IN THE COURT OF APPEALS OF IOWA

No. 1-028 / 10-1020
Filed April 27, 2011

TAMMY SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Humboldt County, Kurt L. Wilke, Judge.

Applicant appeals from the dismissal of her application for postconviction relief. **REVERSED AND REMANDED.**

Darren D. Driscoll of Johnson Kramer, Good, Mulholland, Cochrane & Driscoll, P.L.C, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout and Denise Timmins, Assistant Attorneys General, and Jennifer Benson, County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Miller, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

Tammy Smith was convicted of child endangerment resulting in serious injury after her then four-year-old son received a severe injury to his right arm. She filed this action for postconviction relief contending she should have a new trial because her son, Gabriel, who was noncommunicative at the time of his injury can now express himself and testified at the postconviction hearing he was injured because he put his arm in a front load washer while it was in the spin cycle. Tammy also contended she received ineffective assistance of trial counsel. The district court denied both claims and Tammy on appeal argues that she should have a new trial because her child's statements are newly-discovered evidence. She does not challenge the ruling on her ineffective-assistance-of-counsel claim. We reverse and remand for a new trial.

BACKGROUND. On January 24, 2006, Tammy was home with Gabriel and his two-year old brother. Something happened, and Gabriel was injured. Tammy called her husband, John Smith, who was working at Godfather's Pizza in Humboldt. After taking the call, John told his employer Gabriel had been injured and John returned home. John and Tammy took Gabriel to the Trimark Physicians Group in Humboldt. There Gabriel was examined by Dr. Sharmini Suriar. Suriar found the child in pain, gave him mediation and ordered x-rays of Gabriel's right arm. The x-rays showed Gabriel had fractured his arm in three places. Suriar also noted Gabriel had an open wound on the upper part of the arm as well as a dislocated shoulder. The doctor found the fracture to be complicated and not one commonly seen in children. He opined the type of

break Gabriel had usually occurs when there is a lot of force. When asked by the doctor how the injury happened, Tammy told Suriar Gabriel was standing next to her as she was taking clothes out of the clothes dryer. She looked at him and noticed he had injured his arm.

Suriar referred the child to Des Moines where Dr. Cassim Igram assessed him, looked at the x-rays and found a fairly significant facture to Gabriel's arm. Igram did not feel he had the expertise to reduce the fracture and align the bone fragment, so he put Gabriel in a splint and hospitalized him. When Igram asked Tammy what happened she related Gabriel had fallen. Igram opined the injury Gabriel suffered was not consistent with a mere slip and fall, noting the fractures were of the kind one would not see unless a child had fallen down a flight of stairs or been in a motor vehicle accident.

Gabriel was seen by pediatrician Dr. James Metts for pain management. Tammy told Metts Gabriel was with her in the basement as she was taking clothes out of the dryer. Her two-year-old son was playing with a light switch and she turned to look at him. She reported when she turned back she saw Gabriel had fallen and hurt his arm.

Gabriel was also treated by Dr. Jeffrey Michael Farber, a pediatric orthopedic surgeon. Farber found Gabriel to have four breaks, a dislocation, and some bruising on his arm. Farber set the fracture. He noted Gabriel's injuries were unusual as he did not often see four or five breaks in the arm of a four-year-old child. When he had seen this severe of an injury in the past generally there was a big trauma such as the child being hit by a car. Farber said it appeared to

him the injuries came from some type of leverage exerted on the arm, and it was his opinion within a reasonable degree of medical certainty the child's injury was not likely to happen from a slip and fall or from a fall downstairs. Tammy had told Farber Gabriel was injured when he fell down the stairs.

Tammy, who attended school through the twelfth grade, did not graduate from high school. She called herself a slow learner and her IQ registered at 85. Following her return home with Gabriel she was visited by a Humboldt deputy sheriff and an employee of the Iowa Department of Human Services. They asked her about Gabriel's injury and she told them she was home with the children and washing dishes in the sink when her younger son began flipping the basement light on and off. She closed the door to the basement and took the child to his room. On returning to the kitchen she heard a whimper and upon opening the door to the basement discovered Gabriel standing there with his arm just hanging.

Gabriel, four years old at the time of his injury, was unable to respond intelligently to questions about the cause of his injury. He was developmentally delayed and only uttered sounds such as "owie", "ma", and "no". Jill Coleman, a social worker who saw Gabriel on January 30, 2006, testified in her twenty years as a worker in her field,

> he was the most unsocialized child that I have ever met. I refer to him even as a little animal child because he would do a lot of grunting and moaning and pointing, didn't use a lot of words. It was almost animalistic noises coming out of him.

Coleman also found Gabriel a difficult and frustrating child to work with.

PROCEEDINGS. Tammy was arrested for child endangerment resulting in serious injury and Gabriel was placed in foster care. Tammy and John had supervised visits with him.

Tammy was given a court-appointed attorney and a jury trial was held. Neither Tammy, nor John, nor Gabriel, who at that point was still only able to make sounds, testified at the trial. On June 1, 2007, a Humboldt County jury found Tammy guilty as charged and she was sentenced to an indeterminate term not to exceed ten years.

On June 14, 2007, Tammy filed two motions for a new trial. The first motion challenged certain instructions and the sufficiency of the evidence to support her conviction. The second motion made a claim there was newly-discovered evidence that had not previously been available to the defense. The motion related Bradley Anderson, of the Youth Shelter in Council Bluffs, Iowa, where Gabriel was living, reported Gabriel verbally told him he broke his arm in the washing machine.

The district court dismissed the motion on July 18, 2007. The court found that prior to trial Gabriel could only verbalize isolated words and could not put them in an intelligible phrase or sentence. He acted out by twisting his arm or making a rotational motion and making a sound like “rrr,” which led Tammy and John to believe Gabriel hurt his arm in the spin cycle of the washing machine. The court noted he was put in the Children’s Square and his ability to communicate had improved. Since March Gabriel had been consistently verbalizing and acting out and Bradley Anderson, a family counselor employed

by Visinet Iowa, a contract provider for the Iowa department of Human Services, had been supervising visits between Gabriel and his parent for several months. Anderson said on June 8, 2007, when he was picking Gabriel up for a visit Gabriel stated, "I broke my arm in the washing machine." Anderson said Gabriel had not repeated the statement, but reverted to his prior communications and behavior.

The district court, in denying the motion, also noted on March 23, 2007, in response to a discovery request, Smith presented a DVD of her washing machine in the spin mode. While deposing four doctors, she asked if the injury could have occurred by Gabriel getting his hand caught in a washing machine. Dr. Farber in his deposition testified it could be, but he was not asked at trial about his prior answer from the deposition. Also in Tammy's husband John's deposition taken on May 15, 2007, John testified the child had been able to open the washing machine while it was running since he was two years old. During a visit in March of 2007 he told Bradley Anderson, "we think he broke his arm in the washing machine." The court also noted that Tammy told Dr. Ann Mooney, Ph.D., who conducted a psychological evaluation of her, that Gabriel broke his arm in a front-loading washing machine. In conclusion, the district court did not find the child's verbalization newly-discovered evidence, noting it did not tell Tammy anything she did not already know, and denied her claim that the evidence was admissible under Iowa Rule of Criminal Procedure 2.24(2)(b)(8).

An appeal followed where Tammy challenged the sufficiency of the evidence to support her conviction and a ruling that allowed Mooney, who

conducted a psychological evaluation of Tammy aimed at determining how Gabriel was injured, to testify that Tammy had related to her Gabriel broke his arm in a front-loading washing machine when the machine was in the spin cycle and she just froze up when he hurt his arm. Tammy contended that the statement made to Mooney was involuntarily because she was forced to cooperate with the evaluation or risk losing her children. We, in an unpublished opinion, affirmed the district court's finding Smith was not compelled by the potent sanctions to make the statement to Dr. Mooney. *See State v. Smith*, No. 07-1406, (Iowa Ct. App. Aug. 27, 2008). We also dismissed Tammy's claim there was insufficient evidence to support her conviction because the record did not establish a definite cause of Gabriel's injuries. We concluded:

> [T]he jury here did not find any of Smith's conflicting explanations of how Gabriel was injured convincing and instead put greater weight on the medical expert's testimony as to how the injuries of the nature and extent Gabriel sustained most likely do and do not occur. Accordingly, we conclude there is sufficient evidence for a rational jury to find beyond a reasonable doubt that Smith did knowingly act in a manner that created a substantial risk to Gabriel's physical health or safety, and thus was guilty of child endangerment resulting in serious injury.

On April 30, 2009, Tammy filed an application for postconviction relief, contending she should have a new trial because there existed material facts not previously presented and her trial attorney was not effective. Counsel was appointed for her and on August 12, 2009, the application was amended, realleging the charge of ineffective assistance of counsel and explaining that trial counsel was aware of evidence suggesting Gabriel was injured as a result of a washing machine accident, but failed to present this theory at trial. Instead, counsel for Tammy tried the case on a slip-and-fall theory that was discredited by

the State's expert witnesses as an impossibility. The new evidence was said to be the child's statement. While the washing machine theory was known prior to trial, it was the child's ability now to communicate the theory of the injury that was newly-discovered evidence.

The matter came on for hearing on April 14, 2010. Tammy called three witnesses, namely her trial attorney Joseph McCarville, Bradley Anderson, and Gabriel.

McCarville testified he was aware of the washing machine theory and he went to the Smith home and had a videotape made that showed the machine on the spin cycle with the door open and the drum spinning. He said he believed Gabriel opened the door when the spin cycle was on and got his arm caught. He believed this was consistent with the medical evidence because the break in the arm was rotational in nature. When asked why he did not use this theory as a reasonable explanation of what happened, he testified it was a huge mistake on his part and he should have. He thought because there was no evidence to show Tammy intentionally hurt Gabriel, he did not believe the State could make its case. He also indicated he was afraid if he presented the washing machine theory the State could use that as evidence of neglect to show she allowed Gabriel to be around a washing machine she knew was defective. He was concerned this theory would be used against her as proof she endangered the child under a negligence theory.

McCarville was also asked about his motion to suppress Tammy's statements to Mooney about the washing machine having caused the injury. He

said he moved to suppress the statement because Tammy had made several inconsistent statements and he did not want another inconsistent statement in evidence. Because he was not presenting the washing machine theory to the jury, he did not want another inconsistent statement in evidence. He also testified that he played the videotape for the doctors when taking their depositions and he believed Dr. Farber said the injury could have been caused by the washing machine.

Anderson, a graduate of the University of Nebraska in Omaha, testified he supervised visits between Gabriel and Tammy and John. He indicated early on Gabriel was always happy to see his parents, but lacked the ability to communicate. He further indicated the issue of Gabriel's injuries was never discussed by the parents with Gabriel during visits, and during the visits he never witnessed Tammy or John telling Gabriel he broke his arm in the washing machine. Anderson testified at some point close to Tammy's trial John discussed the incident with him and related the washing machine theory. Anderson said the issue of the injuries came up with Gabriel from the beginning because he would make noises like, "rer, rer, rer," and do something with his arm. Anderson also testified that there were several incidents when Gabriel was at Best Buy or at the house where he was staying and Gabriel actually opened a washing machine, put his arm in it and after doing so he would say always say, "mom." Anderson related that after John discussed the incident with him he understood what Gabriel was doing. Anderson also testified on June 8, 2007,

about a week after the jury found Tammy guilty, Gabriel said, "I broke my arm in a washing machine like that."

Gabriel's testimony at the postconviction hearing came just a few days before his ninth birthday. When asked about his broken arm he said his mommy did not do it and that he did it himself by putting his arm in the washer when the spin cycle was moving and almost done. Gabriel indicated he was currently in school, was learning about reading and was living in Humboldt with his father. He related on cross-examination sometimes his father talks about his arm and tells him he broke it in the washing machine. He said when he broke it his mother was upstairs. He said he loves his mommy and she did not hit him. He testified at the time of the injury he was trying to tell people what happened, but it was hard because he couldn't talk.

On May 11, 2010, the district court filed its order. The district court found Tammy had failed to prove McCarville ineffective, finding the strategy he adopted reasonable under the circumstances. The court noted Tammy knew the machine malfunctioned and Gabriel was a child with special needs who had a propensity to stick his hand in the machine when it was running. The court stated she might have been convicted on the basis of gross neglect for leaving the child in the basement when the machine was running. The district court also discussed that there were problems with the washing machine explanation and that McCarville did not want Tammy to testify because she had already made conflicting reports about how the arm was broken. McCarville feared Tammy, who is mentally challenged, would do poorly on cross-examination. He felt John would be a poor

witness, and Gabriel was developmentally delayed at the time of trial and could not speak. The district court recognized the State was not able to define the cause of Gabriel's injury and McCarville's strategy was to leave in question the cause of the injury, hoping the jury would not find beyond a reasonable doubt Tammy acted intentionally or knowingly to endanger Gabriel.

The district court also rejected Tammy's position that even though she and her attorney knew about the washing machine theory prior to trial, the new evidence is Gabriel's ability to communicate about it. The district court concluded this is not new evidence, nor is it evidence that would likely affect the outcome of the trial.

SCOPE OF REVIEW. We review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

CLAIM OF NEWLY-DISCOVERED EVIDENCE. Tammy contends the district court erred in concluding the evidence was not new and its conclusion that the outcome of the trial would not likely have been affected is unsupported.

Tammy contends her position is supported by Iowa Rule of Criminal Procedure 2.24(2)(*b*)(8), which provides:

> When the defendant has discovered important and material evidence in the defendant's favor since the verdict, which the defendant could not with reasonable diligence have discovered and produced at the trial. A motion based upon this ground shall be made without unreasonable delay and, in any event, within two years after final judgment, but such motion may be considered thereafter upon a showing of good cause. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits or testimony of the witnesses by whom such evidence is expected to be given, ...

The parties are in agreement that for Tammy to be granted a new trial based upon newly-discovered evidence she must show (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *See Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003); *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991). The parties also agree the fact the washing machine malfunctioned and may have been responsible for Gabriel's injuries was known to Tammy prior to trial, was investigated, and was rejected by Tammy as a theory of defense. The State argues because Tammy knew Gabriel's injuries may have been caused by the washing machine, Gabriel's testimony was not discovered after judgment and Tammy cannot show it could not have been discovered with due diligence. Tammy argues the newly-discovered evidence was Gabriel's testimony and specifically his ability to articulate what he contended happened and, because the evidence was clear he could not verbally communicate at the time of the initial trial, it could not have been discovered with due diligence.

The State, relying on *Jones v. Scurr*, 316 N.W.2d. 905, 909–10 (Iowa 1982), argues that Tammy confuses "newly-discovered evidence" with "newly-available evidence." *Jones*, however, is distinguishable. In *Jones*, a postconviction proceeding, the evidence sought to support the granting of a new trial following a murder conviction came from two co-defendants of the applicant. *Id.* at 906–07. The first had asserted his privilege against self-incrimination at

defendant's motion for new trial and the second was an unavailable fugitive. *Id.* The court discussed that some jurisdictions consider such evidence newly discovered, while others do not find unavailable evidence becomes newly-discovered evidence upon becoming available. *Id.* at 908–10. The Iowa court adopted the latter authority, holding that exculpatory evidence that was unavailable, but known, at the time of trial is not newly-discovered evidence. *Id.* at 910.

In *Jones*, the defendant sought to present newly available evidence about events known to the defendant since the defendant was present with the newly available witnesses during the events.

Gabriel's testimony was about an event during which he states Tammy was not present. Although Tammy and her counsel theorized that Gabriel hurt his arm in the washing machine, she could not know for sure how it happened, and Gabriel was unable to tell her. In *State v. Fox*, 491 N.W.2d 527, 534 (Iowa 1992), the court found the anticipated testimony of a codefendant would not constitute newly discovered evidence, stating, "It was clear in *Jones*-as here-that the defendant knew of the general nature of the codefendant's testimony at the time of the defendant's trial." In this case, Tammy did not know, and could not have known, the general nature of Gabriel's testimony because he was unable to communicate this at the time of her trial. The evidence here was unknown and unavailable. Since he was the only eye witness, the evidence could not have been known before Gabriel made his statement.

Gabriel's testimony explaining the cause of his injuries is material in that it, if believed, shows the circumstances surrounding the injury and it disproves the State's theory that the injury occurred because Tammy, in a knowing but unexplained manner, exerted substantial force on the child's arm.

Furthermore, with the child's testimony there is a reasonable likelihood that the result of the trial would be different. The State's case relied heavily on the fact Tammy was alone with the child when the injury occurred and she gave conflicting stories of how the injury happened. *See State v. Smith*, No. 07-1406, (Iowa Ct. App. Aug. 27, 2008). Tammy's trial attorney testified he didn't believe the State had good evidence to convict Tammy and that it was a huge mistake on his part not to use the washing machine theory as a reasonable explanation of what happened.

REVERSED AND REMANDED.