IN THE COURT OF APPEALS OF IOWA

No. 6-186 / 05-0517
Filed August 9, 2006

JAMES TERRENCE MOSLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

James Mosley appeals from the denial of his application for postconviction relief. **AFFIRMED.**

James E. Fitzgerald, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Timothy N. Schott, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

James Mosley appeals from the denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

In 1999, James Mosley was charged with second degree burglary, assault while participating in a felony, and indecent contact with a child. The State alleged Mosley had entered an occupied home without permission and assaulted a child in her bed. Following a bench trial, he was convicted of the burglary and assault charges, but was acquitted on the charge of indecent contact with a child. Mosley was thereafter sentenced as a habitual offender to fifteen years of imprisonment for each conviction with the terms to run consecutively.

Mosley appealed his convictions and sentence in 2001, contending his right to confrontation guaranteed by the Sixth Amendment was violated when the district court permitted the child witness to give her deposition and trial testimony outside of Mosley's presence. This court conditionally affirmed Mosley's convictions and sentence, reversed the district court's ruling on Mosley's motions challenging the child witness's testimony, and remanded the matter to the district court for reconsideration of Mosley's motions under the standard prescribed in *Maryland v. Craig*, 497 U.S. 836, 855, 110 S.Ct. 3157, 3169, 111 L. Ed. 2d 666, 685 (1990) (concluding confrontation rights are not violated if child is permitted to testify outside the presence of the defendant where (1) the procedure is necessary to protect child's welfare, (2) the defendant's presence would tend to traumatize the child, and (3) the emotional distress caused is more than *de minimus*). Following the limited remand, the district court, applying the

appropriate *Craig* factors, again overruled Mosley's motions challenging the admissibility of the child witness's testimony. Mosley appealed once again, but this court held that the trauma likely to be occasioned upon the child witness if she were required to testify in Mosley's presence justified the district court's decision to permit her testimony to be taken through closed circuit television.

In 2004, Mosley filed an application for postconviction relief alleging he was not afforded an adequate opportunity to confer with his trial counsel during the child's testimony, and that trial counsel was ineffective for failing to object to the inadequate communication procedures provided.[1] The district court denied Mosley's postconviction claim, concluding (1) error was not preserved because there was no reason justifying Mosley's failure to raise his ineffective assistance claim on either of his two direct appeals, and (2) even if the merits were reached, Mosley could not demonstrate the requisite prejudice because "[t]he procedure that was employed was designed to afford [Mosley] quick communication with his attorney even though electronic means were not used." Mosley now appeals, contending the district court erred in dismissing his application.

[1] The initial order granting the State's child witness motions directed that Mosley "shall be allowed to communicate with his attorney in the room where the minor is testifying by appropriate electronic means." *See* Iowa Code § 915.38 (1999). It is undisputed that no electronic system was made available to Mosley to allow real-time communication with trial counsel. Mosley was required to stay in the courtroom along with a deputy, and while Mosley could hear and see the child witness's testimony, if he wanted to confer with trial counsel, Mosley was directed to inform the deputy, who would then interrupt the testimony and retrieve trial counsel. It is also undisputed that Mosley made no such attempts to confer with trial counsel during the child's testimony. Trial counsel did come into the courtroom before the conclusion of his cross-examination of the child to inquire whether Mosley had additional questions he wished to have propounded. Mosley indicated at that time that he had none.

II. Scope of Review.

We review postconviction relief proceedings on claimed error. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, because of the constitutional implications inherent in claims of ineffective assistance of counsel, our review here is de novo. *State v. Mapp*, 585 N.W.2d 746, 747 (Iowa 1998).

III. Discussion.

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant bears the burden of demonstrating ineffective assistance of counsel, and both prongs of the claim must be established by a preponderance of the evidence before relief can be granted. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To prove prejudice from an alleged breach, Mosley must convince us "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. If Mosley fails to meet his burden with respect to either prong, his claim is without merit, and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

We acknowledge that Iowa Code section 814.7 (2005) – which removes the error preservation requirement that all ineffective assistance claims be first raised on direct appeal before being raised on application for postconviction relief – did not become effective until 2004, several years after Mosley's bench trial

and appeals took place. Despite this fact, we decline the State's invitation to affirm on this ground, and like the district court, we will address the merits of Mosley's application. After our de novo review of the record in this case, we affirm the district court's determination that Mosley failed to prove that but for trial counsel's allegedly deficient performance, the result of his trial would have been different.

First, it is undisputed that Mosley never availed himself of the non-electronic means of communicating with trial counsel. As such, we are unable to review the adequacy or efficiency of the mechanism provided, or the confidentiality the mechanism afforded. We note that in a similar case, our supreme court has held that a defendant's Sixth Amendment rights were satisfied where he was permitted to confer with counsel once before cross-examination of the shielded witness was completed. *See State v. Shearon*, 660 N.W.2d 52, 54-55 (Iowa 2003) (concluding that strict compliance with section 915.38's "electronic method" provision is not constitutionally required).[2] Here, not only did trial counsel return to the courtroom to inquire whether Mosley had additional questions he would like to ask the child witness before her testimony was complete, but Mosley was given the opportunity to interrupt the proceeding at any time to confer with counsel – an additional Sixth Amendment safeguard that was not afforded to the defendant in *Shearon*.

[2] We view the holding in *Shearon* as additional support for our conclusion that trial counsel was not under a duty to object to the method of communication afforded in this case as it exceeded what was found to be constitutionally adequate there. *See Shearon*, 660 N.W.2d at 54-55.

Second, Mosley has not indicated specific aspects of the child's testimony that he would have discussed with trial counsel if appropriate electronic communications had been provided; nor has he articulated specific questions that he would have asked trial counsel to propound if a more effective method of communication had been available. Because Mosley has claimed prejudice in such a conclusory manner, we are unable to conclude that a reasonable probability exists that the result of the trial would have been different if he had been provided with an electronic means of communication.

Finally, we conclude the State's evidence against Mosley overwhelmingly supports his guilt on both charges. *See State v. Tejeda*, 677 N.W.2d 744, 755 (Iowa 2004) (rejecting prejudice prong of ineffective assistance claim where the evidence of guilt is overwhelming). The child's mother, who had several minutes of interaction with the intruder, gave to the police a detailed description of the intruder matching Mosley's appearance when he was arrested in the neighborhood a short time after the burglary. She also discovered at the bottom of the stairs of her apartment building a paycheck stub bearing Mosley's name, and later made a positive identification of Mosley from a photo array.

Given the paucity of support for Mosley's claim that he was prejudiced by trial counsel's failure to demand a real-time electronic mechanism to facilitate attorney-client communication during the testimony of a shielded witness, we conclude the application for postconviction relief is without merit.

AFFIRMED.