IN THE COURT OF APPEALS OF IOWA

No. 6-337 / 04-1675
Filed July 12, 2006

DOUGLAS JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse, Judge.

Douglas Jones appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Wayne Reisetter, County Attorney, for appellee.

Considered by Sackett, C.J., and Miller, J., and Hendrickson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HENDRICKSON, S.J.

I. Background Facts & Proceedings

Douglas Jones seeks postconviction relief on his convictions for two counts of first-degree murder, in violation of Iowa Code sections 707.1 and 707.2 (1991), and one count of attempted murder, in violation of section 707.11. At Jones's criminal trial the State presented evidence that Jones, together with Harris Evans, Troy Mure, and Joey Wheels, went to a rural farmhouse in Dallas County on July 11 or 12, 1991, with the intent to steal drugs. During the course of the robbery, Shari Exline and Melissa Maharis were fatally shot. Jeffrey Thomas received a gunshot wound to the head, and survived, but had a limited memory about the incident. Wheels entered into a plea bargain with the State and agreed to testify in Jones's trial.

Jones appealed his conviction, raising the following issues: (1) Wheels's testimony was not sufficiently corroborated; (2) the trial court erred by admitting photographs and a videotape; (3) he was improperly prevented from impeaching Wheels and Carolyn McCullen, the mother of Mure; (4) the jury failed to constitute a fair cross-section of the community; (5) the trial court erred in permitting Thomas to testify; (6) the trial court failed to adequately assure that the jury understood his right to remain silent; (7) he should be granted a new trial based on juror misconduct; and (8) he should be granted a new trial based on newly discovered evidence. *State v. Jones*, 511 N.W.2d 400, 404-09 (Iowa Ct. App. 1993). We affirmed Jones's convictions. *Id.* at 410.

On November 28, 1995, Jones filed an application for postconviction relief (PCR). The application was amended in December 1995, and Jones raised the following issues: (1) he was denied a fair trial as a result of misleading publicity; (2) he was denied a fair trial based on misleading jury instructions; (3) he was denied a fair trial because he was not permitted to impeach Wheels and McCullen; (4) he was denied a fair trial because Thomas was permitted to testify despite his incompetence; (5) the district court improperly denied his motions for mistrial; (6) the prosecutor engaged in repeated misconduct; (7) there was insufficient evidence to convict him; (8) he was prejudiced by evidence alleging he forced two of the victims to engage in a sex act; (9) he received ineffective assistance of trial and appellate counsel for failure to preserve issues; (10) he received ineffective assistance because trial counsel failed to present an alibi defense; and (11) he received ineffective assistance because trial counsel advanced a defense that was not supported by the evidence.

For reasons not readily apparent from the record, Jones's PCR action languished for many, many years.[1] In April 2001, Jones filed a pro se amendment to his application, claiming he received ineffective assistance due to appellate counsel's failure to raise the issues he wanted to raise on appeal. He states appellate counsel should have argued the sufficiency of the evidence and ineffective assistance of trial counsel. The district court determined that because

[1] The postconviction application, and the amendment were filed by Michael R. Stowers, who subsequently left the practice of law. Maria Ruhtenberg was appointed in June 2000. Jones requested several times to have Ruhtenberg removed as his counsel, and these requests were denied.

Jones was represented by counsel all matters should be submitted by counsel, and it refused to consider Jones's pro se amendment to the application.

In August 2001, Jones filed a pro se memorandum in support of his claims. PCR counsel also filed a brief, stating she found no legal basis for issues I, II, IV, V, and VIII, and failing to address issue XI.[2] In May 2002, the district court entered an order stating:

> Applicant/Petitioner is represented by counsel. All motions, applications, letters to the court, etc. shall come through counsel. Pleadings, requests, etc. from the represented party except those relating to representation will be ignored.

Notwithstanding the court's order, Jones filed a pro se motion for summary judgment in July 2002. The court refused to consider the motion. Jones then filed a pro se motion seeking reconsideration of the court's refusal to consider his motion for summary judgment. No action was taken on this motion either.

In August 2003, Jones filed a pro se motion asking for a hearing on his PCR claims. The court stated it would not consider his pro se motion. In August 2004, PCR counsel filed a motion asking to have the matter set for a conference. On September 2, 2004, the case was submitted to the district court without hearing.

The district court entered an order on September 28, 2004. The court determined issues I through VII in the PCR application had been addressed and denied in the direct appeal. The court found no basis in the law for issue VIII,

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[2] In September 2001, Jones filed a motion seeking new counsel and asking to have PCR counsel's brief stricken. Ruhtenberg filed a motion seeking to withdraw, stating Jones had filed a complaint against her with the Iowa Board of Professional Ethics and Conduct. The district court took the matter under advisement pending a determination by the Board. In February 2002, the court entered an order stating the Board had dismissed the complaint. The court then overruled Jones's motions.

and no authority was cited for issue XI. The court then addressed issue IX, a general claim of ineffective assistance of counsel, and issue X, a claim of ineffective assistance for failure to present an alibi defense. The court found the trial strategy in the case was reasonable. The court denied Jones's claims for PCR relief.

On October 4, 2004, PCR counsel filed a notice of appeal on Jones's behalf. On October 7, 2004, Jones filed a pro se motion pursuant to Iowa Rule of Civil Procedure 1.904(2), asking for a ruling on his pro se issues. The district court determined it did not have jurisdiction to consider the post-trial motion because the case was on appeal.[3]

II. Standard of Review

Our scope of review in postconviction proceedings is for the correction of errors of law. Iowa R. App. P. 6.4; *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We review constitutional claims, such as ineffective assistance of counsel, de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

III. Pro Se Claims

Jones contends the district court should have considered his pro se claims.[4] He relies upon *Leonard v. State*, 461 N.W.2d 465, 468 (Iowa 1990), which provides:

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[3] On appeal, Jones filed a motion for a limited remand to allow the district court to address the issues raised in his post-trial motion. The motion for limited remand was denied by the Iowa Supreme Court.

[4] To the extent the motion for summary judgment raises new issues, we do not consider those issues. The Iowa Rules of Civil Procedure governing summary judgment are controlling in PCR actions. *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002). A motion for summary judgment is based upon the *pleadings*, depositions, answers to

> A postconviction relief applicant may file applications, briefs, resistances, motions, and all other documents the applicant deems appropriate in addition to what the applicant's counsel files. This qualification should give the applicant assurance that all matters the applicant wants raised before the district court should be considered.

The State asserts that Jones's pro se claims were without merit and that Jones was not prejudiced by the district court's failure to address his claims.

A. In his pro se amended application for PCR relief, Jones claims he received ineffective assistance due to appellate counsel's failure to raise the issue of sufficiency of the evidence in the direct appeal. We find the issue of sufficiency of the evidence was addressed in the appeal, where we stated:

> The total evidence presented against defendant was not overwhelming but was unquestionably sufficient to support a guilty verdict. Evidence corroborating Wheels's testimony is not without contradiction, but it does exist. Whether it was sufficient was for the jury to decide. We find defendant's claims of insufficient evidence and lack of corroboration are without merit.

Jones, 511 N.W.2d at 405.

Jones also claims appellate counsel was ineffective for failing to raise any issues of ineffective assistance of trial counsel. He does not state, however, what claims of ineffective assistance of trial counsel should have been raised on appeal. "When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). An applicant should state the specific ways in which counsel's performance was inadequate and how

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interrogatories, admissions on file, and affidavits, if any. Iowa R. Civ. P. 1.981(3) (emphasis added). Jones did not seek to make an amendment to the PCR application after the 2001 motion to amend. In other words, we do not deny these issues based on the fact that they were raised pro se, but because they were raised improperly through a motion for summary judgment.

competent representation would have changed the outcome of the trial. *Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999). We conclude Jones has not adequately specified how appellate counsel was ineffective.

B. Jones also filed a pro se memorandum in support of all eleven issues raised in the amended PCR application filed in December 1995. After PCR counsel filed a brief stating there was no basis for five of the issues, Jones filed a motion seeking to strike PCR counsel's brief. The only issues which were arguably denied by the district court, however, based on lack of support or argument in the brief were issues II, VIII and XI. Except for issue II (misleading jury instructions), VIII and XI, all other issues were fully considered by the district court, even though Jones believes they were abandoned by PCR counsel.[5]

With respect to issue II, Jones contends his due process rights were violated when the jury was instructed as follows:

> In determining the specific intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follows his act.

This instruction was extensively discussed and approved in *State v. Gates*, 306 N.W.2d 720, 723-25 (Iowa 1981). We conclude that notwithstanding the fact the district court did not address this issue a remand is unwarranted because the claim lacks any potential merit and postconviction relief would not be appropriate.

We will consider issues VIII and XI as though they had been raised as pro se arguments. Issue VIII claims the district court improperly admitted irrelevant

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[5] The State points out that the district court found issue II, that the jury instructions were misleading, had been addressed in the direct appeal, when in fact it had not. We note this issue was not denied because the district court failed to consider Jones's pro se arguments.

and prejudicial evidence that Jones had forced two of the victims to engage in a sex act. We note that evidence immediately surrounding an offense is admissible in order to show the complete story of the crime, even when it shows the commission of another crime. *State v. Veal*, 564 N.W.2d 797, 812 (Iowa 1997); *State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998). The evidence was relevant because it helped establish Jones's participation in the crime. Wheels testified Jones stated he had forced Maharis and Thomas to engage in a sex act. The bodies of Maharis and Thomas were naked when they were found, and the medical examiner testified that the position of their wounds was consistent with the explanation that they had been engaged in a sex act when they were shot. We conclude Jones is not entitled to postconviction relief on this issue.

Issue XI claimed trial counsel was ineffective in advancing a defense that was not supported by the existence of any physical evidence. The defense attempted to show some witnesses had ulterior reasons to implicate Jones in the crimes, and that their testimony was not credible. The defense also attempted to show that the shootings could have been committed by Exline's cousin, David Vestal. Generally, erroneous trial strategies and professional judgments do not translate into ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). Trial strategies and tactics must be reasonable under the totality of the circumstances. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). We conclude Jones has failed to show that he received ineffective

assistance due to counsel's choice of a defense in this case. Defense counsel had valid strategic reasons to advance this defense instead of an alibi defense.

We conclude Jones is not entitled to relief on his pro se claims.

IV. Ineffective Assistance

Jones asserts he received ineffective assistance from his trial, appellate, and PCR counsels. He claims trial counsel should have objected to statements by the prosecutor vouching for the credibility of the State's witnesses and giving the personal opinion that Jones was guilty.[6] He claims appellate and PCR counsel should have raised this issue. 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. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

Jones claims defense counsel should have objected to the following statements by the prosecutor during closing arguments:

> What you will read in here, there is a lot of words, but it gets down to this bottom line, Joey Wheels doesn't tell the truth, he serves life.
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> And I can't think of any better incentive to tell the truth. And maybe you didn't like him. I didn't expect you to like him. He told the truth, he got up and took that oath and subjected himself to all questions.
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> . . . .
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> . . . Carolyn McCullen, even though her son faces the same as this defendant, testified to the truth of the matter.
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> . . . And likewise with Claudia Mure, who went in the house and got the attitude, but she still, in spite of the fact that she's married to another one of these defendants, relates the truth.
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> . . . .
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> . . . Forensic evidence that again support, verifies to you that all you, although you may not like him, it is the truth.

[6] In the direct appeal, Jones raised a different issue regarding prosecutorial misconduct. There he claimed that during closing arguments the prosecutor drew an adverse inference from the fact that he did not testify. *Jones*, 511 N.W.2d at 408.

> . . . .
> . . . Why would [Wheels] tell us unless he's telling the full truth.

During rebuttal the prosecutor stated:

> If you know he's guilty, you have no reasonable doubt. And you know he's guilty.
> . . . This defendant participated in a robbery. He was one of the originators of the plan. He is equally responsible. And that's what you must say, what you must say is guilty.

A prosecutor is precluded from using argument to vouch personally for a defendant's guilt or a witness's credibility. *State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003). "This is true whether the personal belief is purportedly based on knowledge of facts not possessed by the jury, counsel's experience in similar cases, or any ground other than the weight of the evidence in the trial." *Id.* On the other hand, a prosecutor may craft an argument that includes reasonable inferences based on the evidence. *State v. Carey*, 709 N.W.2d 547, 556 (Iowa 2006). When a case turn on which of two conflicting stories is true, a prosecutor may argue, based on the evidence, that certain testimony is not believable. *Id.* In creating an argument, a prosecutor may not use "overinflammatory means that go outside the record or threaten to improperly incite the passions of the jury." *Id.*

As noted above, the defense in this case argued that certain witnesses against Jones had testified he was involved in the crime because they were biased against him, not because he was actually involved in the crime. The prosecutor then, could properly point out to the jury evidence in the record to support his claim the State's witnesses were credible. *See id.* The prosecutor's

argument did not specifically state that he believed the witnesses were credible, and he did not rely on information outside the evidence. We determine defense counsel had no duty to object to the prosecutor's statements. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (noting that counsel is not ineffective for failing to pursue a meritless issue).

Additionally, Jones was required to show that the result of his trial would have been different if defense counsel had objected to the prosecutor's statements. *See Bowman v. State*, 710 N.W.2d 200, 208 (Iowa 2006). Jones has failed to show that but for counsel's alleged unprofessional errors, the result of the trial would have been different. *See Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005). We conclude Jones has failed to show he received ineffective assistance of counsel.

We affirm the decision of the district court which denied Jones's claims for postconviction relief.

AFFIRMED.

Miller, J., concurs specially.

MILLER, J. (concurs specially)

I fully concur in the result, and write separately only to suggest the trial court had no obligation to consider any claims or issues Jones attempted to raise by the proposed amendment and motions that he filed by himself, and that this court on appeal thus has no obligation to address the substance of any claims or issues he attempted to raise by those filings alone.

Jones was at his request at all relevant times represented by appointed counsel. In the absence of an exception[7] provided by a constitution, statute, rule, or case law, the general rule is:

> A party to an action is entitled either to act as his own attorney or to have as his representative an attorney of his own choice or selection; but ordinarily there is no right to representation both pro se and by one's attorney.

7A C.J.S. *Attorney & Client* § 167, at 243 (1980). Cases from jurisdictions other than Iowa, both federal and state, and both civil and criminal, hold that simultaneous representation by counsel and self-representation is not allowed. A few of the many such cases are sufficient to establish the point.

Although a person possesses the right to appear in person and conduct the prosecution of his own case, he does not possess the fundamental right to also have the aid of counsel. *Brasier v. Jeary*, 256 F.2d 474, 476-78 (8th Cir. 1958). Even an attorney who is a party to a lawsuit has no right to proceed pro se in a case in which he and his co-defendant law firm are represented by

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[7] *See, e.g.,* Iowa R. App. P. 6.13(2) (allowing a defendant in a criminal case or an applicant for postconviction relief to file a pro se supplemental brief on appeal); *Leonard v. State*, 461 N.W.2d 465, 468 (Iowa 1990) (holding that an applicant for postconviction relief whose request to dispense with court-appointed counsel is denied may file pro se applications, briefs, resistances, motions, and other documents).

retained counsel. *Frank M. McDermott*, *Ltd. v. Moretz*, 898 F.2d 418, 422 (4th Cir. 1990). "[T]he rights of self-representation and representation by counsel may not be both exercised at the same time." *Lanigan v. LaSalle Nat'l Bank*, 609 F. Supp. 1000, 1002 (N.D. Ill. 1985). "Ordinarily, a court will not consider *pro se* submissions from a party represented by counsel." *Non-Punitive Segregation Inmates v. Kelly*, 589 F. Supp. 1330, 1335 (E.D. Pa. 1984).

"A person who is represented by counsel in litigation has no right to personally conduct any aspect of the litigation except through counsel." *Lincoln v. Lincoln*, 746 P.2d 13, 15 (Ariz. App. 1987). A party may be heard only through the attorney who, while remaining attorney of record has exclusive management and control of the action. *Waite v. Wellington Boats, Inc.*, 459 So.2d 431, 432 (Fla. Dist. Ct. App. 1984). Although the Georgia Constitution allows self-representation by a lawyer who is also represented by an attorney, a non-lawyer may not engage in self-representation while represented by an attorney. *Seagraves v. State*, 376 S.E.2d 670, 672 (Ga. 1989). An Iowa civil case is to the same general effect as the foregoing cases. *See Shores Co. v. Iowa Chemical Co.*, 222 Iowa 347, 350, 268 N.W. 581, 582 (1936).

Essentially the same rule applies in criminal cases as in civil cases, and it makes no difference whether counsel is retained or appointed. "The right of a criminal defendant to represent himself is guaranteed by the United States Constitution. However, a defendant must choose between his right to court-appointed counsel and his right to conduct his own defense." *People v. Gravitt*, 317 N.W.2d 330, 331 (Mich. Ct. App. 1982); *People v. Ramsey*, 280 N.W.2d 840,

842 (Mich. Ct. App. 1979) (same). The New York Court of Appeals has held that a defendant appealing a criminal conviction has no right to represent himself on appeal while represented by appointed counsel. *See People v. White*, 539 N.E.2d 577, 583 (N.Y. 1989). In doing so, it cited certain of its previous cases holding that in the trial court a defendant in a criminal case has no right to act as co-counsel with an appointed attorney. *See id.* at 582.

The general rule in criminal cases is thus that ordinarily, except for the authority over certain basic decisions such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. *See, e.g., Sims v. State*, 295 N.W.2d 420, 425 (Iowa 1980); *State v. Johnson*, 714 S.W.2d 752, 766 (Mo. Ct. App. 1986) (same); *White*, 539 N.E.2d at 582-83 (same). This right of appointed or retained counsel to control the course of a case except as to certain basic decisions would of course include the right to determine what claims or issues to present and what motions to make and pursue.

Another logical exception to the general rule is that even when a litigant has had counsel appointed the court can and should entertain certain motions or responses filed by a party represented by counsel, including motions seeking the removal of counsel or the appointment of substituted counsel and making a substantial complaint about the performance of counsel. *See, e.g., State v. Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983) (stating and citing cases in support of the rule that in cases involving counsel appointed to represent a defendant in a

criminal proceeding the court is required to hold a hearing when defendant makes a substantial complaint about counsel, and must appoint substitute counsel if the defendant demonstrates sufficient cause). Finally, as yet another exception to the general rule, a represented party may always submit a response to a motion by counsel to withdraw. *Non-Punitive Segregation Inmates*, 589 F. Supp. at 1336.

Jones was at his request represented by appointed counsel at all relevant times. He does not claim or show that any exception to the general rule prohibiting self-representation while by choice represented by counsel applied to his proposed amendment to his application for postconviction relief or to any of the various motions he filed. The case should therefore be treated as if the trial court had correctly refused to consider those filings and no error was preserved concerning the matters Jones attempted to present through them. We should thus have no obligation to address on appeal the substance of any claims or issues arising solely as a result of the proposed amendment and motions.