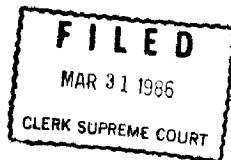


IN THE COURT OF APPEALS OF IOWA



WILLIAM D. BEEMAN,	)	
Petitioner-Appellant,	)	Filed March 31, 1986
vs	)	
STATE OF IOWA,	)	<u>5-688</u>
Respondent-Appellee.	)	85-86

23

Appeal from the Iowa District Court for Muscatine County (No. C2884-783)

- Robert Stohr, Judge.

Petitioner appeals the denial of his application for postconviction relief, asserting that his trial counsel rendered ineffective assistance of counsel in failing to timely file a motion to suppress petitioner's inculpatory statement made to interrogating officers. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; and Stephen J. Petersen, Muscatine County Attorney, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

On May 16, 1980, William D. Beeman was found guilty of murder in the first degree. He was sentenced to life in prison. This conviction was affirmed by the Iowa Supreme Court in State v. Beeman, 315 N.W.2d 770 (Iowa 1982).

On July 15, 1983, Beeman filed an application for postconviction relief. A hearing was held on October 26, 1984, and on December 26, 1984, the district court entered a ruling denying the application.

The facts giving rise to Beeman's conviction may be briefly outlined as follows: On April 26, 1980, the body of Michiel Winkel was found in the Wild Cat Den State Park, northeast of Muscatine. She had been kicked in the head, choked, and beaten before her murderer inflicted a lethal injury by stabbing her seventeen times in the chest. The body was unclothed and the victim had been subjected to sexual intercourse.

Beeman was originally interviewed as part of the routine murder investigation. When Beeman's account of his activities on the evening of the murder could not be substantiated by his girlfriend, the police requested he return for a second interview on May 8, 1980. When Beeman became defensive and evasive during the questioning, the interrogating officers read him his Miranda rights. Beeman initialed next to each right on the Miranda forms and then signed the written waiver. After further questioning, Beeman admitted that he had picked up the victim on his motorcycle and drove her to the park on April 26, 1980. He further stated that when she refused to engage in sex with him, Beeman kicked her in the head with his steel-toed boot. When the officers asked him whether he had stabbed the victim, Beeman "reached in his pocket and produced a knife which he handed to Mr. Werner." Beeman was also found in possession of num chucks.

Beeman sought to suppress his statement to the interrogating officers on the basis that it was involuntary because it was induced by Deputy Werner's statement that Beeman may need "help". This tactic, Beeman's attorneys moved, was such as to render Beeman's statement inadmissible as a violation of his fifth amendment rights against self-incrimination.

At the suppression hearing, Deputy Werner testified that during the interrogation of Beeman he explained to Beeman the difference between premeditated murder and murder "committed on the spur of the moment." After about ten minutes of further questioning, Beeman began to give his statement. Werner testified that Beeman's inculpatory statement was not induced by his explanation of the degrees of murder. Another officer who was present during Beeman's interrogation testified that he recalled Werner asking Beeman if he needed help. Beeman did not testify at the suppression hearing.

The trial court overruled the motion to suppress on the grounds it was unsupported by the evidence and that it had been filed late.

At trial, Deputy Werner testified as follows regarding his interrogation technique:

I believe I said that there was a difference between premeditated or first degree murder and second degree murder. I told him that first degree murder sometimes is planned for several days in advance and then the act is carried out. The other type of murder would be a responsive type and that possibly someone that had committed a responsive type murder, the individual would possibly need some help.

Taking the stand in his own behalf, Beeman testified that when he returned for questioning on May 8, he persisted in professing his innocence for "around a half hour." At that point, he said, Werner began explaining the difference between first-degree murder and manslaughter. According to Beeman, Werner "was acting like--well, he said that if it was manslaughter, he was going--they

could try to help me; and they would help me all they could." At that point, Beeman "went along with what they said," and ultimately made the inculpatory statement.

At the postconviction hearing, Beeman's counsel testified that Beeman was not called to testify at the suppression hearing because counsel felt Beeman would not make a good witness for himself. Counsel testified that Beeman was not cooperating in presenting his defense. They were also considering a diminished capacity defense, based on Beeman's claim that he could not remember everything that happened on the night of the crime. If Beeman had testified, counsel felt he might have said things which would have caused him trouble at trial.

On appeal, Beeman maintains that the officers improperly told him that there was a difference between first and second-degree murder, and that if a defendant came forward with testimony applying the elements of second-degree murder to manslaughter, the officers might be willing to help Beeman. Beeman insists that he was given no reason for the failure to call him to testify at the suppression hearing. Had he been allowed to testify, he could have proven the improper questioning by the officers which induced him to give his statement. Finally, Beeman argues that his trial counsel were ineffective because they failed to timely file the suppression motion and this is why the motion was denied. He argues that although this issue was raised on direct appeal, the supreme court rejected his argument solely on the issue of timeliness, without considering his constitutional claim. Thus, Beeman was precluded from appealing on the merits of the denial of his suppression motion because his counsel failed to timely file the motion and failed to preserve the voluntariness issue for appellate review.

27

The State counters that although the motions to suppress were filed after the deadline, petitioner was not prejudiced by the late filing since the trial court based its decision both on the fact that the motion was untimely and on the merits. The trial court specifically found that the motion was not supported by the evidence. The State also argues that even if Beeman had testified, he could not have prevailed on his motion to suppress.

When a defendant relies on a specific omission to prove ineffective assistance of counsel, two conditions must be demonstrated:

- (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
- (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

The test for ineffective assistance was most recently set forth in Strickland, where the Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Strickland, 466 U.S. at ___, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). The defendant must satisfy this burden by a preponderance of the evidence and rebut the presumption of counsel's competence. Meier, 337 N.W.2d at 206. Ordinarily, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980).

The Iowa Supreme Court has established that the late filing of a motion ²⁸ to suppress an inadmissible inculpatory statement, unaccompanied by a showing of grounds for late filing, is the type of error which can materially prejudice a defendant's case. State v. Rhiner, 352 N.W.2d 258, 261 (Iowa 1984); State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983) (trial counsel's failure to promptly move to suppress an inculpatory statement denied defendant his constitutional rights). We, therefore, must address the merits of Beeman's challenge and determine whether his inculpatory statement was inadmissible.

Beeman does not claim here that the waiver of his constitutional rights was involuntary. Rather, his claim is that his inculpatory statements during interrogation were not voluntary, but rather given in response to the interrogating officers' promise of leniency. The burden is on the State to show by a preponderance of the evidence that the statement was voluntary. State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976). In State v. Hodges, 326 N.W.2d 345 (Iowa 1982), the Iowa Supreme Court set forth the applicable standard for determining the admissibility of inculpatory statements:

The test for determining the admissibility of confessions or inculpatory statements is voluntariness. Culombe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037, 1057 (1961). This court determines the issue of whether officers have exercised coercion so as to render statements involuntary by examining the totality of the circumstances. We have explained this "totality of the circumstances" test in the following manner:

No one factor is determinative of the voluntariness of a confession which necessarily depends upon the totality of the circumstances of the individual case.

There is no talismanic definition of voluntariness. The "totality of the circumstances" encompasses the characteristics of the accused and the details of the interrogation process. The court determines the facts surrounding the inculpatory statement, assesses their psychological impact on defendant,

and evaluates the legal significance of defendant's reactions.

Defendant's choice to confess must be essentially free and unconstrained with his will not overborne and his capacity for self-determination not critically impaired. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975) (citations omitted).

Hodges, 326 N.W.2d at 347-48 (quoting State v. Munro, 295 N.W.2d 437, 440 (Iowa 1980)). The following factors are to be considered in deciding questions of involuntariness:

The defendant's knowledge and waiver of his Miranda rights, the defendant's age, experience, prior record level of education and intelligence, the length of time defendant is detained and interrogated, whether physical punishment was used, including the deprivation of food or sleep, defendant's ability to understand the questions, defendant's physical and emotional condition and his reaction to the interrogation, whether any deceit or improper promises were used in gaining the admissions, and any mental weakness the defendant may possess.

State v. Rhiner, 352 N.W.2d 258, 262 (Iowa 1984) (quoting State v. Whitsel, 339 N.W.2d 149, 153 (Iowa 1983)).

The Iowa Supreme Court has consistently forbidden the use of confessions which are obtained through promises or assurances that the accused would receive better treatment, less severe punishment, or more mercy by confessing guilt. Hodges, 326 N.W.2d at 348-49; State v. Hilipre, 242 N.W.2d 306, 311 (Iowa 1976); State v. Ware, 205 N.W.2d 700, 703 (Iowa 1973); State v. Mullin, 249 Iowa 10, 16-18, 85 N.W.2d 598, 601-02 (1967). However, an investigating officer's offer to recommend psychiatric help or inform the prosecutor of defendant's cooperation are not tantamount to promises of leniency. Whitsel, 339 N.W.2d at 153; State v. Miller, 316 N.W.2d 23, 28 (Minn. 1982) (fact that officer mentioned he would try to get psychiatric help for defendant if he was guilty did not render subsequent confession involuntary). An officer can also tell a suspect that it is better to tell the truth. Hodges, 326 N.W.2d at 349. "The line between

admissibility and exclusion seems to be crossed, however, if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. Ordinarily the officer's statements then become promises or assurances, rendering the suspect's statements involuntary." Id.

The testimony of Beeman's trial counsel reflects that their decision not to have Beeman take the stand during the suppression hearing was a tactical one. Their conclusion as to the desirability of having Beeman testify was not beyond the range of competence demanded of attorneys as to constitute ineffective assistance of counsel. Moreover, even if we take into account what Beeman could have added to the evidence during the suppression hearing, we do not believe that his inculpatory statement was involuntary as a result of police inducement.

It is not disputed that during the course of Beeman's questioning, Deputy Werner explained to Beeman the difference between the degrees of murder. Werner also gave some indication that if a person committed a responsive type murder, the officers could possibly help. A few minutes after this exchange and further questioning, Beeman made the inculpatory statement.

Deputy Werner did not mention anything about what charges would be filed against Beeman. Werner did not indicate that other or higher charges might be filed against Beeman if he failed to cooperate or that charges would be lessened if Beeman talked. The officer did not expressly state nor imply that the offered "help" included reduction of charges or leniency from the courts or prosecuting authorities in any fashion. We conclude that the officer's offer to help Beeman is not tantamount to a promise or assurance of leniency.

Other factors relevant to our determination that Beeman's statement was voluntary and not the result of coercion include that prior to making the inculpatory statement Beeman had voluntarily, knowingly, and intelligently

waived his Miranda rights. Also, Beeman was familiar with the criminal justice system. Further, Beeman's inculpatory statement came less than an hour after questioning began. The length of detention time was thus relatively short and during normal working hours. Beeman was offered a drink and was permitted to go to the restroom during the interview. The record is void of any indication that threats or force were used to elicit Beeman's statement.

In sum, the totality of the circumstances reveals the complete absence of any form of coercion and demonstrates that the inculpatory statement made by Beeman was voluntary. Therefore, the trial court was correct in refusing to suppress Beeman's statement. No prejudice resulted from either trial counsel's failure to timely file the motion to suppress or from the absence of Beeman's testimony at the suppression hearing.

AFFIRMED.