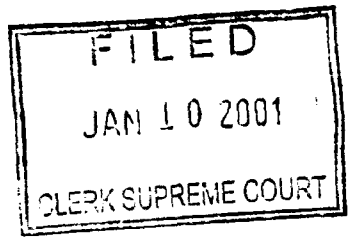
IN THE COURT OF APPEALS OF IOWA

No. 0-749 / 00-491
Filed January 10, 2001



HEIN QUOC THAI,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

On appeal from the denial of his postconviction relief application, applicant contends the court erred in concluding he was not provided ineffective assistance due to his counsel's failure to challenge the voluntariness of his confession on the ground it was induced by promissory leniency. **AFFIRMED.**

Frank Burnette of Burnette & Kelley, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell and Ann E. Brenden, Assistant Attorneys General, John P. Sarcone, County Attorney, and Daniel Voogt, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

On appeal from the denial of his postconviction relief application, Hein Thai contends the court erred in concluding he was not provided ineffective assistance due to his counsel's failure to challenge the voluntariness of his confession on the ground it was induced by promissory leniency. We find the statements made by the interrogating police officer did not constitute promissory leniency. Therefore, Thai's counsel had no duty to raise this issue so did not render ineffective assistance of counsel. We affirm.

Background facts. A shooting incident took place on August 6, 1995, at the Café DiVang. Having had a prior altercation with some young men that were in the café, Chien Le called several of his friends to come to the café and help him seek retribution. Thai received this call and responded by arming himself with a .38 revolver, which was apparently later used by Hoang Nguyen in the fatal shooting of Hai Van Nguyen. When Thai arrived at the café, several of his friends were already there. He was wearing the gun in a holster and was aware a fight was about to take place, as evidenced by statements he made to a friend. Thai was observed entering and leaving the restaurant several times before the shooting occurred, including one final time when he entered and told the owner not to call the police. Nguyen took the weapon from Thai and entered the establishment with Kiet Nguyen. Gunplay broke out and Hai Van Nguyen was fatally wounded in the back.

Thai was arrested on August 22, 1995, and interviewed by Detective Dennis O'Donnell, with police cadet Phoukham Tran acting as the interpreter.

During the interview, Thai expressed a fear for his safety if he told police what he knew. Detective O'Donnell promised to keep him safe from such harm. Thai then told police what he knew of the incident and his part in it. His trial counsel moved to suppress the interrogation on the grounds that it was done without properly Mirandizing Thai. The trial court overruled this motion and Thai was convicted of second-degree murder and terrorism without intent.

Thai's appellate counsel raised an ineffective assistance of counsel claim on direct appeal, alleging Thai's trial attorney should have moved for suppression on grounds of promissory leniency. After affirming the convictions, this court reserved the ineffective assistance of counsel claim for postconviction relief proceedings. The district court denied Thai's application for postconviction relief, finding the detective's statements did not amount to a promise of leniency and trial counsel's decision was a tactical one, which should not be second-guessed. Thai now appeals this decision.

Scope of review. A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick,* 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck,* 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the

defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick,* 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Walker,* 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell,* 533 N.W.2d 576, 579 (Iowa App. 1995).

Promissory leniency. Thai asserts his statement to police was not voluntary because it was induced by the promise made by Detective O'Donnell. Thai claims the promissory leniency occurred in the following exchange:

> (Italicized text indicates statements made in Vietnamese; regular font indicates the use of English.)
>
> *Hein: Perhaps I will speak directly to you. Everything I know I will tell all today and I do not want this to go outside because I am afraid of the consequences to my life, because I am not in this gang. I do not know. Please repeat this to him.*
>
> Phoukham: He says he wants to talk, straight it out, he scared for himself too. Anything what we say here type of --, falls in this room right here.
>
> Det. O'Donnell: What I will promise, let me know if you understand....
>
> *Phoukham: Do you understand? He promises you he is going to tell you now so you understand.*
>
> Det. O'Donnell: I will tell you that I keep you safe. Okay? I will not let anything happen to you. I want you to be honest.
>
> *Hein: I will tell you. . . .*

In determining the voluntary nature of the statements, we must sort out the impetus for the inculpatory statement. State v. McKowen, 447 N.W.2d 546, 547 (Iowa App. 1989). "A promise of help or leniency by a person in authority negates the voluntary nature of an incriminating statement, and is inarguably inadmissible." *Id.* Thai claims the promise of safety was, to his understanding, a promise of leniency in this case. He contends because of his ethnic background and poor English skills, his understanding of the promise to keep him safe and "not let anything happen to you," was that he would be released from custody.

The State asserts Thai's statement was not induced by a promise of leniency. The promise made in this case did not pertain to the legal repercussions of Thai's involvement in the murder, but to his physical safety from outside forces, "the gang", if he told the police what he knew. The implication was if Thai said nothing, the gang would not harm him; if he talked to police he would be putting himself in danger. There was no immediate threat in this case because there would be no retribution if he did *not* give a statement to the police. *Cf. Arizona v. Fulminante,* 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (holding threat of outside harm was immediate because it would occur unless Fulminante confessed to police).

In addition, a complete reading of the interview transcript indicates Thai knew charges would be filed regardless of his confession. In fact, in the following exchange, Thai attempts to extract a promise of leniency from the police.

> (Italicized text indicates statements made in Vietnamese; regular font indicates the use of English.)

Hein: Ask him when will we go to court?

Phoukham: Perhaps tomorrow.

Hein: When we go to the court?

Det. O'Donnell: Pardon me?

Phoukham: When we go to the court?

Det. O'Donnell: Tomorrow morning.

Hein: If "after court" *they* "find out", *can they* "change" *my* "tape"?

Phoukham: Can they what?

Hein: Change my "case".

Phoukham: Maybe.

Hein: Because if I can be of any help, maybe I can help because I go out with the niece of this guy. And this guy, if he knows anything he will tell me about it, which places have guns, what happens here and there, I will know all about it. If I can help the police to take guns from the outside also, to tell them which house has guns, which one has gang members, I am willing to help. However, do me a favor after I point out the house, I will walk away.

The officers did not agree to such an offer or even address it in the subsequent interview. Clearly, Thai's comments to the officers about a court appearance indicate his understanding that he would not be released from any charges surrounding the murder for having given his statement to police.

Thai also indicated that he had a very difficult time understanding the content of the interview due to the language barrier. Upon closer examination of the record, however, we note Thai had been living in the United States for three to five years prior to his arrest. At the beginning of his police interview, he stated, in English:

> Yes, I understand what you say, you know. But you know something, you know when I talk to you, you don't understand and some word I cannot read English or speak you know, so I let him translate.

By his own statements, Thai has a reasonable understanding of the English language but used the interpreter for some words and to make sure Detective O'Donnell could understand him.

Based on our review of the record, we find the promise of safety from outside threats by Detective O'Donnell did not constitute promissory leniency. Because the police statement given by Thai was voluntary, we find trial counsel was not ineffective in failing to raise this claim below. Accordingly, we affirm.

AFFIRMED.