IN THE COURT OF APPEALS OF IOWA

No. 0-008 / 09-0075
Filed March 10, 2010

MICHAEL ABRAHAMSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Darrell Goodhue, Judge.

A postconviction relief applicant appeals the district court's denial of his application for postconviction relief premised on prosecutorial vindictiveness. **AFFIRMED.**

Cathleen J. Siebrecht of Siebrecht Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Brian Tingle, County Attorney, and Tiffany Koenig, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

Michael Abrahamson appeals the district court's denial of his application for postconviction relief premised on prosecutorial vindictiveness.

I. Background Facts and Proceedings

The State charged Abrahamson with possession of lithium and pseudoephedrine as precursors used in the process of manufacturing methamphetamines. Abrahamson moved to dismiss the charges on speedy trial grounds. Two weeks after the motion was filed, the State brought a separate charge against Abrahamson for ongoing criminal conduct. The district court granted Abrahamson's motion to dismiss the original possession charges. Abrahamson also moved to dismiss the ongoing criminal conduct charge on double jeopardy grounds. The district court denied that motion.

Abrahamson and the State reached a plea agreement in connection with the ongoing criminal conduct charge, under which the State agreed to amend the charge to possession of a precursor and Abrahamson agreed to plead guilty to this reduced charge. Our court affirmed the judgment and sentence that were subsequently entered and preserved for postconviction relief proceedings a claim that trial counsel was ineffective in allowing Abrahamson to plead guilty. *See State v. Abrahamson*, No. 06-0383 (Iowa Ct. App. May 23, 2007).

Abrahamson filed an application for postconviction relief, alleging that by filing the ongoing criminal conduct charge, the "State engaged in a vindictive prosecution." The district court examined this claim under an ineffective-assistance-of-counsel rubric and denied the application. This appeal followed.

II. Analysis

Abrahamson contends "trial counsel was ineffective by failing to move to dismiss based on prosecutorial vindictiveness." To prevail, he must show that trial counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005).

Abrahamson specifically asserts that the State filed the ongoing criminal conduct charge to punish him for moving to dismiss the precursor charges on speedy trial grounds. While he concedes he has no direct evidence that the prosecutor acted in bad faith, he argues that the court should presume prosecutorial vindictiveness based on the timing of the prosecutor's filing.

"To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372, 102 S. Ct. 2485, 2488, 73 L. Ed. 2d 74, 80 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 610 (1978)). In *Goodwin*, the United States Supreme Court declined to apply a presumption of vindictiveness to a pretrial decision by a prosecutor. *Id.* at 383–84, 102 S. Ct. at 2493–94, 73 L. Ed. 2d at 86–87. The Court reasoned as follows:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent

> of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.
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> In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some "burden" on the prosecutor. Defense counsel routinely file pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.
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> Thus, the timing of the prosecutor's action in this case suggests that a presumption of vindictiveness is not warranted. A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. As we made clear in *Bordenkircher*, the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.

Id. at 381–82, 102 S. Ct. at 2492–93, 73 L. Ed. 2d at 85–86. Based on the Court's holding and its reasoning, we conclude that a presumption of prosecutorial vindictiveness does not apply.

Given Abrahamson's concession that there was no direct evidence of bad faith, he could not prove prosecutorial vindictiveness without the presumption. *Id.* at 384, 102 S. Ct. at 2494, 73 L. Ed. 2d at 87 ("In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do."). Therefore, his ineffective-assistance-of-

counsel claim fails on the duty prong. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992) (allowing court to affirm if either breach or prejudice is not proven).

We affirm the denial of Abrahamson's postconviction relief application.

AFFIRMED.