sentencing, Smith filed a motion for new trial, asserting that the jury verdict was contrary to the evidence adduced at trial, see Iowa R. Crim. P. 23(2)(b)(6), and that the district court's denial of his motion for a continuance was error. The motion was denied by the district court and Smith was sentenced to an indeterminate term of incarceration not to exceed twenty-five years. Smith filed a timely notice of appeal.

Smith's direct appeal was dismissed without prejudice on motion by the appellate defender. Smith subsequently filed an application for postconviction relief. The application was denied by the district court on June 25, 1985. This

appeal followed. Smith grounds his request for postconviction relief on two allegations: (1) the district court's pretrial denial of his motion for a continuance was arbitrary and violated his due process rights, and (2) he is entitled to a new trial because of newly-discovered evidence. Generally, our review of post-conviction actions is at law. McKnight v. State, 356 N.W.2d 532, 533 (Iowa 1984). As Smith's first contention involves the alleged violation of a constitutional right, however, we review that claim de novo in light of the totality of the circumstances. Hackett v. State, 354 N.W.2d 247, 249 (Iowa Ct. App. 1984).

There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 850, 11 L. Ed. 2d 921, 931, reh'g denied, 377 U.S. 925, 84 S. Ct. 1218, 12 L. Ed. 2d 217 (1964). Our courts have long held that in granting or denying continuances, the district court's discretion is very broad. E.g., State v. Grimme, 338 N.W.2d 142, 144 (Iowa 1983). A district court's ruling on a motion for continuance will not be interfered with on appeal unless it clearly appears that the trial court has abused its discretion and an injustice has resulted therefrom. Id. In addition, our courts have noted that error in the administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced. State v. Gates, 306 N.W.2d 720, 725 (Iowa 1981). In the case at bar, Smith contends that his right to a fair trial was prejudiced because the district court's action resulted in his facing surprise testimony at trial. See In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942, 946 (1955) (a fair trial in a fair tribunal is a basic requirement of constitutional due process).

Smith's explanation of Hardisty's testimony and its "surprise" effect does little to support Smith's allegation of prejudice. His argument runs as follows:

- (1) Because Hardisty was a state's witness, Smith was led to assume Hardisty would testify that Smith had perpetrated the robbery;
- (2) Hardisty did not testify that Smith had perpetrated the robbery;
- (3) Ergo, Hardisty's testimony was a surprise.

As an additional, and similarly unconvincing, attempt to establish prejudice, Smith contends that he was forced to develop a defense without knowing, prior to trial, the substance of Hardisty's testimony. We have examined the minutes of testimony and conclude that Hardisty made no substantial statement at trial with respect to which Smith had not been alerted by Hardisty's minute. See Grimme, 338 N.W.2d at 146 ("[t]he minute of testimony disclosed much of what defendant might have learned from depositions.").

Smith concedes in his brief that although Hardisty's absence from depositions occurred on April 20, a Tuesday, no motion for continuance was filed until the following Monday, April 26. Trial was set for April 28. Although contending that "[i]t would have been easy [for the state] to produce" him, Smith made no attempt to coerce Hardisty's attendance for deposition. See Iowa R. Crim. P. 14(5). In ruling on motions for continuance, the district court may properly consider not just the interests of the state and defendant in a speedy and fair trial but also the orderly administration of the court's business. Grimme, 338 N.W.2d at 144. A criminal defendant's right to depose State's witnesses is subject to reasonable regulation by the district court. Gates, 306 N.W.2d at 725. The petitioner in a postconviction action bears the burden of establishing the asserted facts by a preponderance of the evidence. Thomas v. State, 316 N.W.2d 182, 183 (Iowa Ct. App. 1981). In the present appeal, Smith has shown neither that the district court's denial of his motion for continuance was arbitrary, that

it constituted an abuse of discretion, nor that it resulted in prejudice to any substantial right. Accordingly, we reject his first contention.

Smith next argues that he is entitled to a new trial because of newly-discovered evidence. This evidence consists of an affidavit sworn out by Hardisty while he was in jail admitting perjury and detailing a conspiracy to convict Smith; a statement made by a Mills County Deputy Sheriff relating hearsay statements made by an alleged coconspirator which would corroborate the conspiracy theory; and an affidavit of Smith's fiancée relating similar hearsay statements allegedly made by Hardisty.

In general, the elements which must be established by a postconviction applicant before a new trial will be granted on the basis of newly-discovered evidence are as follows: (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) the admission of the evidence would probably change the result if a new trial were granted. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 32-33 (Iowa 1979). In addition, the determination as to whether a new trial should be granted in a criminal case after the recantation of a prosecution witness's testimony lies in the discretion of the district court. State v. Frank, 298 N.W.2d 324, 328 (Iowa 1980). That determination will not be disturbed on appeal unless it is reasonably clear that the discretion was abused. Id. The recantation is viewed with suspicion, State v. Folck, 325 N.W.2d 368, 377 (Iowa 1982), and the district court is not bound to believe it. Frank, 298 N.W.2d at 329. The court may properly consider the possibility that the recantation was the result of the witness's fear of the defendant. See State v. McGhee, 280 N.W.2d 436, 442 (Iowa 1979), cert. denied, 444 U.S. 1039, 100 S. Ct. 712, 62 L. Ed. 2d 674 (1980).

The record in the present case discloses that Smith and Hardisty were both confined in the Men's Reformatory at Anamosa, Iowa, at the time Hardisty was willing to change his testimony. Smith acknowledged that after being released Hardisty repudiated his affidavit. These facts amply support the skepticism with which the district court viewed Hardisty's affidavit. An equal amount of skepticism is not unjustified with respect to the affidavit sworn out by Smith's fiancée. In addition, we think the statement made by the deputy sheriff, even when considered with the remainder of the "new evidence," falls short of demonstrating that a new trial would result in a different outcome.

The district court is affirmed.

AFFIRMED.