IN THE COURT OF APPEALS OF IOWA

No. 9-321 / 98-0738
Filed July 23, 1999

STATE OF IOWA,
Appellee,

vs.

ROBERT ERNEST RUSTAN, JR.,
Appellant.

FILED
JUL 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Robert Rustan, Jr. appeals from judgment and sentence entered upon his conviction of second-degree sexual abuse of a child, in violation of Iowa Code sections 709.1 and 709.3 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

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HUITINK, P.J.

Robert Rustan, Jr. appeals the judgment and sentence entered upon his conviction of second-degree sexual abuse of a child. We affirm.

I. Background Facts and Procedure.

Robert E. Rustan, Jr. appeals his conviction for second-degree sexual abuse of a child, in violation of Iowa Code section 709.1 and 709.3 (1995). Rustan allegedly committed the offense while baby-sitting his cousin's five-year-old son.

Prior to trial, Rustan agreed to participate in a "prosecutorial diversion" program called the Intra-Family Sexual Abuse Program (IFSAP). After successful completion of the IFSAP program, Rustan would be allowed to plead guilty to reduced charges. As part of the program, Rustan was required to provide a taped confession to the county attorney.[1] After enrolling in the program and providing the county attorney with a taped confession, Rustan was terminated from the IFSAP program for failure to accept responsibility for his offense. After Rustan was dismissed from the program, the county attorney refiled the charge of second-degree sexual abuse of a child.

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[1] As part of the IFSAP program, enrollees are required to sign a "Release of Information" which provides in pertinent part:

> 2. This information is being disclosed and may be used by the County Attorney's Office as to my progress in therapy through the Intra-Family Sexual Abuse Program and may be used as evidence in the criminal prosecution of my case in the event I am terminated from the IFSAP Program.

Prior to trial on the refiled charges, Rustan filed a motion to suppress the taped statements he had given to the county attorney as well as other admissions he made to authorities as part of IFSAP. The district court denied the motion. Following a bench trial, the court found Rustan guilty as charged. He was sentenced to an indeterminate twenty-five-year term of incarceration.

Rustan appeals, contending his trial counsel was ineffective for failing to preserve error on a challenge to the admissibility of the taped statements and other admissions to authorities under Iowa Rule of Criminal Procedure 9(5).[2] Rustan also challenges the admissibility of his statements on grounds they were made involuntarily and were unreliable based on the State's promise of leniency.

II. Scope of Review.

We review Rustan's ineffective assistance of counsel claim de novo. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). We review the application of Iowa Rule of Criminal Procedure 9(5) for errors at law. *See* Iowa R. App. P. 4. As Rustan's voluntariness claim implicates his constitutional right to due process, we review it de novo. *State v. Davis*, 446 N.W.2d 785, 787 (Iowa 1989).

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[2] Iowa Rule of Criminal Procedure 9(5) provides in pertinent part:

> **Inadmissibility of plea discussions.** If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible in any criminal or civil action or administrative proceeding.

III. Ineffective Assistance of Counsel.

To demonstrate ineffective assistance of counsel, one must show that "under the entire record and totality of the circumstances" his attorney's performance was not "within the normal range of competence." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show that his lawyer failed to perform an essential duty, and that failure resulted in prejudice. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

Rustan must overcome the strong presumption that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). "The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the procedures cannot be relied on as having produced a just result." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). The test for prejudice is whether counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable probability exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). A reasonable probability is one sufficient to undermine confidence in the outcome. *Kone*, 557 N.W.2d at 102.

Our supreme court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The court quoted *Strickland v. Washington*:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700). Pursuant to *Taylor*, we may affirm Rustan's conviction because he has failed to prove prejudice without deciding whether there was a failure of duty. *See Taylor*, 352 N.W.2d at 685.

We find Rustan has failed to prove the prejudice element of his ineffective assistance claim. In its findings of fact, the district court noted "based on the testimony of the victim, the Court finds the Defendant committed a sex act as described in Section 702.17 of the 1995 Code upon the victim . . . ." The court gave considerable weight to he testimony of the then six-year-old victim. The court also specifically found Rustan's testimony was not credible. The district court made only passing reference to the various admissions Rustan provided to IFSAP counselors as corroborative of the victim's account of the crime.

We are not convinced there is a reasonable probability that the district court would have reached a different result had Rustan's admissions to authorities been excluded. We therefore affirm on this issue.

IV. Voluntariness of Rustan's Admissions.

Rustan contends the taped confession and other admissions made to authorities were involuntarily made as a result of "promissory leniency" afforded by the county

attorney during plea negotiations. Iowa appellate courts have long held if a defendant's "statement is not the product of rational intellect and free will, but results from a promise of help or leniency by a person in authority it is not considered voluntary and is not admissible." *In re J.D.F.*, 553 N.W.2d 585, 589 (Iowa 1996) (quoting *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982)). *See also Brady v. United States*, 397 U.S. 742, 753, 90 S. Ct. 1463, 1471-72, 25 L. Ed. 2d 747, 759 (1970). Use of any inculpatory statement or confession obtained via police coercion as evidence against a criminal defendant is strictly forbidden. *State v. Ware*, 205 N.W.2d 700, 703 (Iowa 1973).

We find the record does not support Rustan's theory of promissory leniency. The record is undisputed that Rustan was represented by counsel at all times relevant to his making the decision to enroll in the IFSAP program. All negotiations took place between defense counsel and the county attorney. For these reasons, we determine, as admitted in Rustan's brief, that "the typical promissory leniency context of police-dominated interrogation is absent here." The United States Supreme Court has noted plea negotiations are typically the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Bordenkircher v. Hayes*, 434 U.S. 357, 362-63, 98 S. Ct. 663, 667 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 1479 (1970) (Brennan, J. dissenting)). We find Rustan's representation by counsel distinguishes the situation presented here from that of a "police-dominated

interrogation" more prone to raise promissory leniency concerns. *See Bordenkircher*, 434 U.S. at 363, 98 S. Ct. at 668 ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation").

AFFIRMED.