IN THE COURT OF APPEALS OF IOWA

No. 8-013 / 07-0272
Filed February 13, 2008

DAVID L. HILL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, James Q. Blomgren, Judge.

David Hill appeals from the trial court's dismissal of his application for postconviction relief. **AFFIRMED.**

Bryan J. Goldsmith of Webber, Gaumer & Emanuel, P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Mark Tremmel, County Attorney, for appellee.

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

HUITINK, P.J.

David Hill appeals from the trial court's dismissal of his application for postconviction relief. Hill claims his trial counsel was ineffective in failing to (1) notify him of a deposition to perpetuate testimony, a "stage of trial" in which his presence was required, and (2) properly advise him of his right to have a no-inference-of-guilt jury instruction. We review Hill's claims de novo. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

Ineffective Assistance of Counsel

To prevail on ineffective assistance of counsel claims, the applicant has the burden of proving by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, "the [applicant] must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, the applicant must show "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of ineffective assistance of counsel claims if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Notice of Deposition

Hill was charged with (and ultimately convicted of) one count of manufacturing methamphetamine and three counts of possession of the precursors pseudoephedrine, ethyl ether, and lithium with intent to manufacture methamphetamine. Ten days prior to trial, the State identified Patricia Krahn, a criminologist at the Iowa Division of Criminal Investigation Criminalistics Laboratory, as a potential witness. Eight days prior to trial, Hill's trial counsel deposed Krahn without notifying Hill. As a result, Hill was not present at Krahn's deposition. At trial the State attempted to admit into evidence Krahn's report. Hill's counsel objected, and the State called Krahn to testify.[1] Hill's trial counsel cross-examined Krahn.

Hill argues Krahn's deposition to perpetuate testimony is a "stage of trial" under Iowa Rule of Criminal Procedure 2.27(1) in which his presence was required. The purpose this rule "is to implement a defendant's right of confrontation under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005). "Stage of trial" includes

> the trial itself, from the selection of the jury through the verdict and, in addition, all pretrial and post-trial proceedings when fact issues are presented or when their dispositions, for some other reason, will be significantly aided by the defendant's presence.

State v. Foster, 318 N.W.2d 176, 179 (Iowa 1982). While a deposition to perpetuate testimony for introduction at trial is a "stage of trial," *State v. Turner*, 345 N.W.2d 552, 559 (Iowa Ct. App. 1983), a discovery deposition is not a "stage

[1] We note the State was not required to call Krahn to testify about her report under Iowa Code section 691.2 (1999).

of trial," *Otteson v. Iowa Dist. Ct.*, 443 N.W.2d 726, 728 (Iowa 1989). Krahn's deposition was a discovery deposition, not a deposition to perpetuate testimony, because the State intended to call Krahn as a witness at trial and Krahn's deposition was not admitted into evidence at trial. Therefore we find trial counsel did not breach a duty. We also find Hill did not suffer prejudice because Krahn testified at trial and his trial counsel had the opportunity to cross-examine her.

No-Inference-of-Guilt Instruction

While discussing final jury instructions, Hill's trial counsel conferred with Hill about including a no-inference-of-guilt instruction. Hill told his trial counsel off the record and the trial court twice on the record that he did not want the instruction. Therefore, the trial court did not give it. Hill's trial counsel testified he had represented Hill on a number of occasions and, although he did not remember the specifics of the conversation, Hill "absolutely" knew what he was doing when he requested the instruction not be given.

Hill argues trial counsel failed to properly advise him of his right to have a no-inference-of-guilt instruction. Under Iowa law, it is reversible error to give a no-inference-of-guilt instruction unless requested by the defendant. *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970). Hill "absolutely" knew what he was doing when he requested the instruction not be given. Therefore, we find trial counsel did not breach a duty. We also find Hill has not shown prejudice because he fails to specify how the result of the proceeding would have been different if the instruction had been given. We accordingly affirm.

AFFIRMED.

Zimmer, J., concurs; Miller, J., concurs specially.

MILLER, J. (concurring specially)

I concur in the result, and write separately only to disagree with certain language in the majority's discussion of the issues.

First, the majority's description of Krahn's deposition, which was taken while the case against Hill was pending, as a "deposition to perpetuate testimony" runs the risk of confusing a deposition such as Krahn's with one taken before an action is pending. *See* Iowa Rs. Civ. P. 1.722-.727 (dealing with applications "to take *depositions to perpetuate testimony for use in an action not yet pending*") (emphasis added). *State v. Turner*, cited by the majority, in fact does not incorrectly describe the deposition taken during the pendency of that case as one "to perpetuate testimony." Instead, it describes the deposition at issue in that case as a "deposition where testimony is taken for introduction at trial." *Turner*, 345 N.W.2d at 559.

Second, somewhat relatedly and more importantly, I find any distinction between a "deposition where testimony is taken for introduction at trial" and a "discovery deposition" to be not only meaningless but also a distinction that is not recognized by our rules of procedure and is contrary to our long-standing and well-reasoned case law. *See, e.g., Osborn v. Massey-Ferguson, Inc.*, 290 N.W.2d 893, 897 (Iowa 1980) ("There is no basis in law (Iowa Rules of Civil Procedure) to support [the proposition that a deposition intended only for discovery would therefore not be admissible at trial]. The Iowa Rules of Civil Procedure make no distinction between discovery depositions and depositions to be used at trial."); *see also State v. Belken*, 633 N.W.2d 786, 795 (Iowa 2001) (noting, in a criminal case, that although our rule of civil procedure does not

contemplate the use of depositions for discovery a deposition is commonly viewed as a discovery tool, and stating that depositions may be used at a trial or hearing when admissible under the rules of evidence); *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986) ("The admissibility of a deposition in our courts is not affected by whether it was taken for discovery or for use at trial."); *Farley v. Seiser*, 316 N.W.2d 857, 858-59 (Iowa 1982) (explaining and applying the court's decision in *Osborn*).

I reach two conclusions. First, the intent of a party or parties, whether subjective or expressly stated, that a deposition be taken for discovery or be for use at a trial or hearing does not control admissibility. Second, whether the taking of a deposition is a "stage of trial" requiring a criminal defendant's presence unless that presence is properly waived does not depend on the intent with which, or the purpose for which, the deposition was actually or purportedly taken, but instead depends on whether the deposition or part thereof is in fact admitted at trial.

Here, no portion of Krahn's deposition was admitted at trial, and the taking of her deposition was therefore not a "stage of trial" requiring Hill's presence. I therefore concur in the result concerning Hill's first claim of ineffective assistance of counsel.

In all other respects I agree with the majority opinion and the result.