

IN THE COURT OF APPEALS OF IOWA

No. 2-1190 / 12-0629

Filed June 26, 2013

DALE R. KOHLAND,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, John D. Telleen,
Judge.

Dale R. Kohland appeals from a district court order denying his application
for postconviction relief. **REVERSED AND REMANDED.**

Steven J. Drahozal, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney
General, and Michael Wolf, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Dale R. Kohland appeals from a district court order denying his application for postconviction relief. Kohland argues his trial counsel was ineffective in failing to move to suppress a confession Kohland argues was the result of an offer of leniency by police. Kohland also argues his counsel was ineffective in appealing his conviction only on sufficiency of the evidence grounds. Because we find counsel was ineffective in failing to file a motion to suppress and prejudice resulted, we reverse and remand for further proceedings not inconsistent with this opinion.

I. Background Facts and Proceedings

On July 7, 2007, two separate fires at 514 7th Avenue South, Clinton, Iowa, were reported to authorities by a resident of the apartment building. The resident, Dale Kohland, first reported a car fire and then reported a fire in the apartment across the hall from his own. The apartment had recently been vacated by Ron and Rachel Champion, who also owned the vehicle. Three days later, Clinton Police questioned Kohland, and he confessed to starting both fires.

Kohland's confession was given during an interview conducted by Corporal Colin Reid of the Clinton Police Department. During the course of the interview, Cpl. Reid made several statements that are important to this appeal. After advising Kohland that certain pieces of evidence might implicate him in the crimes, Cpl. Reid indicated that truthfulness during the interview would allow him to help Kohland. Cpl. Reid stated that people who were honest with the police would be helped differently than those who lied about their guilt and were later

implicated by evidence. Cpl. Reid told Kohland he would be allowed to leave the police station that day regardless of what information he provided, and although he would be held responsible for any illegal act committed, Cpl. Reid indicated Kohland might not go to jail and his level of responsibility would depend upon statements made during the interview. Kohland was also told there would be an opportunity to fix the problem if he were honest, and the case would proceed differently than in a criminal investigation following an honest statement. Kohland was charged with two counts of first degree arson on July 23, 2007.

The confession was used, without objection, as evidence during the trial. Kohland's counsel simply requested the full videotaped recording of the confession be shown. Following his conviction on both counts, Kohland appealed, and we affirmed his convictions. *See State v. Kohland*, No. 08-0227, 2008 WL 4877645 (Iowa Ct. App. Nov. 13, 2008).

Kohland filed his application for postconviction relief on November 23, 2008. An evidentiary hearing was held on November 22, 2011. The district court issued its ruling denying the application on January 13, 2012. In the ruling the district court concluded Kohland had not been coerced into confessing, and under a totality of the circumstances analysis, the confession was properly obtained. The court further concluded trial counsel was not ineffective because there were no valid grounds upon which the confession could have been suppressed.

II. Standard of Review

Claims of ineffective assistance of counsel raise constitutional issues. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). We review such claims de novo. *Id.* We examine the alleged error in light of the totality of the circumstances and examine the record as a whole. *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012).

III. Discussion

A. Preservation of Error

The State argues Kohland failed to preserve error on the issues presented for our review. It is the State's contention the district court ruled only on the totality of the circumstances test for involuntariness and did not address the evidentiary test under Iowa law.

It is fundamental that an issue must be both raised and decided by the district court for error to be preserved, and when the district court fails to rule upon an issue, the aggrieved party must raise the issue before the district court before proceeding on appellate review. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

Multiple bases exist under which a confession induced by promises of leniency may be challenged and suppressed. Challenges may be brought under both the Federal and Iowa Constitutions, or the confession may be challenged on an evidentiary basis. Federal courts employ a totality of the circumstances test, a process used in the district court's ruling. See *State v. McCoy*, 692 N.W.2d 6, 27–28 (Iowa 2005). Iowa courts traditionally apply an evidentiary, rather than a

constitutional test. *Id.* at 28. The State contends that because the district court did not address the evidentiary test it has not been preserved for appeal. We disagree.

In *State v. Madsen*, 813 N.W.2d 714 (Iowa 2012), our supreme court, on direct appeal, was presented with a similar procedural issue. In *Madsen*, a motion to suppress was argued on constitutional grounds only. 813 N.W.2d at 724. The court found, although the evidentiary test was not preserved for review, it could be argued as a part of an ineffective-assistance-of-counsel claim. *Id.* Ineffective-assistance-of-counsel claims are based upon the Sixth Amendment to the United States Constitution. *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). Because the district court ruled under both the state and federal constitutions, we find Kohland has preserved his ineffective-assistance-of-counsel claim under the federal constitution and can, within that framework, address the evidentiary claim on appeal.¹

B. Ineffective Assistance During Trial

Kohland contends his trial counsel was ineffective in failing to file a motion to suppress his confession.

To succeed on an ineffective-assistance-of-counsel claim, Kohland must prove his counsel failed to perform an essential duty and prejudice resulted from counsel's failure. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). When assessing the performance of counsel for sufficiency, we do not review trial

¹ Our supreme court has indicated a strong preference for the evidentiary test, and district courts are to apply that test before applying a totality-of-the-circumstances test. *Madsen*, 813 N.W.2d at 726 n.1.

tactics or strategy which are not clearly and obviously misguided. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). “[W]e will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail.” *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

Kohland’s trial counsel did not object to the introduction of the written confession nor the interrogation video during trial. Testifying during the postconviction trial, counsel explained his decision, saying, “I was unaware of any grounds on which the court would grant relief.” Counsel further explained the decision by expressing a belief that courts and juries are unreceptive to motions by counsel when there is little probability of the motion being sustained. It was also noted the presiding judge had indicated an unwillingness to suppress the confession during informal discussions.

Counsel’s decision in this case is substantially similar to a decision examined by our supreme court in *McCoy*, 692 N.W.2d at 27. In *McCoy*, trial counsel reviewed a confession allegedly induced by promises of leniency and indicated, “[I]t never occurred to him that he could move to suppress the defendant’s statements on the basis that the statements were involuntary.” 692 N.W.2d at 27. Trial counsel in the present matter provided a similar explanation. The *McCoy* court determined that because there was a valid basis to exclude the confession, counsel’s failure to move to suppress was a breach of an essential duty and ineffective. *Id.* at 29. At the time of trial it was well settled a breach of an essential duty occurs when trial counsel “does not attempt to suppress a

confession under our evidentiary test and the confessions were induced in violation of that test.” *Madsen*, 813 N.W.2d at 724.

The evidentiary test was best set out in *State v. Hodges*, 326 N.W.2d 345 (Iowa 1982). In *Hodges*, our supreme court indicated a confession must be suppressed on the basis of promises of leniency where the officer tells the defendant what advantage is available to be gained from truthfulness. 326 N.W.2d at 349. Officers are allowed to tell a defendant that being honest is better than withholding the truth, without crossing the line and mandating exclusion of the confession. *State v. Polk*, 812 N.W.2d 670, 674–75 (Iowa 2012). When police indicate they will inform the county attorney of the defendant’s cooperation, without more, there is no basis for exclusion under the evidentiary test. *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983).

In *Hodges*, the officer induced a confession by indicating the defendant would receive “better treatment and less severe punishment” if he confessed. 326 N.W.2d at 346. A promise that no charges would be filed was similarly impermissible in *State v. Kase*, 344 N.W.2d 223, 226 (Iowa 1984). In *Madsen*, promises that an advantage could be gained, the defendant could “go along with his life,” and that publicity could be avoided, failed the evidentiary test. 813 N.W.2d at 727 (internal marks omitted).

In the present matter, Cpl. Reid offered help and indicated people who confessed were helped differently than those who withheld the truth. Cpl. Reid repeatedly instructed Kohland he would be free to leave at the end of the interview regardless of what he said and truthfulness would allow Kohland to fix

any mistake. More disturbing, however, was when Cpl. Reid stated a confession would mean the case would proceed differently than if it continued as a criminal investigation. The obvious implication from this statement is Kohland's cooperation would prevent the case from being investigated as a criminal matter.

Cpl. Reid's repeated offers to help, that the case would be treated differently with Kohland's cooperation, and confessing would be a path to fixing the problem, are troubling. We find these statements are the equivalent of a promise for better treatment, as found in *Hodges*. The same can be said of Cpl. Reid's assurance that Kohland would be set free following the interview. See *Madsen*, 813 N.W.2d at 727. Cpl. Reid's statement that the case would be treated differently than a criminal investigation is impermissible and amounts to an assurance that no criminal charges would follow.² These statements go far beyond simply informing the prosecuting authorities of the defendant's cooperation and amount to an identifiable benefit being promised.

Using the evidentiary test there was sufficient basis to suppress the confession. Counsel's admission that he was unaware of this basis is a violation of his duty. See *State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) ("Competent representation requires counsel to be familiar with the current state of the law."). The informal statement by the district court that the confession would not be suppressed does not change the outcome. Counsel, at a minimum, was required to preserve this argument for appeal.

² Prior to authoring his written confession, Kohland was informed by Cpl. Reid that Cpl. Reid was not making any promises. Cpl. Reid also informed Kohland that he would be held accountable for his actions. We do not believe that these statements, after repeated impermissible inducements, are sufficient to cure the tainted interview process.

To succeed on his ineffective-assistance-of-counsel claim, Kohland must also demonstrate prejudice. *Hopkins*, 576 N.W.2d at 380. Prejudice is shown by demonstrating a reasonable probability the result of the proceeding would have been different but for counsel's error. *Id.* at 378. Prejudice must be shown by a preponderance of the evidence. *Clay*, 824 N.W.2d at 496.

During trial Kohland was tied to the fires in two ways. First, the evidence indicated lighter fluid was used to set the car fire, and Kohland kept lighter fluid in his home for the purpose of refilling his cigarette lighters. Second, the confession tied Kohland to both fires. Absent the confession, which was shown in video form to the jurors, the evidence tying Kohland to the fires was scarce. Testimony established that Kohland called 911 on each occasion and was seen standing in front of the building after the vehicle fire was underway. A neighbor testified she thought she saw a small bottle of lighter fluid on fire on the front seat of the car, and it was later determined Kohland kept lighter fluid in his apartment. There were indications of tensions between Kohland and Champion, but no eye witnesses tied Kohland to either fire, and no physical evidence aside from the lighter fluid was produced.³ Absent the confession, it is more likely than not Kohland would have been acquitted.⁴

³ Testimony also established that no accelerant, such as lighter fluid, was used in the apartment fire.

⁴ Because we have determined that counsel was ineffective in failing to move to suppress the confession during trial, we do not reach the issue of counsel's failure to raise the issue on direct appeal.

For these reasons we conclude the district court improperly denied Kohland's application for postconviction relief and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.