FILED
MAY 28 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JAMES LEE BAKER,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

Filed May 28, 1985

5-160
84-1019

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Petitioner appeals from a denial of postconviction relief from his conviction for third-degree sexual abuse. AFFIRMED.

Marc R. Engelmann, Eldrige, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Pamela S. Greenman, Assistant Attorney General, for respondent-appellee.

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

Petitioner's conviction for sexual abuse in the third degree was affirmed in a direct appeal that raised only an issue concerning prosecutorial misconduct. He appeals from the denial of his subsequent application for postconviction relief. We affirm.

Defendant James Baker was charged with second-degree sexual abuse following an incident July 20, 1981. The defendant is accused of picking up the victim in a tavern in Bettendorf, Iowa, and then driving her in his 18-wheel truck to various locations in Iowa and Illinois. Two instances of sexual abuse were alleged to have been committed, and the victim indicated he threatened her with a knife. The defendant then released the victim and one witness testified that the victim appeared at her house at 3:00 a.m., hysterical and with injuries on her face. A detective testified that the victim told him she was dropped off near the house at about 2:30 a.m. However, at trial the victim said that she arrived at the house at 4:00 a.m. The detective testified at trial that Baker said he had received a speeding ticket in Princeton, Illinois, at 3:50 a.m., 60 miles from where the victim was released. The detective further testified that he verified Baker's story regarding the speeding ticket.

Baker claims his counsel was ineffective because he did not depose a witness who would have confirmed the time when Baker was given the ticket. Defendant says he did not inform counsel of the ticket because he is subject to blackouts and seizures and could not provide the information. As a result the jury was not instructed on an alibi defense.

The strong showing which must be made by defendant in order to prevail in his claim has been set out by the Supreme Court at Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052 80 L. Ed. 2d 674 (1984). Defendant must show (1) that counsel failed to perform an essential duty, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." Id. at ____, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

The minutes of testimony indicated the witness would testify that the victim arrived at 3:00 a.m. and the detective would state the victim told him she appeared at the home at 2:30. Nowhere in the minutes is there an indication the victim would testify otherwise. Until the time of trial when the victim testified, defense counsel had no reason to believe that the victim would make any statement to the contrary. Her arrival at the witness's home at 2:30 or 3:00 a.m. is consistent with Baker receiving a ticket some 60 miles away an hour or more later. We do not believe defense counsel failed to perform an essential duty in failing to depose a witness which would have added nothing to what he already knew.

Further, we cannot agree that any error that might have occurred would have affected the result. The jury was told by the detective that Baker had received a ticket at 3:50 a.m. and heard the victim's statement that she arrived at the house at 4:00 a.m. Although the jury was not given an alibi defense instruction, they were told by the court, "If after consideration of all of the evidence, you have a reasonable doubt as to whether the accused was present at the time and place the alleged offense was committed, you should acquit the defendant." Since the jury was aware of the inconsistency, and considering the instruction they received, the failure to obtain an alibi defense instruction was not so prejudicial to warrant a grant of postconviction relief.

Defendant claims his counsel was ineffective in three other instances. He first says that he was not informed that posttrial motions for an arrest of judgment and for a new trial would be filed. Such a procedural move on the part of his attorney does not necessarily have to be discussed with the client if a

reasonable attorney in similar circumstances would consider alternatives as having little or no likelihood of success. Zaehringer v. Brewer, 635 F.2d 734, 737 (8th Cir. 1980). There could not be any prejudice to Baker, since the motions were properly filed and Baker's rights were preserved.

Closing arguments were not recorded and defendant says counsel erred in failing to request the statements be recorded. Defendant asserts that no argument was made concerning his alibi defense and without the alibi instruction the importance of the defense was not made clear to the jury.

There is no duty on the part of counsel to have closing arguments recorded. See Iowa R. Cr. P. 18(4); Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). In addition, defendant's trial counsel says he did refer to the defense in his arguments. The court hearing the postconviction claim was faced with determining the credibility of the witnesses, given the inconsistent statements of defendant and his counsel. This matter is ordinarily left to the trial court's discretion and credibility is decided as a matter of law only where the witness so contradicts himself that he destroys all probative value of the testimony. State v. Still, 208 N.W.2d 887, 891 (Iowa 1973). We find neither error on the part of counsel nor prejudice to defendant, considering the court's apparent decision to give more weight to counsel's statement that he commented on the alibi defense.

We find the same result is also in order concerning Baker's claim that his counsel did not let him testify despite his desire to do so. Again, conflicting statements were made at the hearing on this issue. Baker says he was not allowed to decide if he should testify. His counsel said he advised Baker not to testify, but left the ultimate decision to the client. Baker has also failed to point out what contribution his testimony would have made to his trial since he has indicated he suffered a blackout and could not remember the events of the evening of the crime.

Baker finally contends the court erred in its handling of his posttrial motions When the court denied the motion for a new trial and for arrest of judgment, the written motions were not before the judge. Instead, the court asked defendant's counsel if anything new was asserted in the motions. When counsel replied there was nothing new, the court responded, "I have considered and reconsidered in my mind those matters since the time of trial, and I see no reason to change my ruling, so the motion is overruled."

This issue was not presented in Baker's direct appeal and he does not claim ineffective assistance of appellate counsel for failure to raise the claim. Defendant is barred from raising the claim in a postconviction action. Iowa Code § 663A.8 (1985). Defendant failed to cite an authority for his argument on this issue. This also constitutes waiver of an issue. Iowa R. App. P. 14(a)(3).

We find no error in the court's denial of postconviction relief.

AFFIRMED.