IN THE COURT OF APPEALS OF IOWA

No. 1-097 / 10-1245
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellant/Cross-Appellee,

vs.

ANDREA MORRIS,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The State appeals a district court ruling granting a defendant a new trial and the defendant cross-appeals. **AFFIRMED.**

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Steve Foritano, Assistant County Attorneys, for appellant.

Angela L. Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.* Tabor, J., takes no part.

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

VAITHESWARAN, J.

Andrea Morris, found guilty of first-degree murder, was granted a new trial based on questions arising from her attorney's consumption of alcohol. The State's appeal and Morris's cross-appeal raise several issues, one of which we find dispositive: Morris's exclusion from what we determine was a "stage of the trial" within the meaning of Iowa Rule of Criminal Procedure 2.27(1).

I. Background Proceedings

The State charged Morris with first-degree murder in connection with the death of a Des Moines man. Morris was represented by lead attorney Robert Powers and another attorney, both employed by the State public defender. During trial, several people smelled alcohol on Powers, including the trial judge's court reporter and a substance abuse counselor who happened to be at the courthouse. The latter two individuals privately disclosed their observations to the trial judge.

Following these disclosures, the trial judge met with Powers in chambers and outside the presence of Morris, her other attorney, or the prosecutors. He confronted Powers with the allegations of alcohol use. Powers responded that he had one or two glasses of wine the night before. The trial judge made his own observations of Powers, which he later testified to in a deposition. The judge also met with the State public defender, who had learned from Morris's second attorney that Powers smelled of alcohol during trial. This meeting did not include Morris or her attorneys. Morris was not informed of anyone's concerns about Powers's alcohol use until after trial.

As noted, the jury found Morris guilty as charged. At this stage, a new attorney was appointed to represent her. He filed a motion for new trial and a motion to recuse the trial judge based on his ex parte conversations with Powers and the State public defender. The court denied the recusal motion and scheduled the new trial motion for an evidentiary hearing.

At the hearing, the court reporter who smelled alcohol on Powers testified that she noticed it after Powers went home to get something and came back to court. She stated the odor was "noticeable." The substance abuse counselor similarly testified that, on the first day of trial, she smelled a "strong odor of alcohol" coming from Powers and, based on her professional experience, she "believe[d] it was fresh."

Power's co-counsel also was called to testify. She stated she smelled alcohol around Powers on the first day of trial, and the smell was "very strong." She stated she also smelled alcohol on Powers on the second, third, and fourth days of trial, although the smell was mild. The trial judge called Powers into his chambers on the third day of trial. Morris was in the courtroom at the time of this in-chambers discussion. Co-counsel notified three people in her office of her observations, speaking to the State public defender twice. She did not notify Morris.

Following the evidentiary hearing, the trial judge denied the new trial motion. In his ruling, the court stated, "At no time did the court independently smell any odor of alcohol coming from Mr. Powers's breath or person."

Morris filed a direct appeal from her judgment and sentence. We reversed the court's denial of the recusal motion and remanded for reconsideration of the

new trial motion by a different judge. *See State v. Morris*, No. 07-1835 (Iowa Ct. App. June 17, 2009).

The new judge assigned to consider the new trial motion granted the motion following an evidentiary hearing. The State appealed and Morris cross-appealed.

II. Analysis

The district court granted the new trial motion on several grounds. Among them was a conclusion that the in-chambers meeting between the trial judge and Powers was a critical stage of trial, requiring Morris's presence.[1] The court reasoned that Morris's absence "deprived [her] of the opportunity to develop the facts of Powers's alcohol use at the time of trial." The State takes issue with this conclusion, arguing that Morris's "presence at the proceeding would not have assisted the trial court in deciding whether it was necessary to intervene in counsel's representation."

We begin by noting that a defendant's right to be present at certain stages of trial may be constitutionally based or rule based. *See State v. Hemminger*, 308 N.W.2d 17, 19 (Iowa 1981) (noting assignment of error was predicated on rule rather than constitution). Morris argues the right stems from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 10 of the Iowa Constitution as well as Iowa Rule of Criminal Procedure 2.27(1). We find it unnecessary to flesh out the parameters of her constitutionally-grounded argument, as we believe the language of the rule is

[1] The court also concluded the meeting between the trial judge and the State public defender was a critical stage of trial. We find it unnecessary to reach this issue.

dispositive. *See In re S.P.*, 672 N.W.2d 842, 846 (Iowa 2003) (declining to address constitutional issues where statutory analysis was means of resolving the case); *Wengert v. Branstad*, 474 N.W.2d 576, 578 (Iowa 1991) ("We regularly decline to address constitutional questions unless their answers are necessary to dispose of the case."). That said, it is worth emphasizing that rule 2.27(1) implements constitutional guarantees. *See State v. Meyers*, 426 N.W.2d 614, 616 (Iowa 1998). Specifically, our highest court has stated that the Confrontation Clause of the Sixth Amendment to the United States Constitution[2] and the Due Process Clause of the Fifth Amendment to the United States Constitution are implicated. *See State v. Blackwell*, 238 N.W.2d 131, 134 (Iowa 1976); *State v. Snyder*, 223 N.W.2d 217, 222 (Iowa 1974). As will become clear, this constitutional underpinning means that we cannot neatly segregate constitutional precedent from rule-based precedent.

Iowa Rule of Criminal Procedure 2.27(1) requires that, "[i]n felony cases the defendant shall . . . be personally present at every stage of the trial including the impaneling of the jury and the return of the verdict." "Stage of the trial" as used in this rule

> includes the trial itself, from the selection of the jury through the verdict and, in addition, all pretrial and post-trial proceedings when fact issues are presented or when their dispositions, for some other reason, will be significantly aided by the defendant's presence.

State v. Foster, 318 N.W.2d 176, 179 (Iowa 1982).

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[2] *But see Snyder v. Massachusetts*, 291 U.S. 97, 107, 54 S. Ct. 330, 333, 78 L. Ed. 674, 679 (1934) ("Confusion will result again if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned."), *partially overruled on other grounds by Maloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

There is no dispute that the trial judge's conversation with Powers about the two disclosures of smell on Powers's breath did not include Morris. The key question is whether that conversation presented "fact issues" or whether resolution of the issue raised in that conversation "for some other reason" would have been significantly aided by the defendant's presence. *See id.*

Like the district court, we are persuaded that the conversation raised fact questions requiring Morris's presence. The trial judge asked Powers why he smelled of alcohol while in the courthouse at the time of trial. The State concedes this information raised concerns about Powers's ability to competently defend Morris in her first-degree murder trial. At a minimum, Morris had a right to question Powers about his explanation of the alcohol smell. *See Foster*, 318 N.W.2d at 178 (stating "trial" includes "matters beyond the mere presentation of evidence before the trier of fact"); *cf. State v. Hemminger*, 308 N.W.2d 17, 19 (Iowa 1981) (noting defendant's presence not required at pretrial ruling on State's motion that "dealt strictly with a legal issue, and no evidence was presented"). She was not given this opportunity. She was deprived of a fair hearing on an issue that was critical to her defense, the competency of her lawyer. *See Snyder v. Massachusetts*, 291 U.S. 97, 107–08, 54 S. Ct. 330, 333, 78 L. Ed. 2d 674, 679 (1934) ("[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."), *partially overruled on other grounds by Maloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

We also believe Morris's presence would have significantly aided resolution of the issue "for some other reason." *See Foster*, 318 N.W.2d 179;

see also Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667, 2668, 96 L. Ed. 2d 631, 647 (1987) ("[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right 'to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'") (quoting *Snyder*, 291 U.S. at 105–06, 54 S. Ct. at 332, 78 L. Ed. at 678). After meeting with Powers on the third day of trial, the trial judge allowed Powers to continue representing Morris through trial, which lasted for several more days. No one was more directly affected by this decision than Morris. With her lifelong liberty at stake, she had a right to "except to the ruling of the court." *Blackwell*, 238 N.W.2d at 137. She was not afforded this right. As rule 2.27(1) entitled her to be present during this "stage of the trial," the trial judge's failure to ensure her presence amounted to a violation of the rule.

Our analysis cannot end here because "[t]he rule requiring a defendant in a prosecution for a felony to be present at all stages of the trial must be considered together with the rule of harmless error." *Id.* at 136. In this context, the harmless error rule is as follows. The absence of a defendant at a stage of the trial triggers a presumption of prejudice that the State may rebut. *State v. Atwood*, 602 N.W.2d 775, 781 (Iowa 1999). Our highest court has made several pronouncements on what is required to rebut the presumption of prejudice,

In *State v. Snyder*, 223 N.W.2d 217 (Iowa 1974), the court construed a statute that was the precursor to rule 2.27(1).[3] The court stated the absence of a

[3] Iowa Code section 777.19 (1973) required the defendant's personal presence at trial when a felony was charged.

defendant when a jury is given additional instructions gives "rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant." *Snyder*, 223 N.W.2d at 221–22. The court suggested that this high standard was necessary because the statute requiring a defendant's presence was "an elemental corollary of the constitutional rights of due process and confrontation." *Id.* at 222. In effect, the court adopted the harmless error standard applicable to constitutional violations even though the violation in that case was based on a statute. *See State v. Peterson*, 663 N.W.2d 417, 431 (Iowa 2003) (defining constitutional harmless error).

In *Blackwell*, the court confirmed that error predicated on a defendant's absence from a stage of trial would be examined using a constitutional harmless error standard. 238 N.W.2d at 136–37. Under this standard, the court stated it would have to declare that the error was harmless beyond a reasonable doubt in order to uphold the conviction. *Id.* at 137. Conversely, the court stated a defendant's absence from a stage of trial would require a new trial if the absence "prejudiced his case, weakened his defense, or was otherwise harmful to his interests." *Id.* (quoting *Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972)).

In subsequent opinions addressing prejudice in this context, our highest court focused on the result of the proceeding from which the defendant was excluded rather than the result of trial. *See Atwood*, 602 N.W.2d at 781 (focusing on consequence of defendant's absence from a court conference with jury and noting defense was given opportunity to be present, court had comments reported and read to parties after meeting, and parties had an opportunity to

object to the comments before and after they were given); *State v. Wise*, 472 N.W.2d 278, 278–79 (Iowa 1991) (focusing on consequence of defendant's absence from court conversation with juror and noting defense counsel was present and voiced no objection to juror's continued presence on jury); *State v. Orozco*, 290 N.W.2d 6, 9 (Iowa 1980) ("Defendant's right to a fair and just hearing was not thwarted by his absence in this case, in view of the fact he gained virtually everything he requested and his right to assert the balance of his requests at a later date was preserved by the court's order."). This is consistent with the practice in at least one jurisdiction cited by the State. *See People v. Hovey*, 749 P.2d 776, 793 (Cal. 1988) (noting nothing was disclosed at in-chambers conference with attorney that might have led defendant to seek new counsel, defendant's counsel agreed to discuss matter with defendant and report back to court if defendant had questions about counsel's competence, and "[e]vidently, defendant expressed no such reservations").

Based on this precedent we are not persuaded by the State's argument that we should look to Powers's performance during the remainder of trial to determine whether the presumption of prejudice was rebutted. In our view, Powers's performance is not material to this harmless error analysis. What is material are the consequences of excluding Morris from the trial judge's conference with Powers. As will be seen, those consequences dovetail with our reasons for concluding that the conference was a "stage of the trial." *See Blackwell*, 238 N.W.2d at 136 (jointly examining violation of rule and whether violation was harmless).

Applying Iowa precedent, we conclude Morris's exclusion from the conference between the trial judge and Powers was presumptively prejudicial. We further conclude that the State did not affirmatively rebut the presumption of prejudice by proof beyond a reasonable doubt. The trial judge did not inform Morris that he intended to meet with Powers and Powers did not inform Morris about the nature of the meeting. Morris's second-chair attorney also did not inform Morris of her observations or suspicions and the State public defender did not inform Morris of his conversations with the judge or co-counsel. Morris was left completely in the dark. Unlike other cases in which defendants learned or were apprised of matters that took place outside their presence before it was too late to object, the State did not show that Morris had any inkling of the concerns about Powers until after the jury found her guilty. Morris did not object to Power's continued representation because she did not know she might have reason to object. *See Berness v. State*, 83 So. 2d 613, 619 (Ala.1955) ("[H]ad the defendant and his counsel been present at the time the judge investigated this misconduct on the part of the jurors, they may well have deemed it advisable to request the trial judge to press the investigation further or give additional instructions or admonishments to the recalcitrant jurors. Had they been present, the defense may well have deemed the misconduct of the jurors sufficient basis for a motion for a mistrial. The defendant did not learn of the exact nature of the judge's finding until he dictated a statement into the record on motion for new trial. We cannot, therefore, say that this was error without injury. We believe the motion for a new trial should have been granted."). As the district court stated, had Morris been a party to the in-chambers conversation, she "would have

insisted on a different course of action other than proceeding to trial on a murder charge with a lead attorney who smelled of alcohol for the first few days of trial." The presumption of prejudice was not rebutted and the district court did not err in granting Morris a new trial.

We find it unnecessary to decide the remaining issues raised by the parties, including the primary issue raised by Morris: whether Powers labored under a conflict of interest between his duty of loyalty to his client and his self-interest in preserving his employment. Our conclusion that Morris's presence was required during the conference between the trial judge and Powers is not predicated on this claimed conflict of interest but on Morris's right to develop a factual record on her attorney's use of alcohol during trial and her right to object to his continued representation of her after gaining knowledge of the assertions against him, knowledge which she did not glean until after trial.

We affirm the district court's grant of Morris's motion for new trial.

AFFIRMED.