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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**MICHAEL W. FARNHAM,**

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Petitioner-Appellant,

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Filed November 20, 1984

vs

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4-36483-1470**STATE OF IOWA,**

)

Respondent-Appellee.

)

Appeal from the Iowa District Court for Pottawattamie District Court, Paul H. Sulhoff, Judge.

Petitioner appeals from denial of his application for postconviction relief from his conviction for theft in the second degree and for criminal mischief in the second degree, asserting that newly discovered evidence requires that his conviction and sentence be vacated. **AFFIRMED.**

Fred J. Kraschel of Kraschel and Comes, Council Bluffs, for plaintiff-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for defendant-appellee.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

The petitioner appeals from the trial court decision denying his application for postconviction relief. We affirm.

The petitioner, Michael Farnham, was tried before a Pottawattamie county jury and convicted of second-degree theft and second-degree criminal mischief. The conviction came after evidence was presented that he had taken a motor vehicle belonging to Jean Davison and damaged it. This apparently resulted after a relationship between the two ended. At the trial Davison testified that she did not give Farnham permission to use her car and that he had admitted to her he had taken it. She indicated she later executed a transfer of title of the automobile to Farnham which falsely revealed a date of transfer before the theft, as part of an effort to clear Farnham of the charges. Although she was taking tranquilizers during the time of the trial under a doctor's orders, she stated on the day she testified she had not taken any medication.

Davison has now recanted her testimony and says that Farnham had permission to use her car, that the transfer of title was a valid reflection of an agreement between the parties, and that she was confused and disoriented the day of the trial because she had taken more tranquilizers than had been prescribed for her. When questioned on cross-examination, she admitted she had testified at trial she had not given permission for Farnham to use the car, but says she meant he did not have permission the day he took it, and had her blanket approval to use the car when he desired. She says the drugs were to blame in large part for her testimony at trial, claiming she was so out of touch with reality that she could not relate events to time periods. She further says she had wanted to drop the complaint against Farnham, but that the assistant county attorney and a police detective coerced her into continuing with the charges. Davison says one detective told her she might face charges of filing a false report, and that this statement along with her malleable condition due to the use of drugs resulted in the perjured testimony.

Farnham says this constitutes newly discovered evidence that could not have been discovered at trial and that pursuant to Iowa Code § 663A.2(4)(1983), he is entitled to have his application for postconviction relief granted.

The petitioner further claims that he did not testify on his own behalf at trial because his attorney told him the trial judge indicated Farnham should not testify. Rather than claiming he had ineffective assistance of counsel, he says that he did not discover the unwise nature of this decision until he sought new legal counsel regarding the postconviction relief petition. On this basis, he argues he should be granted relief because of the newly discovered evidence.

The scope of our review of the trial court decision is limited to correcting errors of law. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981). We must uphold the factual findings of the court if supported by substantial evidence. Michels v. Brewer, 211 N.W.2d 293, 294 (Iowa 1973). The burden is on the petitioner to show he should be granted the relief requested. State v. Henderson, 313 N.W.2d 522, 524 (Iowa 1981). Petitioner claims the burden is on the State since the burden shifts when the petitioner alleges denial of constitutional safeguards. Hahn, 306 N.W.2d at 768. He says his arguments present the equivalent of claims of denial of due process. Here, petitioner's claims go to the sufficiency of the evidence. To raise constitutional issues in petitioner's reply brief is far too late. The burden properly rested on petitioner.

Newly discovered evidence warrants grant of relief when (1) it was discovered after the judgment; (2) it could not have been discovered during trial even with due diligence; (3) it is material to the issue and not merely cumulative or impeaching, and (4) it would probably change the result if a new trial were granted. Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982).

We find there is substantial evidence to support the finding that Farnham was not advised by his attorney that the trial judge thought it best that Farnham decline to testify. His attorney testified at the postconviction hearing he did not

know how Farnham could have made that conclusion from what was said to him. The decision whether to testify or not was clearly left to Farnham, and the ramifications of his decision should have been apparent to him at trial.

The courts of this jurisdiction have followed the lead of most federal circuits in distinguishing between standards used in determining if a new trial should be granted when newly discovered evidence is found, and when that newly discovered evidence involves the revelation that certain testimony is perjured. United States v. Runge, 593 F.2d 66, 73 (8th Cir.), cert. denied 44 U.S. 859, 100 S. Ct. 123, 62 L. Ed. 2d 80 (1979); Hamann v. State, 324 N.W.2d 906, 909 (Iowa 1982); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). As stated in Runge, "Unlike the stricter standard of materiality used in new trial motions based on discovery of new evidence or failure of the prosecution to disclose favorable evidence, knowing use of perjured testimony requires that a conviction be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" United States v. Runge, 593 F.2d at 73 (citing United States v. Agnes, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397 49 L. Ed. 2d 342, 349 (1976)). It must be shown the prosecutor knew or should have known the testimony was false, or did not correct false testimony when it was given. Hamann, 324 N.W.2d at 909. The court has noted this is not the same as presenting evidence relevant to a question upon which reasonable minds could differ or where the questions were vague, and taken in context, could have truthfully been given. Id. The defendant waives his right to present this claim if he had reason to know of the perjury at the trial. Id. at 910.

The trial court concluded Davison's answers were incomplete, though not necessarily incorrect. It further found that the petitioner called witnesses which adequately presented his alibi defense, and that nothing new is presented that was

not revealed during the trial. The matters brought to the court's attention in the hearing were in essence testified to at trial and were matters for the jury to accept or disregard.

Even under the less stringent standard to be applied in this situation, there is ample evidence to support the trial court's findings. The jury was aware of Davison's drug problem, and although she testifies she was out of touch with reality while on the stand, the jury apparently chose to believe her at that time. She claims because of her state she was vulnerable to influences of the prosecutor and detective involved and that other people made most of her decisions for her, while at the same time saying Farnham had no influence on her. Our courts have indicated we are to view recanted testimony with the utmost suspicion. State v. Frank, 298 N.W.2d 324, 328 (Iowa 1980); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). There is substantial evidence to show that the recanted testimony of Davison is nothing more than another attempt to clear a person she admits she has been intimately involved with for some time and who she would have "done anything" for at various periods in her life.

In addition, there is no reason to believe the prosecution should have known she was lying at the time of her testimony rather than vacillating in her feelings towards the plaintiff. As indicated by the trial court, her new testimony is merely cumulative and impeaching, would not likely affect the jury's decision, and does not support a grant of postconviction relief.

Petitioner finally argues that misconduct on the part of the prosecution warrants reversal of his conviction. State v. Swallow, 244 N.W.2d 321, 325 (Iowa 1976). Farnham does not dispute, however, that the prosecution could have continued to bring the complaint against Farnham even if Davison had waived. The evidence shows that instead of threatening Davison with prosecution for filing

a false complaint, that the county attorney and detective allowed her time to reconsider her desire to withdraw her complaint and the she later decided to go ahead with the action.

We hold the findings of the trial court are supported by substantial evidence and that there has been no error of law

AFFIRMED.

All judges concur except Sackett, J , who dissents

SACKETT, J. (dissenting)

I respectfully dissent from the majority opinion in two particulars. First, I don't believe that the majority applied the proper standard of judicial review in this instance. The majority limited its review to a correction of any errors of law that may have occurred. We are, I believe, dealing with the right of the plaintiff-appellant to a fair trial. U.S. Const. Amend. VI; See Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763, ___, 31 L.Ed.2d 104, 108 (1972). Our review of criminal proceedings is ordinarily on assigned error. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). However, we make an independent evaluation of the totality of the circumstances on issues involving the denial of basic constitutional guarantees. Id.

Second, I disagree with the majority's conclusion that a new trial should not be granted in this case. The majority is correct in citing the case of United States v. Runge, 592 F.2d 66 (8th Cir.), cert. denied 44 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979), as authority, for it is very instructive of the issue which confronts us in this case. However, I don't believe they have full appreciation for the language which the Eighth Circuit has used. The Court of Appeals recognizes that there is a different standard of analysis to apply when trial courts are faced with motions for new trial based on newly discovered evidence or failure of the prosecution to disclose favorable evidence and the contrasting situation where there is a knowing use of perjured testimony. In the latter instance, a conviction is set aside "if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. at 73 (citing to the supreme court cases of U.S. v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342, 349-50 (1976); Giglio v. U.S., 405 U.S. 150, 154, 92 S.Ct. 763, ___, 31 L.Ed.2d 104, 108 (1972)). The government need not even have actual knowledge that the testimony of one of the prosecution witnesses is perjured. See Runge at 73. The Eighth Circuit also recognizes that false testimony which merely impeaches a witness' credibility may require a new trial. Id.

The court in Runge analyzed the fact situation before them and found that even though a woman's perjured testimony was entered into evidence "there was not a reasonable likelihood that the perjury the [prosecution's witness] committed and its reflection on her credibility would have affected the jury's judgment. She was a minor witness and added nothing to the government's case. . ." Id. at 74.

My reading of the entire record in this case does not, whatsoever, lead me to the conclusion that "there would not be a reasonable likelihood that the perjury would have affected the jury's judgment"—to use the words of the Runge court. On the contrary, in the case at bar Jean Davidson was not a "minor witness" who added "nothing to the prosecution's case." She, in fact, supplied essential elements of the crimes needed to convict Michael Farnham. Without her testimony, in the perjured form it was offered at trial, there would not have been a conviction. There could not have been a conviction without the state proving all the elements of the crime beyond a reasonable doubt.

A majority of federal circuit appeals courts make a distinction between false evidence situations, such as is involved here, and new evidence situations. The Eighth Circuit does make this distinction and applies the following standard which analysis culminates in a new trial when:

- (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury might have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it for it did not know of its falsity until after the trial.

State v. Tevee, 679 P.2d 136, 140 (Hawaii App. 1984). As can be seen from criterion (b) above, clearly a broad standard is presented. Our factual setting presents a situation that undoubtedly exceeds the standard whereby a different jury conclusion would have been reached had Ms. Davidson's testimony not been perjured or, even if, it was not entered at all.

I would vacate plaintiff's sentence and order a new trial.