

IN THE COURT OF APPEALS OF IOWA

No. 2-547 / 11-1694
Filed October 17, 2012

BRANDON REEVES TYERMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Timothy J. Finn,
Judge.

Applicant appeals the district court decision denying his request for
postconviction relief from his convictions for stalking, going armed with intent,
and third-degree burglary. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish Kruidenier Dunn Boles
Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Stephen Holmes, County Attorney, and Travis Johnson, Assistant
County Attorney, for appellee State.

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

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

MAHAN, S.J.**I. Background Facts & Proceedings.**

On June 24, 2008, Brandon Tyerman was charged with stalking, a class D felony, in violation of Iowa Code section 708.11(2) and .11(3)(b)(1) (2007) (Count I); going armed with intent, a class D felony, in violation of section 708.8 (Count II); and burglary in the third-degree, an aggravated misdemeanor, in violation of section 713.6A (Count III).

The criminal trial commenced November 18, 2008. A jury found Tyerman guilty on all counts and sentencing followed. Tyerman's convictions were upheld on appeal. See *State v. Tyerman*, No. 09-0113, 2010 WL 787935, at *13 (Iowa Ct. App. Mar. 10, 2010). The court specifically preserved for possible postconviction proceedings a claim that Tyerman's attorney was ineffective for disclosing information in violation of the attorney-client privilege. *Id.*

On June 7, 2010, Tyerman filed an application for postconviction relief, claiming he received ineffective assistance because his attorney violated his attorney-client privilege. He also claimed his due process and fair trial rights were violated because the State was allowed to introduce evidence of the firearm during the trial. The case was submitted to the district court based on briefs, the criminal file, and a transcript from the federal proceedings.

The district court denied Tyerman's request for postconviction relief. The court noted that at the bond review hearing Tyerman appeared to consent to the disclosure of the gun in the hope of securing bond and sentencing concessions. The court also found attorney Peter Berger's testimony was more credible than Tyerman's. The court determined the tactical reasons of attempting to reduce

bond and time served justified disclosure, even if that attempt was ultimately unsuccessful. The court also found Tyerman had not shown he was prejudiced by Berger's conduct. The court found there was sufficient evidence, unrelated to the disclosure of the gun's location, to support a conviction for going armed with intent. The court additionally denied Tyerman's due process claim. Tyerman now appeals the decision of the district court.

II. Standard of Review.

Generally, we review an appeal from a denial of postconviction relief for the correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). When an applicant raises a constitutional claim as a basis for postconviction relief, we review the claim de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

III. Ineffective Assistance.

Tyerman contends he received ineffective assistance because Berger violated the attorney-client privilege. He claims the location of the firearm was a protected communication that should not have been revealed by Berger. He asserts he did not give informed consent to Berger. He notes that Berger did not inform him that if the location of the firearm was revealed there was a possibility he could be prosecuted in federal court. Tyerman also claims he was prejudiced by Berger's disclosure of the location of the gun because the State obtained additional evidence to use against him.

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d

638, 641 (Iowa 2008). Absent evidence to the contrary, we assume the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Generally, communications between an attorney and client are confidential, unless the client waives the right. Iowa Code § 622.10(1), (2). Under Iowa Rule of Professional Conduct 32:1.6(a), "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is [otherwise] permitted." The term "informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Iowa R. of Prof'l Conduct 32:1.0(e). A party claiming the attorney-client privilege has the burden to establish it. *State v. Tensley*, 249 N.W.2d 659, 661 (Iowa 1977).

"[T]he attorney-client privilege protects statements by a client revealing the location of the fruits or instrumentality of a completed crime." *Wemark v. State*, 602 N.W.2d 810, 816 (Iowa 1999). "Yet, the duty of a lawyer not to disclose the location of an instrumentality of a crime does not always mean disclosure to the prosecution compromises the right to effective counsel. Disclosure may be justified as a tactical choice or strategy." *Id.* at 817. Furthermore, ineffective assistance does not arise merely because trial strategy or tactics are unsuccessful. See *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009).

We agree with the district court's conclusion that Tyerman consented to or impliedly authorized the disclosure of the location of the gun in the hope of securing bond and sentencing concessions. We specifically note Tyerman's complaint was not that Berger disclosed the location of the gun, but that he disclosed the location without first obtaining bond or sentencing concessions. The transcript from the bond review hearing on September 22, 2008, reveals Tyerman agreed that at the request of the court and the prosecutor he had worked with Berger to locate the gun, "which everyone was worried about in this case." We conclude that by this statement he impliedly waived the attorney-client privilege concerning conversations about the location of the gun.

Additionally, at the bond review hearing Tyerman did not complain about Berger's representation, or raise any concerns about the attorney-client privilege. As exemplified by Tyerman's later decision to represent himself, Tyerman was clearly capable of speaking out when he felt it was in his best interests to do so. We also note the district court found Berger's testimony about the matter more credible than Tyerman's. See *Cox v. State*, 554 N.W.2d 712, 714 (Iowa Ct. App. 1996) (noting we give weight to the credibility findings made by the postconviction court). In sum, we conclude the evidence shows Tyerman agreed with Berger's tactical decision to disclose the location of the gun in an attempt to reduce his bond and the time he might serve. Disclosure is permissible when the client gives informed consent or impliedly authorizes disclosure. See Iowa R. of Prof'l Conduct 32:1.6(a).

However, even if we were to conclude there was no informed consent in this case, we determine Tyerman has not shown he was prejudiced by his

attorney's conduct. The following evidence was presented during the criminal trial: (1) Roberta Putney testified she observed Tyerman tucking a gun into his pants on June 5, 2008; (2) when she confronted Tyerman about the gun, he did not deny having it in his possession; (3) officers found bullets and a gun case for a 9 mm Beretta in Tyerman's vehicle; (4) Tim Yasunaga testified he owned a 9 mm Beretta, and the gun was missing for a period of time; (5) Tyerman had access to Yasunaga's home; (6) Tyerman had borrowed the gun from Yasunaga several months earlier; (7) Yasunaga identified the empty gun case and ammunition as additional items missing from his home; and (8) Daryn Foley testified he observed a box of bullets in Tyerman's vehicle. As the district court found, "[b]ased on the foregoing evidence, the Court finds the State presented sufficient evidence—unrelated to the disclosure of the gun's location—to support a conviction for the charge of Going Armed with Intent." Also, there was very limited evidence at the criminal trial concerning the discovery of the gun. Certainly, there was no evidence of the conversations between Tyerman and Berger.

Tyerman has not shown that, but for counsel's alleged errors, the result of the trial would have been different. We conclude Tyerman has not shown he received ineffective assistance of counsel.

IV. Due Process

Tyerman also contends that allowing the State to use evidence obtained in violation of the attorney-client privilege violated his due process and fair trial

rights under the United States and Iowa Constitutions.¹ He asserts the State should not have been permitted to introduce evidence about the gun at his criminal trial.

We first note that we have already determined Tyerman has not shown there was a violation of the attorney-client privilege because he waived that right by consenting to or impliedly authorizing the disclosure. See *Tensley*, 249 N.W.2d at 662 (finding there was no violation of the attorney-client privilege where defendant had waived that right). Second, even if Tyerman's attorney-client privilege had been violated, he has not shown his due process or fair trial rights were violated by the State.

"Substantive due process prevents the government 'from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'" *King v. State*, 818 N.W.2d 1, 31 (Iowa 2012) (citations omitted). Due process bars a conviction based on outrageous government conduct. *State v. Apt*, 244 N.W.2d 801, 803 (Iowa 1976). A federal court has stated:

[I]n order to raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the following three elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate

¹ The State has asserted this issue may not be addressed in the postconviction proceeding because Tyerman did not raise it in his direct appeal and he is unable to raise it as a claim of ineffective assistance of counsel because he represented himself at the criminal trial. See Iowa Code § 822.8; *State v. Martin*, 608 N.W.2d 445, 450 (Iowa 2000). In the direct appeal, however, Tyerman claimed "the cumulative effect of the district court's evidentiary and constitutional errors denied him a fair trial and due process." *Tyerman*, 2010 WL 787935, at *13. Like the district court, out of an abundance of caution, we will address the merits of Tyerman's postconviction due process claim.

intrusion into that relationship; and (3) actual and substantive prejudice.

United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996) (footnote omitted).

Here, there was clearly an attorney-client relationship between Tyerman and Berger. See *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). There is no evidence, however, that the State intruded upon that relationship. Also, as discussed above, Tyerman has not shown he was prejudiced by the disclosure of the location of the gun. Tyerman has not shown the State engaged in outrageous conduct; therefore, his due process and fair trial claims must be denied.

We affirm the decision of the district court denying Tyerman's application for postconviction relief.

AFFIRMED.