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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-329 / 91-756

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MICHAEL A. BAUER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Decatur County, J. W. Jordan, Judge.

The applicant appeals the district court's ruling denying his application for postconviction relief from a 1987 conviction involving sexual abuse. **AFFIRMED.**

Carol A. Clark, Lamoni, for appellant.

Bonnie A. Campbell, Attorney General, Thomas G. Fisher, Assistant Attorney General, and Robert L. Fulton, County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The applicant, Michael A. Bauer, appeals the district court's ruling denying his application for postconviction relief from a 1987 conviction involving sexual abuse. Bauer claims: (1) the district court erred in not granting him a new trial on the basis of newly-discovered evidence consisting of the availability of DNA testing; (2) the trial counsel and appellate counsel were ineffective in failing to present evidence and failing to investigate the defendant's claimed inability to ejaculate; (3) the trial counsel was ineffective in failing to request the jury be instructed on the lesser-included offense of assault with intent to commit sexual abuse; and (4) the trial counsel was ineffective in failing to request a continuance to obtain a witness to challenge a State witness's rebuttal testimony and in failing to object to the State's cross-examination of Bauer regarding inconsistent statements.

In May 1987 Bauer was charged by trial information with one count of sexual abuse in the second degree and one count of burglary in the first degree. Bauer's first jury trial resulted in a mistrial because the jury failed to reach a unanimous decision. At the second jury trial, the victim testified Bauer committed the sexual abuse, although she indicated she had difficulty seeing him. The physical evidence taken from the crime scene did not connect Bauer with the crimes because both Bauer and the victim had the same blood type.

During the course of the criminal trial, a State rebuttal witness testified Bauer had stated he was angry with the victim while Bauer was incarcerated at the county jail prior to the rape. Bauer's trial counsel did not request a continuance to obtain a witness for rebuttal purposes. Bauer testified at his criminal trial regarding his activity prior to the commission of the crime, his clothing worn on the night of the crime, and his clothing worn at the time of his arrest. On cross-examination, Bauer denied making certain statements to law enforcement officers, but he was subsequently impeached with his deposition which indicated he had told police what he was wearing.

Prior to the submission of the case to the jury, Bauer's trial counsel did not request the trial court give instructions regarding the lesser-included offense of assault with intent to commit sexual abuse, and no instructions on this offense were given. The jury returned a verdict finding the defendant guilty of sexual abuse in the second degree and of burglary in the first degree. Bauer was sentenced to consecutive terms of incarceration not to exceed twenty-five years on each count. Bauer appealed, and the court of appeals affirmed his conviction on December 29, 1988.

On August 7, 1989, Bauer filed an application for postconviction relief challenging his conviction. He claimed DNA testing should constitute newly-discovered

evidence permitting a new trial and asserted ineffective assistance of counsel at trial and on appeal. On May 4, 1990, the district court approved Bauer's request for DNA testing in the case, but the physical evidence has not been located to conduct such testing.

At the trial on his postconviction relief action, Bauer testified he told his trial counsel during the second trial Bauer was unable to ejaculate. His trial counsel disputed this claim. Evidence existed which indicated Bauer's appellate counsel knew of Bauer's claimed inability to ejaculate, but the issue was not raised on appeal. Additional evidence was presented at the postconviction relief action concerning the increased availability of DNA tracking.

On April 17, 1991, the district court entered an order denying the application for postconviction relief. The court determined the availability of a more extensive examination through DNA testing was not newly-discovered evidence providing a basis for granting a new trial. The district court also determined Bauer did not establish his claim of ineffective assistance of counsel regarding the issue of his claimed inability to ejaculate. The court rejected Bauer's other claims regarding ineffective assistance of counsel as well. On May 13, 1991, Bauer filed a notice of appeal.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290

N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Bauer claims he is entitled to a new trial because the availability of DNA testing constitutes newly-discovered evidence which was not available at the time of his trial and which would establish his innocence. Newly-discovered evidence claims in postconviction relief cases are contemplated by statute. Iowa Code section 663A.2(4) (1991) provides a petitioner is entitled to postconviction relief if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Newly-discovered evidence claims under this section consist of three elements: (1) the evidence could not have been discovered earlier in the exercise of due diligence; (2) the evidence is material to the issue, not merely cumulative or impeaching; and (3) the evidence would probably change the result if a new trial is granted. See Cornell v. State, 430 N.W.2d 384, 386-87 (Iowa 1988) (citing State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983)).

We do not believe the availability of DNA testing constitutes newly-discovered evidence in accordance with Iowa Code section 663A.2(4) (1991) under the particular

circumstances of this case, nor do we agree with the defendant's contention that the use of DNA tracking technology would result in the discovery of new evidence. The capability to collect and analyze Bauer's deoxyribonucleic acid for the purpose of comparing his genetic "markers" with those present in the blood and seminal fluid contained in the physical evidence is useless in the absence of the physical evidence itself. Here, the State has failed to locate the physical evidence or "rape kit" which was in its possession and which was used in the original prosecution of Bauer. Without this evidence for comparison purposes, the availability of DNA testing could not change the result of Bauer's criminal convictions if a new trial was granted.

Bauer contends the State's loss or destruction of the physical evidence in its possession results in a presumption that this evidence is adverse to the State's case against him. We disagree. Such a presumption does not arise unless the evidence suggests the destruction of evidence was intentional. State v. Ueding, 400 N.W.2d 550, 552 (Iowa 1987). In State v. Langlet, 283 N.W.2d 330 (Iowa 1979), the court stated:

> The intentional destruction of evidence, sometimes discussed as a form of obstruction of justice, is usually referred to as spoliation. When it is established, the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its spoliation. [Citations omitted.] Spoliation involves more than destruction of evidence. Application of the concept requires an intentional act of destruction. Only intentional destruction

> supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness of one's case.

Id. at 333.

Having thoroughly reviewed the record, we find no indication of intentional destruction of the missing physical evidence. Indeed, Bauer does not contend the evidence was intentionally destroyed, nor does he contend the evidence was necessarily destroyed at all. The record fails to indicate the existence of new evidence which would likely result in a different verdict if a new trial was granted in this case.

Next, Bauer contends both his trial counsel and his appellate counsel rendered ineffective assistance by failing to present evidence regarding Bauer's claimed inability to ejaculate and failing to raise this issue in Bauer's appeal. The record is absent any credible evidence to support Bauer's contention he was unable to ejaculate seminal fluid at the time the rape was committed.

During the hearing on Bauer's application for postconviction relief held April 10, 1991, Bauer testified he has been unable to ejaculate since he was approximately seventeen years old. Bauer was twenty-five years of age when he testified at this hearing. Bauer also testified he had informed his trial counsel of Bauer's inability to ejaculate "during the second trial." Bauer's second trial commenced October 26, 1987, and Bauer was found guilty on November 2, 1987.

Bauer's trial counsel testified at the postconviction relief hearing that Bauer did not advise him of his claimed inability to ejaculate during either of the criminal trials. The trial counsel stated he first became aware of Bauer's claimed inability to ejaculate in February 1988--three months following Bauer's conviction in the second trial. The trial counsel's testimony is substantiated by State's exhibit B, a hand written letter to Bauer's trial counsel signed by Bauer and dated "Feb. 9, 1988." State's exhibit B provides:

> Dear Sherm,
>
> Well ol' buddy, I've been having alot [sic] of problems. In the last 4 weeks I've had 2 operations and one testical [sic] removed because of cancer. The problem started at Clarinda, but they wouldn't do anything about it. So when I arrived at Anamoso [sic] they took me to Iowa City to start treatment, but they were too late and had to remove my left testical [sic].
>
> But what I need to tell you is that I don't ejackulate [sic] sperm and it can be proved [sic] by a doctor, therefor [sic] I should be able to go back in front of a Judge to be aquited [sic] for my charge.
>
> I also need information for a [sic] Attorney who would be willing to take my claim against the state for my medical condition. I can call you if you send me the day & time you will be there because I feel we have alot [sic] to talk about at this time.
>
> Please don't talk to my mother about this untill [sic] I say.
>
> Yours truly
>
> Michael A. Bauer

If Bauer has truly been unable to ejaculate since age seventeen, he would have been aware of this deficiency throughout both of the criminal trials, and he would have

undoubtedly advised his trial counsel of his deficiency in time for his counsel to investigate the claim in preparation of Bauer's defense. This is particularly true in light of the district court's finding that "the applicant appears to be intelligent and quite articulate." Clearly, Bauer did not advise his trial counsel of Bauer's claimed inability to ejaculate until after Bauer's conviction in the second trial.

Furthermore, the medical evidence contained in State's exhibit A, a urology record from Richard D. Williams, chairman of the department of urology at the University of Iowa Hospitals and Clinics, dated "8-21-90," reveals:

> This [patient] has a past hx of having a L radial orch on January of 1988 for embryonal cell Ca. He subsequently had a retroperitoneal node dissection . . . . The situation is the following: after having a retroperitoneal lymph node dissection, lack of ejaculation is extremely common. At this point in time, there would be no way to prove that he does not ejaculate . . . . I have no way of knowing whether this man ever did ejaculate prior to his surgery, but certainly in the face of having the surgery now I have no way of proving that he can or cannot ejaculate.

No credible evidence exists in this record indicating Bauer's inability to ejaculate at the time the rape was committed. His contention that both his trial counsel and his appellate counsel rendered ineffective assistance is entirely without merit.

Having carefully examined the record, we find the remainder of Bauer's claims in this appeal without merit.

Accordingly, we affirm the district court's denial of Bauer's application for postconviction relief.

AFFIRMED.