

IN THE COURT OF APPEALS OF IOWA

No. 6-773 / 05-1408
Filed January 31, 2007

TEDDIE FISHER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Washington County, Michael Mullins, Judge.

Applicant appeals from the dismissal of his application for postconviction relief. **AFFIRMED.**

Rockne O. Cole, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Barbara A. Edmondson, County Attorney, and Eric R. Goers, Assistant County Attorney, for appellee State.

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

ZIMMER, J.

Teddie Fisher appeals from the district court's denial of his application for postconviction relief. We affirm the district court.

I. Background Facts and Proceedings.

Fisher was charged with sexual abuse in the second degree, in violation of Iowa Code section 709.3 (1999). The trial information alleged that on or about April 9, 1999, Fisher had committed a sex act on A.E., who was then nine years old, by having oral contact with her genital area. During trial A.E. testified as to the abuse, which allegedly occurred while A.E. was spending the night at Fisher's home, during a sleepover with Fisher's step-daughter, M.B. The jury also heard evidence regarding Fisher's interview with law enforcement, which was not recorded. The officer who conducted the interview testified that Fisher had confessed to oral-to-genital contact with A.E. Fisher testified and denied that he had abused A.E., and asserted he had never confessed to law enforcement.

The jury returned a guilty verdict on January 20, 2000. Following sentencing, Fisher filed a timely notice of appeal. On September 22, 2000, Fisher's appellate attorney, Dennis Hendrickson, filed a motion and brief pursuant to what is now Iowa Rule of Appellate Procedure 6.104,¹ asserting that Fisher's appeal was frivolous and seeking leave to withdraw. That same day Hendrickson notified Fisher in writing of his decision, with attached copies of his motion and brief, as required by rule 6.104(2). Pursuant to rule 6.104(4), the letter informed Fisher that if he disagreed with Hendrickson's conclusions, he

¹ At the time of the appeal this matter was governed by rule 104, which has since been renumbered as rule 6.104. There have been no substantive changes to the rule since the time of Fisher's appeal from his criminal conviction.

was required to submit a letter to the clerk of the supreme court within thirty days raising any points that he believed supported his appeal. Although Fisher received this letter at least nine days prior to the deadline, he did not file a response. On December 19, 2000, the supreme court concluded Fisher's appeal was frivolous and ordered it dismissed.

Fisher filed a pro se postconviction relief application on January 24, 2002. He filed an amended application, through counsel, on February 24, 2004. The matter came on for hearing in May 2005. Fisher presented several claims for the district court's determination. He contended his trial counsel was ineffective for failing to adequately investigate prior allegations of sexual abuse by the victim, and to adequately investigate and present the testimony of the victim's stepfather. He also asserted due process violations stemming from prosecutorial misconduct during unreported closing arguments, and the State's failure to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Finally, he alleged ineffective assistance of appellate counsel.² The State resisted the claims on the merits, but further contended Fisher had failed to preserve error because he had not raised these claims on direct appeal.

Following hearing, the district court dismissed Fisher's postconviction relief application. The court did not expressly address the issue of error preservation, but did determine that Fisher had failed to establish any of his claims. It rejected the prosecutorial misconduct claim both as alleged in the

² An additional "possible" claim, new evidence in the form of an as-yet-unlocated videotape of Fisher's interrogation by police, was not pursued during the postconviction hearing and is not at issue on appeal.

postconviction relief application and, alternatively, as a claim of ineffective assistance of trial counsel. Fisher appeals, reasserting the above-noted claims.

II. Scope of Review.

We conduct a de novo review of alleged constitutional violations. See *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999) (ineffective assistance of counsel); *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996) (due process).

III. Necessity of Raising Claim in Direct Appeal.

Before we look to the merits of Fisher's claims, we address the State's renewed contention that Fisher's failure to raise his claims on direct appeal precludes him from raising them in a postconviction relief application. Pursuant to section 822.8,

Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted

This section has long been interpreted as providing that a "claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error." *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Sufficient reasons include the ineffective assistance of appellate counsel, and factual and legal matters excusably unknown at the time of trial and appeal. *Id.* When, as here, an appeal is dismissed pursuant to an uncontested rule 6.104 motion, the applicant must show sufficient reasons why he did not raise such grounds in response to the motion. *Bugley v. State*, 596 N.W.2d 893, 897 (Iowa 1999) ("An unresisted rule

[6.]104 motion transforms counsel's decision not to raise any grounds on direct appeal into the decision of the applicant.").

Fisher contends the foregoing requirements no longer apply, at least as to his ineffective assistance of counsel claims, because section 814.7(1), effective July 1, 2004, provides:

An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822, except as otherwise provided in this section. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes.

Noting the postconviction ruling in this case was rendered after the statute's effective date, Fisher asserts he must receive the benefit of the new provision because "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003) (citations omitted). The State contends Fisher's ability to raise claims in a postconviction relief action is governed by the statutes in effect at the time of conviction and judgment in the underlying criminal proceeding. No published supreme court opinion speaks to this issue. Upon our review, we conclude that Fisher may avail himself of section 814.7, although for a slightly different reason than the one advanced.

Section 814.7, which governs the methods by which a criminal defendant may assert an ineffective assistance of counsel claim, is procedural in nature. See *Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa 1999) (noting procedural legislation is that which "prescribe[s] a method of enforcing rights or obtaining redress for their invasion"); *Board of Trs. of Mun. Fire & Police Ret. Sys. of Iowa*

v. City of West Des Moines, 587 N.W.2d 227, 231 (Iowa 1998) (noting such legislation is that which “governs the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective”). Procedural legislation will be applied to all actions, including those currently pending, *Dolezal*, 602 N.W.2d at 351, unless “it is not feasible to do so or will work an injustice in the particular case,” *Brewer v. Iowa Dist. Ct.*, 395 N.W.2d 841, 842 (Iowa 1986). However, the question of retroactive versus prospective application is ultimately governed by legislative intent. *Board of Trs.*, 587 N.W.2d at 230-31. Employing these principles leads us to conclude that section 814.7 is to be applied retroactively as well as prospectively.

We recognize that retroactive application of section 814.7 allows Fisher to benefit from its provisions solely because he was fortunate enough to experience a lengthy delay between the filing of his application and the court’s ruling on the same, a benefit not shared by numerous other applicants who had their actions resolved in a more timely fashion. Moreover, the State’s contention that Fisher should be bound by the law in existence at the time of his conviction makes practical sense, and is not without appeal. Nevertheless, there is no indication that retroactive application of section 814.7 is not feasible or would work an injustice in this particular case.

Notably, we see nothing in the language of section 814.7 which would indicate an intent by the legislature that it be applied prospectively only. Rather, the apparent goal of section 814.7 was to promote judicial economy and ensure that ineffective assistance of counsel claims are heard in the arena most conducive to their resolution. See *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa

2001) (noting that, unless record on appeal is adequate to assess counsel's performance, ineffective assistance of counsel claim is preserved for possible postconviction review to allow a full development of the record regarding counsel's actions). Such a goal favors retroactive application.

In light of the foregoing, we conclude that section 814.7 is applicable in the present matter. Accordingly, Fisher need not provide a sufficient reason for his failure to raise his ineffective assistance of counsel claims on direct appeal. We note, however, that this exemption does not extend to Fisher's direct claims of due process violations based on the State's alleged failure to disclose exculpatory evidence and its alleged engagement in prosecutorial misconduct during closing arguments. Fisher must accordingly show a "sufficient reason" why these claims were not raised on direct appeal.

The only sufficient reason alleged by Fisher for his failure to raise a direct prosecutorial misconduct claim is the ineffective assistance of appellate counsel. This allegation, however, is limited to a contention that Hendrickson's rule 6.104 motion and accompanying brief failed to comply with *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498 (1967), which requires an appellate counsel to act "in the role of an active advocate in behalf of his client." Fisher asserts Hendrickson's motion and brief were inadequate because they "only describe[] why the issues are not any good." We have reviewed the law in this area, and conclude his contention is without merit.

First, we note rule 6.104, which was complied with in this case, mirrors the specific requirements set forth in *Anders*. See *Anders*, 386 U.S. at 744, 87 S. Ct. at 1400, 18 L. Ed. 2d at 498. Moreover, *Anders* "merely aims to 'assure the court

that the . . . defendant's constitutional rights have not been violated.” *Smith v. Robbins*, 528 U.S. 259, 272, 120 S. Ct. 746, 757, 145 L. Ed. 2d 756, 771 (2000) (citation omitted). A brief in support of a frivolous appeal motion is not inadequate merely because it discusses only why each issue lacks merit. *Id.* at 272-73, 120 S. Ct. at 757, 145 L. Ed. 2d at 771-72. Rule 6.104 affords defendants the necessary “adequate and effective appellate review” so long as it “reasonably ensures that an . . . appeal will be resolved in a way that is related to the merit of that appeal.” *Id.* at 276-77, 120 S. Ct. at 759, 145 L. Ed. 2d at 774 (citations omitted). The foregoing standard has been met in this case. Accordingly, Fisher has not shown a sufficient reason for his failure to raise his due process prosecutorial misconduct claim on direct appeal.³

Regarding the alleged *Brady* violation, Fisher asserts he was unable to raise the claim on direct appeal because he was unaware of the allegedly exculpatory evidence—reports regarding prior allegations of sexual abuse made by A.E.—until after his direct appeal had been dismissed by the supreme court. Although the record indicates trial counsel was aware that there had been a prior allegation of sexual abuse, we will assume for the sake of argument that the reports themselves were excusably unknown to Fisher at the time of direct appeal, and thus that he has shown sufficient reason for failure to raise this claim in resistance to Hendrickson’s rule 6.104 motion. We accordingly turn to the merits of the claims properly before us in this appeal.

³ We further note that, even if the claim had been raised on direct appeal, it is doubtful error would have been preserved. See *State v. Romeo*, 542 N.W.2d 543, 552 (Iowa 1996) (providing a defendant cannot obtain relief on a claim of prosecutorial misconduct during closing arguments when the arguments were not reported and no objection to the alleged misconduct appears of record).

IV. Alleged *Brady* Violation.

Fisher asserts the State suppressed reports relating to two prior allegations of sexual abuse made by A.E.—one in 1996 regarding a Lawrence Manning and one in 1998 regarding a Damon Nichols—in violation of his right to due process. A defendant’s due process rights are violated when the State fails to produce upon request evidence that is favorable to the defendant “where the evidence is material either to guilt or punishment.” *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963)). Thus, to show a due process violation, the defendant must prove the evidence was (1) suppressed by the prosecution, (2) favorable to the defendant, and (3) material to the issue of guilt. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed. 2d at 218. Our review of the record indicates that Fisher has not made this showing.

First, we question whether Fisher has demonstrated that the reports were in fact suppressed by the prosecution. As previously noted, the record indicates trial counsel was or should have been aware of at least one of the prior allegations of sexual abuse. See *Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003) (providing evidence is not considered suppressed “if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence” (citation omitted)). Moreover, there is no affirmative evidence that the State failed to produce the reports in response to a defense request. At best, the record is simply bereft of evidence that any reports were provided defense counsel. More importantly, however, Fisher has failed to demonstrate the reports were material to the issue of guilt.

“Evidence is material when there is a ‘reasonable probability’ that disclosure would have changed the result of the proceeding.” *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997) (citation omitted). Here, both reports related to prior allegations of sexual abuse. Such evidence falls within the ambit of Iowa’s rape shield law, and thus may not be admitted into evidence unless it involves a false claim of prior sexual conduct. See Iowa R. Evid. 5.412; *State v. Baker*, 679 N.W.2d 7, 9-10 (Iowa 2004). The record in this case demonstrates that (1) Manning admitted to touching “a little girl” while at A.E.’s home and a complaint was filed against Manning for indecent contact with a child in violation of Iowa Code section 709.12(2) (1997) and (2) the State declined to pursue prosecution against Nichols, not because it believed the allegation was false, but because it “just felt [it] didn’t have the kind of evidence [it] would like to take the case to trial.” This is a far cry from evidence that A.E.’s allegation against either man was false.⁴ Because Fisher has not shown the prior allegations are false, he failed to demonstrate the report would have been admissible in the criminal trial.

The district court did not err in dismissing Fisher’s *Brady* violation claim. We accordingly turn to the ineffective assistance of trial counsel claims.

⁴ Our supreme court has recently held that a criminal defendant wishing to admit such evidence must first make a threshold showing to the trial judge outside the presence of the jury that (1) the complaining witness made the statements and (2) the statements are false, based on a preponderance of the evidence. *State v. Alberts*, 722 N.W.2d 402, 409-10 (Iowa 2006).

V. Ineffective Assistance of Trial Counsel.

Fisher asserts his trial counsel was ineffective for failing to (1) adequately investigate prior allegations of sexual abuse by the victim; (2) adequately investigate and present the testimony of the victim's stepfather, Matt Simone; and (3) object to prosecutorial misconduct during closing arguments. To establish these claims, Fisher must overcome a strong presumption of his counsel's competence. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). He has the burden of proving his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *State v. Carillo*, 597 N.W.2d 497, 500 (Iowa 1999).

The first claim, regarding counsel's alleged failure to investigate the prior allegations of sexual abuse, fails for the reasons stated in the previous section of this opinion. Fisher has not shown that evidence regarding the prior allegations would have been admissible at his criminal trial, and thus has not demonstrated prejudice stemming from any failure by counsel to uncover the reports and related evidence.

Nor do we find merit in Fisher's second contention, that trial counsel was ineffective for failing to present testimony from A.E.'s stepfather, Matt Simone, indicating that when Simone picked A.E. up at Fisher's home the morning

following the sleepover he noticed nothing unusual, that A.E. did not tell him about the sexual abuse, and that he doubted the truth of A.E.'s accusation since A.E. expressed a desire to return to Fisher's home the following day. We agree with the State that the foregoing information is largely cumulative of A.E.'s own testimony. A.E. explained that she did not tell Simone about the incident because she "didn't think he would really listen," and indicated that she was concerned about making him angry. A.E. also testified that she had asked to spend the following night at Fisher's home because M.B. "had asked [her] to." Moreover, the mere observation that A.E. was "acting normally" the following morning is not sufficient to undermine confidence in the outcome of the proceedings. As with his first claim, Fisher has failed to demonstrate any prejudice stemming from the failure to introduce this evidence.

Finally, we turn to Fisher's claim that trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. Fisher contends that, during closing arguments, the prosecutor made the following statement: "A.E. couldn't have made up this accusation because nothing like this has ever happened before." Because arguments were not reported, Fisher relied on his own testimony and the testimony of two relatives to establish that the statement was made. The prosecutor, however, denied making the statement, and although trial counsel could not recall the content of the prosecutor's closing argument, he asserted that such a statement would have "raised a red flag" and "been something [he] would have objected to had it occurred."

In concluding Fisher had failed to carry his burden on this claim, the district court determined that Fisher's recollections were "suspect" and that the

credibility of his witnesses, who had difficulty recalling many basic details of the trial, was “weak.” Like the district court, we place more weight upon the testimony of the prosecutor and defense counsel than we do upon Fisher’s self-serving assertions or the testimony of his witnesses. When we do so, we conclude that Fisher has failed to establish the disputed statement was made. Accordingly, his ineffective assistance claim must fail.

VI. Conclusion.

We have considered all of Fisher’s contentions, whether or not specifically discussed. For those claims properly before us on appeal, Fisher had failed to carry his burden of proof. We accordingly affirm the district court’s dismissal of Fisher’s application for postconviction relief.

AFFIRMED.