

IN THE COURT OF APPEALS OF IOWA

No. 6-867 / 05-1598
Filed November 30, 2006

JOSE DARIO RUESGA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson,
Judge.

Jose Dario Ruesga appeals from the district court's denial of his
application for postconviction relief. **AFFIRMED.**

James S. Nelson of Cook, Brown & Scott, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney
General, John P. Sarcone, County Attorney, Nan Horvat, Assistant County
Attorney, and Melodee Hanes, Special Assistant County Attorney.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Jose Dario Ruesga appeals from the district court's denial of his application for postconviction relief. He contends the district court erred in concluding his trial counsel was not ineffective because he failed to object to the prosecutor's questions regarding the veracity of other witnesses' testimony. Armed with new counsel on appeal, he now contends his attorney in the postconviction proceedings was ineffective in several respects.

On September 7, 1992, Ruesga pled guilty to felony child endangerment. On September 14, 1992, a jury convicted him of two additional counts of child endangerment and one count of willful injury. These convictions were the result of severe injuries inflicted on Jonathan Waller, a four year old.

Waller died from complications of the injuries several years later. Ruesga was then charged with first-degree murder. Following a jury trial, Ruesga was convicted and sentenced to life in prison. His conviction was affirmed in *State v. Ruesga*, 619 N.W.2d 377 (Iowa 2000).

On December 17, 2001, Ruesga filed a pro se application for postconviction relief. On October 27, 2004, the date of the postconviction hearing, Ruesga filed an "Amended Pro Se Motion" raising new issues. The district court treated the motion as a supplemental postconviction application and allowed the new issues to be raised. Trial was continued until June 21, 2005. On August 22, 2005, the court denied the application. Ruesga appeals.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, when the applicant asserts a claim of constitutional

nature, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Ledezma*, 626 N.W.2d at 141.

To prevail on a claim of ineffective assistance of counsel, Ruesga must show that his attorney's performance fell outside the normal range of competency, and the deficient performance so prejudiced his case as to give rise to a reasonable probability that, but for counsel's alleged errors, the outcome of the proceedings would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). There is a strong presumption counsel performed competently, and the claimant has the burden to prove that counsel was ineffective. *Id.* An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Ruesga contends the postconviction court erred in denying his application for postconviction relief because the prosecutor committed misconduct in questioning him about the veracity of other witnesses' testimony in violation of *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003). Because of the overwhelming evidence of Ruesga's guilt—after all he did plead guilty to causing a “severe head injury” to Waller—and his theory of defense, expressed in his own closing argument, admitting he lied and accusing other witnesses of lying, we conclude Ruesga was not prejudiced by the prosecutor's questions.

Ruesga also contends his postconviction counsel was ineffective. He claims counsel should have raised the issue of trial counsel's failure to object to the prosecutor's reference to his silence. The prosecutor at his murder trial referred to Ruesga's silence following his arrest and during his 1992 trial. We reject his claim. The United States Supreme Court has held questions regarding

a defendant's silence in a previous trial are acceptable when the defendant takes the stand in a subsequent trial and those questions are relevant. *Raffel v. United States*, 271 U.S. 494, 497, 46 S. Ct. 566, 568, 70 L. Ed. 1054, 1058 (1926). The question was clearly relevant here where Ruesga waited until after he was charged with murder to claim someone else injured Waller. See *Anderson v. Charles*, 447 U.S. 404, 408-409, 100 S. Ct. 2180, 2182, 65 L. Ed. 2d 222, 227 (1980) (holding the rule barring use of silence against a criminal defendant does not apply to cross-examination that merely inquires into prior inconsistent statements). Furthermore, the prosecutor's questions regarding Ruesga's post-arrest silence referenced an arrest for a crime to which Ruesga later pled guilty.

Ruesga also contends his postconviction counsel was ineffective in not claiming appellate counsel was ineffective. He claims appellate counsel should have raised the issue of whether his waiver of counsel was voluntary. We conclude appellate counsel breached no duty to raise the issue. This claim is directly inconsistent with Ruesga's original pro se appeal where he argued he was denied his right to self-representation. He cannot have it both ways.

We affirm the district court's denial of Ruesga's application for postconviction relief.

AFFIRMED.