IN THE COURT OF APPEALS OF IOWA

No. 7-467 / 06-0908
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARRYL KENYATA WASHINGTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown (motion to suppress) and Cynthia H. Danielson (jury trial), Judges.

Darryl K. Washington appeals from his conviction and sentence for murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Patrick Rogers and Heidi Van Winkle, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Darryl K. Washington appeals from his conviction and sentence for murder in the first degree, contending he was denied effective assistance of counsel. We affirm.

Shortly after midnight on June 10, 2005, two men kicked open the back door to the residence of Dexter Ivey and Hilary Peterson. They held Ivey and Peterson at gunpoint and demanded money and drugs. Peterson recognized one of them as Sammy Clayton. While Peterson was looking for money as Clayton watched her, she heard a gun shot in the back room where Ivey was taken by the other man. The other man came out from the back room and told Clayton they had to go. The two men left in a car. Peterson found Ivey's body on the floor in the back room. He had been shot in the head.

Peterson called the police. Clayton was arrested the same day shortly after the incident. He named Darryl Washington as the man who shot Ivey. Later that afternoon, Peterson picked out Washington in a photo line-up of seven pictures, telling police that she was 75% sure he was the man with Clayton.

Washington was arrested in Chicago on July 25, 2005. Special Agent Rahn from the Iowa Division of Criminal Investigation and Des Moines County Sheriff's Deputy McIntyre traveled to Chicago to interview Washington. Before the interview, Chicago police officers asked Agent Rahn whether he wanted to videotape the interrogation, Agent Rahn declined.

The officers introduced themselves to Washington at the beginning of the interview. Washington immediately made a statement that he was in the same car with the two men who robbed Ivey's residence. He claimed he did not know

those two men, and he was drunk and asleep in the car when the robbery occurred. The officers then read Washington his Miranda rights which he expressly waived. After the officers told Washington he had been identified as the shooter by eyewitnesses, Washington admitted he shot Ivey, however claimed it was an accident. The officers asked Washington whether he wanted to give a written statement or a taped recording of his statement. Washington refused.

Washington was charged with murder in the first degree. Jury trial was commenced on March 21, 2006 during which Agent Rahn and Detective McIntyre testified to Washington's statements during the interview. The jury found Washington guilty as charged. Washington filed a motion for new trial and a motion in arrest of judgment on April 13, 2006, claiming the verdict was based on insufficient evidence. The district court overruled the motions after a hearing. Washington appealed on June 1, 2006, claiming his trial counsel was ineffective for failing to (1) move to suppress the testimony of Agent Rahn and Detective McIntyre on the basis that Agent Rahn's refusal to videotape the interview made their testimony suspect and inherently untrustworthy, (2) urge the district court to consider the agent's refusal to videotape the interview as a factor in its analysis of defendant's pretrial motion to suppress, and (3) request a jury instruction on the agent's refusal to videotape the interview.

We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To succeed with a claim of ineffective assistance of counsel, a defendant typically must prove the following two elements: (1) counsel failed to perform an essential duty, and (2) defendant

was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). There is an assumption that counsel's performance is competent. *Id.* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. The defendant must show that his counsel performed below the standard demanded of a reasonably competent attorney. *Id*. 466 U.S. at 687-8, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To show prejudice, the defendant must establish that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Ineffectiveness claims raised on direct appeal are ordinarily preserved for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999). Here we find the record sufficient to decide the claims on direct appeal.

Suppression of Statements

Washington argues that a reasonably competent counsel would have argued the officers' failure to videotape the interview, when the equipment was readily available, in itself made the officers' testimony untrustworthy and subject to suppression. We acknowledge the advantages of videotaping interrogations. Some states have adopted rules requiring electronic recording of custodial interrogations. However, at the time of Washington's trial, our law on this issue was (and still is), at best, unsettled. *See e.g. State v. Bowers*, 661 N.W.2d 536, 543 (Iowa 2003); *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997). "A claim for ineffective assistance of counsel will not lie when the law governing the issue complained of is unsettled at the time the cause is tried." *See, e.g. State v.*

; *State v. Bayles,* 551 N.W.2d 600, 610 (Iowa 1996).

When Washington was tried, law enforcement officers were allowed to decide whether to record the interview based on their personal preferences. Agent Rahn explained he preferred not to videotape the interrogation because from his experience, the officers tended to take fewer and less precise notes when they know the interview was recorded. He stated it had caused problems in the past when recording equipment failed or was not properly used. His decision was not against Iowa law or department policy at the time.

Our supreme court held in a recent case that electronic recording, particularly videotaping, of custodial interrogations is strongly encouraged. *State v. Hajtic*, 724 N.W.2d 449, 456 (Iowa 2006). However, *Hajtic* was not decided until December 2006, eight months after Washington's conviction; it cannot be used to evaluate whether or not Agent Rahn's refusal to record the interview was proper. Moreover, *Hajtic* suggests recording interrogations is a favorable practice because it assists the courts to reconstruct what had occurred during the questioning. It does not support Washington's proposition that police failure to videotape an interview in itself makes the officer's testimony untrustworthy and therefore subject to suppression. The district court still has to make a finding whether the testimony is so suspect as to warrant suppression. In the present case, the officers' testimony was corroborated by other evidence. Washington's appearance matched Peterson's description of the shooter. Peterson identified Washington in photograph lineup with significant certainty. Clayton also named Washington as the shooter. A reasonably competent counsel would find no

sufficient basis supporting a motion to suppress. Washington's counsel therefore did not breach any duty in not raising the claim.

Voluntariness of Washington's Statements

Washington also contends counsel failed to ask the district court to consider the agent's refusal to record the interrogation as a factor in its determination of the voluntariness of his statements and his waiver of Miranda rights. We find counsel did, in substance, make this argument in pretrial proceeding.

Washington's attorney challenged the interview process by a pretrial motion to suppress. During the hearing on this motion, counsel elicited from both Agent Rahn and Detective McIntyre that their interview with Washington could have been, but was not, recorded. Counsel questioned Agent Rahn about his reasons for choosing not to videotape the interrogation, and clearly stated that due to the lack of recording, the only evidence of what was said during the interview was the story told by the officers. Counsel stated "everything surrounding [the interview] is suspect," and vigorously argued that the officers' failure to record the interview compelled the court to determine whether Washington validly waived his rights and voluntarily made his statements. Counsel clearly asked the district court to consider the agent's refusal to record the interrogation in its ruling. The alleged failure of duty did not occur.

Jury Instruction

Washington further argues counsel was ineffective for failing to ask the district court to instruct the jury that the officers' failure to videotape the interview could be considered in determining the weight to be given to the officers'

testimony. In *State v. Bowers*, 661 N.W.2d 536, 543 (Iowa 2003), our supreme court rejected a similar claim. In *Bowers*, defendant urged that his trial counsel was ineffective for failing to request a spoliation instruction based on the officer's failure to tape-record his interrogation. *Id.* The supreme court said: "We have not been made aware of any requirement that law enforcement officers tape-record their interviews, and a failure to do so may in no way be equated with the destruction of evidence." It then held that defendant's counsel was not ineffective for failing to request a spoliation instruction. We therefore conclude Washington's counsel did not have a duty to request the instruction.

AFFIRMED.