

**IN THE COURT OF APPEALS OF IOWA**

No. 6-572 / 05-1493  
Filed August 23, 2006

**JOHN BUENAVENTURA,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

John Buenaventura appeals the denial of his application for postconviction relief. **AFFIRMED.**

Wallace Taylor, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Harold Denton, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee State.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

**HUITINK, P.J.**

John Buenaventura appeals the denial of his application for postconviction relief.

***I. Background Facts and Proceedings.***

Buenaventura is a Philippine national. He resided with his wife (Shirley), their daughter, and Shirley's sister (Sally Malacas) in an apartment in Cedar Rapids. On March 8, 2001, Shirley was working the night shift at the nursing home where both she and Sally worked. When Shirley returned home the next morning, Sally was gone, but Sally's purse was in the apartment. Later in the day, Shirley and Sally's friends began to look for her. Buenaventura did not join the efforts to find Sally; instead he rented a carpet cleaner and cleaned the carpets in the apartment where they lived.

When Sally was not found, the police were notified that she was missing. On March 11, 2001, Sally's body was found in a utility closet of the apartment building. Sally's body was fully clothed, and she was wearing her coat. The autopsy revealed that she had been dead for approximately two and one-half days. She had been beaten, and her death resulted from severe head injuries. Before an autopsy was performed, samples were taken for a rape kit. The samples were not tested because there were no signs that she had been sexually assaulted.

The police talked with Buenaventura at the police station on March 11, 2001. Buenaventura waited in a room at the police station for four hours while the police interviewed other witnesses. At 8:00 p.m. the detectives began their interview with Buenaventura. Buenaventura was read his *Miranda* rights, and he

signed a waiver-of-rights form. He did not request an attorney. The police knew Buenaventura was a Philippine national. The police did not inform him that he had a right to contact the Philippine consulate under the Vienna Convention on Consular Relations.

During the interview, Buenaventura stated he had last seen Sally when she had taken Shirley to work on March 8, 2001. He denied cleaning the carpets on March 9, 2001, and only admitted to cleaning the carpets after the police confronted him with this information. He claimed to have been cleaning the carpets to remove cosmetic stains in order to get the security deposit from the landlord when they moved. Buenaventura acknowledged that they had no intention of moving in the immediate future. Buenaventura took a polygraph test. The detectives informed Buenaventura that the results of the polygraph indicated he was lying. Buenaventura did not provide any additional information and requested an attorney. At that time, the police stopped their questioning and allowed Buenaventura to go home.

While investigating the apartment, the police found that the carpet pad and the underside of the carpet were covered in Sally's blood. The police also found blood and a large amount of detergent in the family vacuum cleaner. The police interviewed neighbors who stated that in the early morning hours of March 9, 2001 they heard a woman screaming and a man yelling.

At Sally's funeral, Buenaventura saw the detectives after the service and asked them why they were there. One of the detectives asked Buenaventura if he would speak with them. The detectives cautioned Buenaventura that they could not speak to him unless Buenaventura agreed to waive his right to an

attorney. Buenaventura agreed to waive his right to an attorney and went to the police station to talk with the detectives.

After being read his *Miranda* rights, Buenaventura again signed a waiver-of-rights form that specifically stated he did not wish to have an attorney. The detectives confronted Buenaventura about the blood in the vacuum cleaner. Buenaventura told the detectives that he killed Sally with twelve blows to the head with his fists. Later he stated that he used a wooden baseball bat. Immediately after making the confession, Buenaventura again denied he killed his sister-in-law and asked to speak with the pastor of his church.

Around midnight, the pastor arrived. The pastor allowed the police to listen to his conversation with Buenaventura. Several times the pastor reminded Buenaventura that he could ask for an attorney. Buenaventura did not ask for an attorney. Buenaventura decided to give a written statement.

Buenaventura's written statement varied from his earlier recitations of the events of March 8, 2001. Buenaventura stated that when he returned home from taking his wife to work at 11:00 p.m., Sally was at the apartment. He and two other men started smoking marijuana together. He did not know the two men, but when he saw that they were smoking marijuana, he invited them into his apartment. He could not describe the men because he was high. Buenaventura said Sally was mad about the two men being in the apartment. She got in her truck and left. After the two men left, he went to sleep in his bedroom. He woke up later that night around 4:00 a.m. and saw blood on the carpet in Sally's room. After seeing the blood, he knew Sally was dead and he felt responsible. He tried to clean up the blood with detergent and a vacuum cleaner but was

unsuccessful. On March 9, 2001, he rented a carpet cleaner to get the blood stains from the carpet.

After the police read his statement back to him, Buenaventura vomited because he was so upset. He signed the statement, and the police arrested him for murder. Once Buenaventura was arrested, the police notified the Philippine consulate in Chicago by voicemail and facsimile. Buenaventura was charged with first-degree murder. He moved to suppress his statements made to the police, arguing the statements were not voluntary and were obtained in violation of Article 36 of the Vienna Convention. He maintained he should have been informed of his right to contact the Philippine consulate. He argued he had a right to consultation prior to giving any statement to the police. The trial court denied his motion. Buenaventura was found guilty of first-degree murder at trial. The Iowa Supreme Court affirmed his conviction and preserved his claims of ineffective assistance of counsel for postconviction relief. *State v. Buenaventura*, 660 N.W.2d 38 (Iowa 2003).

Buenaventura filed an application for postconviction relief, and the trial court denied his application. On appeal, Buenaventura argues the following points:

- I. Mr. Buenaventura was denied effective assistance of appellate counsel regarding suppression of his statement to police.
- II. Mr. Buenaventura was denied effective assistance of appellate counsel regarding the district court's exclusion of evidence.
- III. Mr. Buenaventura was denied effective assistance of appellate counsel in presenting the issue of insufficiency of the evidence.
- IV. Mr. Buenaventura was denied effective assistance of trial counsel in investigation of this case.

## **II. Standard of Review.**

Ordinarily postconviction proceedings are law actions. *Collins v. State*, 588 N.W.2d 322, 401 (Iowa 1998). When a constitutional claim is implicated, appellate review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

## **III. Vienna Convention.**

To establish a claim of ineffective assistance of counsel, the defendant must show (1) counsel failed to perform an essential duty and (2) prejudice resulted from this failure. *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). If the postconviction petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. *Bear v. State*, 417 N.W.2d 467, 472 (Iowa Ct. App. 1987).

There is a strong presumption that the performance of counsel falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). “Mistakes in judgment are not enough to establish ineffective assistance of counsel.” *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987). “Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel.” *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). “Where counsel’s decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel.” *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). We require more than that trial strategy backfired or that another attorney

would have prepared and tried the case somewhat differently. *Bear*, 417 N.W.2d at 472.

In terms of an appeal, “an attorney is . . . not required to raise every colorable issue at the risk of burying good arguments.” *Foster v. State*, 378 N.W.2d 713, 717 (Iowa Ct. App. 1985). When determining which issues to present on appeal, appellate “counsel must be discerning in the determination of those issues to be presented on appeal with an idea of presenting the most effective argument.” *Arnold v. State*, 540 N.W.2d 243, 247 (Iowa 1995). We have held:

A heavy professional responsibility devolves upon an appellate lawyer when it comes to assessing possible assignments of error. Of course error is waived if it is not assigned. On the other hand most experienced appellate lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint. Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal.

*Cox v. State*, 554 N.W.2d 712, 716 (Iowa Ct. App. 1996).

Buenaventura argues that his appellate counsel was ineffective for failing to argue his Sixth Amendment right to counsel was violated because he was not informed that he could contact the Philippine consulate as permitted by the Vienna Convention. The district court rejected Buenaventura’s argument, finding he was not prejudiced by the detectives’ failure to inform him that he had a right to contact the Philippine consulate.

The Vienna Convention was drafted to “contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems.” *Sanchez-Llamas v. Oregon*, \_\_\_ U.S. \_\_\_, \_\_\_, 126 S. Ct.

2669, 2674, \_\_\_ L. Ed. 2d \_\_\_\_, \_\_\_\_ (2006) (*Vienna Convention on Consular Relations* art. 36, Apr. 24, 1963, 21 U.S.T. 79, 100-101, T.I.A.S. No. 6820).

“Article 36 of the Convention concerns consular officers’ access to their nationals detained by authorities in a foreign country.” *Sanchez-Llamas*, \_\_\_ U.S. at \_\_\_\_, 126 S. Ct. at 2675, \_\_\_ L. Ed. 2d at \_\_\_\_\_. The Article states as follows:

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or custody pending trial or is detained in any other manner.

*Id.* (Art. 36(1)(b), *id.* at 101). “In other words, when a national of one country is detained by authorities in another the authorities must notify the consular officers of the detainee’s home country if the detainee so requests.” *Sanchez-Llamas*, \_\_\_ U.S. at \_\_\_\_, 126 S. Ct. at 2675, \_\_\_ L. Ed. 2d at \_\_\_\_\_. “Article 36(1)(b) further states that ‘[t]he said authorities shall inform the person concerned [*i.e.*, the detainee] without delay of his rights under this sub-paragraph.’” *Id.* The Article sets out procedures for notifying the consular officers.

The issue of whether the Vienna Convention grants individuals enforceable rights is undecided. *Id.*; *Buenaventura*, 660 N.W.2d at 45; *Ledezma*, 626 N.W.2d at 150. Accepting the principle that *Buenaventura* had an enforceable right to be informed that he could contact the Philippine consulate, his statements to the detectives would not have been suppressed. The supreme court determined that “the exclusionary rule simply does not apply to evidence obtained in violation of Article 36.” *Buenaventura*, 660 N.W.2d at 45. The United States Supreme Court has stated that it is “unnecessary to apply the exclusionary rule where other constitutional and statutory protections—many of

them already enforced by the exclusionary rule—safeguard the same interests . . . advanced by Article 36.” *Sanchez-llamas*, \_\_\_ U.S. at \_\_\_, 126 S. Ct. at 2682, \_\_\_ L. Ed. 2d at \_\_\_\_.

Buenaventura was informed of his right to counsel. He was read his *Miranda* rights twice and at one point exercised his *Miranda* rights by requesting an attorney. Buenaventura’s pastor repeatedly reminded Buenaventura that he could request an attorney. Buenaventura opted to waive his right to counsel. Buenaventura admitted at trial that he understood he could have a lawyer. Accordingly, we find the argument that Buenaventura’s Sixth Amendment right to counsel was violated without merit and appellate counsel was not ineffective for failing to raise this issue. Appellate counsel is not required to raise a meritless claim. *State v. Jackson*, 387 N.W.2d 623, 632 (Iowa Ct. App.1986). Therefore, appellate counsel did not breach a duty to Buenaventura.

#### ***IV. Motion in Limine.***

Buenaventura further maintains that his appellate counsel was ineffective in how he challenged the district court’s ruling on the motion in limine. There was evidence that prior to her death, Sally was the victim of acts of harassment and vandalism. The district court excluded this evidence, because the vandalism was too remote in time to her murder and not accompanied by threats against Sally. Additionally, the evidence of harassment consisted of statements made by Sally to other people, and therefore the district court excluded these statements as hearsay.

On direct appeal Buenaventura’s counsel argued that the district “court’s ruling was wrong and prevented him from presenting his defense—that another

person harbored malice toward [Sally] and was responsible for her murder.” *Buenaventura*, 660 N.W.2d at 50. The supreme court found that the district court was correct in not admitting the evidence because it was irrelevant and too remote “to establish the victim was murdered by someone other than the defendant.” *Id.* at 51. Buenaventura is now arguing the district court’s ruling was a violation of his constitutional right to due process and his appellate counsel was ineffective in failing to raise the issue as a constitutional issue.

“Rules of evidence are formulated for the very purpose of assuring fair trials.” *State v. Veal*, 564 N.W.2d 797, 809 (Iowa 1997) *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 253 (Iowa 1998). Appellate counsel testified that he recognized that Buenaventura had a due process right to present a defense, but that the courts are not required to admit otherwise inadmissible evidence. We find the argument that appellate counsel’s failure to argue the ruling violated Buenaventura’s constitutional rights is without merit. Not only was this issue inherently decided on direct appeal when the supreme court affirmed the evidentiary rulings, but appellate counsel considered the argument and believed it to be meritless. Appellate counsel is entitled to be discerning in deciding which issues to present on appeal, favoring the most effective arguments. *Arnold*, 540 N.W.2d at 247.

#### ***V. Insufficient Evidence to Corroborate Confession.***

Buenaventura further argues that his appellate counsel was ineffective for failing to argue there was insufficient evidence to corroborate Buenaventura’s confession. Iowa Rule of Criminal Procedure 2.21(4) provides that “[t]he confession of the defendant, unless made in open court, will not warrant a

conviction, unless accompanied with other proof that the defendant committed the offense.” “Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime.” *State v. Polly*, 657 N.W.2d 462, 467 (Iowa 2003) (quoting *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994)). “The State must offer evidence to show the crime has been committed.” *Polly*, 657 N.W.2d at 467. “The ‘other proof’ itself does not have to prove the offense beyond a reasonable doubt or even by a preponderance.” *Id.* (quoting Iowa R. Crim. P. 2.21(4)). The “other proof” must merely fortify “the truth of the confession, without independently establishing the crime charged.” *Smith v. United States*, 348 U.S. 147, 156, 75 S. Ct. 194, 199, 99 L. Ed. 192, 209 (1954)). The “other proof” must sustain “the essential facts admitted sufficiently to justify a jury inference of their truth.” *Id.* (quoting *United States v. Lopez-Alvarez*, 970 F.2d 583, 590 (9th Cir. 1992)).

Here, there was sufficient corroborating evidence to support a jury’s inference of guilt. In Buenaventura’s first statement to the detectives, he denied renting a carpet cleaner to clean blood from the carpet. Later after being confronted with the detectives’ knowledge that he rented a carpet cleaner, Buenaventura admitted to cleaning blood from the carpet. Buenaventura admitted to using a vacuum cleaner and detergent to clean up Sally’s blood. “We have said that a defendant’s inconsistent statements are probative circumstantial evidence from which the jury may infer guilt.” *State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984). The neighbors were reported to have heard a man yelling and a woman screaming on the night Sally went missing. There was no forced entry into the apartment. There was evidence Buenaventura disapproved of Sally’s

religion and the person with whom Sally was romantically involved. Buenaventura wanted Sally to date a friend of his in the Philippines.

Moreover, appellate counsel considered this issue and stated that

[E]ven the admissions were corroborated by all the other evidence the State presented, including his rental of a carpet cleaner, the finding of the blood in the carpet cleaner, the presence of all the carpet cleaning agents in his house, the blood on the carpet in the house or the apartment.

Appellate counsel did not believe that a lack of corroborating evidence was a “legitimate claim.” Accordingly, we find that appellate counsel considered the argument and was not ineffective for failing to raise this argument based on existence of corroborating evidence from which a jury could infer guilt.

#### ***VI. Trial Counsel’s Failure to Investigate.***

Buenaventura’s final argument is that appellate counsel failed to raise the argument that trial counsel was ineffective for not thoroughly investigating the case against Buenaventura. He maintains trial counsel should have had the rape kit tested and investigated other people who may have wanted to start romantic relationships with Sally. Additionally, his trial counsel did not take action in response to receiving a letter from an inmate at the Linn County Correction Center refuting evidence that Buenaventura confessed to killing Sally while in jail.

The function of defense counsel is to apply “professional judgment to an infinite variety of decisions in the development and prosecution of the case.” *Schrier v. State*, 347 N.W.2d 657, 661 (Iowa 1984). “A determination whether any given action or omission by counsel amounted to ineffective assistance cannot be divorced from consideration of the peculiar facts and circumstances that influenced counsel’s judgment.” *Schrier*, 347 N.W.2d at 661-62. Defense

counsel's duty to investigate "is a subset of the overall duty of defense counsel." *Id.* When the issue of investigation depends on the availability of funds, counsel must show the funds are necessary to further investigation of specific evidence and how the evidence is material to the defense. *Id.* "[C]ourts have recognized that the duty to investigate and prepare a defense is not limitless." *Id.* "It does not require that counsel pursue 'every path until it bears fruit or until all conceivable hope withers.'" *Id.* (quoting *United States v. Tucker*, 716 F.2d 576, 584 (9th Cir. 1983)). "The extent of the investigation required in each case turns on the peculiar facts and circumstances of that case." *Id.*

The rape kit performed was not tested by the prosecution or defense counsel despite Buenaventura's request the rape kit be tested. The autopsy did not reveal any evidence of sexual assault. Additionally, a separate doctor performed a sexual assault examination on the victim's body before the autopsy, and there was no evidence of sexual assault. There were superficial perineal abrasions that alone were not necessarily indicative of sexual assault. There was no semen or other fluid found in the victim's vagina.

Buenaventura's trial counsel testified that he did not have the rape kit tested.

[T]he reason why it would not have been tested was because we questioned the pathologist who did the postmortem about any evidence of sexual assault, and as I recall, he answered those questions at deposition and maybe also at trial that there was no evidence whatsoever that the victim had been sexually assaulted.

Buenaventura testified that at the time he requested the rape kit be tested, his attorneys told him they were afraid the results would implicate Buenaventura. The testimony indicates that Buenaventura's trial counsel made a strategic

decision not to have the rape kit tested based on the fact that there was no evidence of sexual assault and despite Buenaventura's assurances there was a possibility the results of the test would implicate him. This decision was a strategic choice that does not rise to a level of a breach of trial counsel's duty.

Buenaventura argues that trial counsel should have investigated other possible witnesses who were seeking a romantic relationship with Sally. The State argues Buenaventura cannot raise this argument because he did not preserve it on direct appeal. Iowa Code section 814.7 as amended no longer requires a defendant to raise ineffective assistance of counsel issues on direct appeal to preserve them for postconviction relief. *Young v. State*, No. 03-0277 (Iowa Sept. 1, 2004). In that case the court said:

The new statute, however, does not help Young because of the rule which provides that "statutes controlling appeals are those in effect at the time the judgment or order appealed from was rendered." The district court's postconviction judgment was entered January 16, 2003, approximately, eighteen months before the statute went into effect.

*Id.* (citations omitted). *Young* indicates that the date of the postconviction relief judgment is the date that determines the applicability of 814.7, not the date of the underlying criminal conviction.

Here, the district court ruled on Buenaventura's postconviction relief application on August 18, 2005, well after the July 1, 2004 effective date of amended section 814.7. Therefore, Buenaventura was not required to raise his claim for postconviction relief on direct appeal, and we consider his arguments.

Buenaventura does not specifically state who trial counsel should have investigated. He merely states that the names of the persons were known to his

trial counsel. We find Buenaventura's argument vague and unsupported by specific evidence. It is not enough for Buenaventura to simply claim that his counsel could have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Buenaventura must "identify how competent representation probably would have changed the outcome." *Id.* Buenaventura does not provide the names of these additional witnesses or how they responded to Sally's refusal to engage in a romantic relationship. Moreover, trial counsel testified that his investigator did try to contact possible suspects or people who had wanted a romantic relationship with Sally. Trial counsel testified that the investigator did not return with any concrete evidence. Accordingly, trial counsel was not ineffective in failing to investigate.

Finally, Buenaventura claims that trial counsel was ineffective for failing to investigate statements made in a letter he received from Mark Rambo, an inmate at the Linn County Correctional Facility. The letter was written on the last day of Buenaventura's trial, and according to Buenaventura, it would have been grounds to file a motion for a new trial. At trial Lamel Brandon, a fellow inmate of Buenaventura testifying on behalf of the defense, changed his previous deposition testimony and stated that he heard Buenaventura admit to killing Sally. He was impeached by his deposition testimony.

The letter written by Rambo stated that another inmate, Noah Cripe, would testify that Buenaventura never made the statement and that Cripe was present during the conversation in which Brandon and the other inmate claim Buenaventura admitted to killing Sally. At the postconviction relief hearing, Buenaventura's trial counsel testified that he received the letter and that he

attempted to call another inmate, Joseph Spivey, who would testify that Buenaventura did not admit to killing Sally. However, Spivey was not allowed to testify before the jury because he was not sequestered.

Trial counsel testified at the postconviction relief hearing that after receiving the letter he was reluctant to call any further witnesses in light of the fact that calling Brandon was unsuccessful because he recanted his previous statement defending Buenaventura. Trial counsel also testified that inmate testimony in general is unreliable because the inmates use the opportunity to testify as a way to “curry favor with either the prosecution, that is that they would make a better plea bargain . . . .” Trial counsel testified that he did not file a motion for new trial because the letter did not meet the newly discovered evidence standard. Trial counsel’s decision not to file a motion for new trial based on the letter he received from an inmate was an informed decision and does not rise to ineffective assistance.

We have carefully considered all the arguments raised on appeal and find that they are without merit or controlled by the foregoing.

**AFFIRMED.**