IN THE COURT OF APPEALS OF IOWA

No. 8-173 / 06-1045
Filed August 27, 2008

JAMES SYDNEY CURTIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Bobbi M. Alpers, Judge.

Applicant appeals the district court decision that denied his request for postconviction relief on his convictions for first-degree murder and first-degree robbery. **AFFIRMED.**

Brian Farrell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross J. Barlow, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

NELSON, S.J.

I. Background Facts & Proceedings

Donald Davidson was killed on May 12 or 13, 1998, in his apartment. Davidson's fellow employees at Club 110 in Clinton, Iowa, including James Curtis, were questioned by police officers for background information.

In regard to Curtis, in April 1999 the State filed an application for nontestimonial identification, under Iowa Code chapter 810 (1999). Davidson's attorney on unrelated criminal matters, David Pillars, filed a motion to quash the application.[1] The district court ruled that the State could file a new application, and Pillars asked that the application be served on him rather than Curtis. The order was instead served on Curtis.

Curtis appeared at a hospital on May 12, 1999, to give the requested blood, saliva, and hair samples. He told officers he was meeting his attorney there, and Pillars soon arrived. Pillars was upset that he had not been served with the order for nontestimonial identification. Officers testified Pillars did not state that Curtis could not be contacted unless he was present, or make any comments about future contact between officers and Curtis.

On July 7, 1999, Curtis was in jail on the unrelated criminal charges when officers visited him at the jail. Curtis told the jailer to call his attorney, and told the officers he did not want to talk to them. He then walked over and began talking to the officers about an appeal on the unrelated charges. The officers

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[1] Curtis was convicted of burglary in Jackson County, and in January 1999 received a deferred judgment. He was convicted of robbery and burglary in Clinton County, and in August 1999 was sentenced to two terms of imprisonment not to exceed two years, to be served concurrently.

stated they were only interested in the whereabouts of his brother, Tony Curtis. Curtis provided the requested information about his brother.

On March 1, 2000, while Curtis was at the Fort Dodge Correctional Facility on the unrelated charges, officers visited him. Curtis stated the officers should not be talking to him because his case was on appeal. The officers stated they were not there to talk about the unrelated charges, but wanted Curtis to submit to a polygraph examination in regard to the Davidson murder. Curtis agreed to the polygraph examination.

On March 29, 2000, officers transported Curtis to the Fort Dodge Highway Patrol Headquarters (HPH). When Curtis arrived, he stated he did not want to take the polygraph examination. Officers then asked Curtis if he would talk to them about the Davidson case, and he agreed. During questioning, Curtis confessed he and his brother had entered Davidson's apartment and killed him.

Curtis was charged with and convicted of first-degree murder and first-degree robbery. His post-trial motions were denied by the district court. His convictions were affirmed on appeal. *See State v. Curtis*, No. 01-0512 (Iowa Ct. App. Aug. 28, 2002).

On August 3, 2005, Curtis filed an application for postconviction relief. He claimed his constitutional right to counsel attached at the time of the nontestimonial identification proceedings, and any subsequent waiver of his right to counsel during police-initiated interviews was ineffective. The district court found that the right to counsel during nontestimonial identification proceedings was statutory, under section 810.8(8). The court concluded the statutory right to

counsel ended at the time the nontestimonial identification proceedings ended, and Curtis's constitutional right to counsel was not triggered because no adversarial judicial proceedings had commenced at that time. The court concluded Curtis had not shown he received ineffective assistance of counsel based on a failure to object to his incriminating statements on this ground. Curtis now appeals the district court's denial of his request for postconviction relief.

II. Standard of Review

In this appeal Curtis claims he received ineffective assistance from trial, appellate, and postconviction counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Seizure of Person

At the postconviction hearing, Curtis testified that after he agreed to take the polygraph examination, he called Pillars, who requested he not take the examination. He stated that as soon as he walked into the HPH he told the officers he did not want to take the examination. He stated the officers did not ask him if he wanted to go to the HPH. Curtis admitted he signed a *Miranda* waiver form before talking to the officers.

Curtis contends he received ineffective assistance because trial, appellate and postconviction counsel did not raise the issue of whether he was illegally seized when he was taken from the correctional facility to the HPH. He claims that because of this Fourth Amendment violation his statements at the HPH should be suppressed.

The Fourth Amendment is violated when, without probable cause, police officers seize a person and transport the person to a police station for interrogation. *Dunaway v. New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 2258, 60 L. Ed. 2d 824, 838 (1979). "[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Id.*, 99 S. Ct. at 2258, 60 L. Ed. 2d at 838. Evidence obtained as a result of such an illegal seizure should be suppressed. *State v. McCoy*, 692 N.W.2d 6, 21 (Iowa 2005).

There is no Fourth Amendment "seizure," however, when a person voluntarily accompanies police officers. *See State v. Ledezma*, 549 N.W.2d 307, 310 (Iowa Ct. App. 1996); *see also State v. Lathum*, 380 N.W.2d 743, 745 (Iowa Ct. App. 1985) ("Thus, if the conduct of the police officers is to be considered constitutionally permissible, it must be based upon the voluntary consent of the defendant [to go with officers to the scene of the crime]."). The State has the burden to show the person consented to accompany officers. *McCoy*, 692 N.W.2d at 21.

Curtis admits that when officers asked him on March 1, 2000, if he would submit to a polygraph examination, he agreed to the examination. Curtis did not withdraw his consent to the examination until after he had already been transported to the HPH by police officers. In fact, Curtis never informed the officers he did not consent to being transported to the HPH. We conclude Curtis consented to accompanying the officers.

Because the evidence does not support Curtis's claim that he was illegally seized in violation of the Fourth Amendment, he has not shown he received ineffective assistance due to the failure of direct, appellate, or postconviction counsel to raise this issue. We will not find counsel engaged in ineffective assistance due to failure to raise a meritless claim. *See State v. Hildebrand*, 405 N.W.2d 839, 841 (Iowa 1987).

IV. Right to Counsel

Curtis asserts he received ineffective assistance of appellate counsel due to counsel's failure to adequately raise the issue of whether his constitutional right to counsel had attached at the time of the nontestimonial identification proceeding. In the direct appeal we stated:

> Curtis also appears to argue that invoking his right to have counsel present at the nontestimonial identification procedure, pursuant to Iowa Code section 810.8(8) (1999), somehow engendered a constitutional right to counsel. While we agree such an issue would be a matter of first impression in Iowa, Curtis cites no authority in support of this claim, nor does he develop any argument beyond a bare assertion that representation pursuant to section 810.8(8) creates an offense-specific right to counsel under the Iowa and/or United States Constitutions. Accordingly, we find this issue is waived.

State v. Curtis, No. 01-0512 (Iowa Ct. App. Aug. 28, 2002).

Generally, once a Sixth Amendment right to counsel attaches, officers may not deliberately elicit incriminating statements from a defendant, unless counsel is present or defendant has made a valid waiver of the right to counsel. *State v. Newsom*, 414 N.W.2d 354, 358 (Iowa 1987). "An accused's Sixth Amendment right to counsel attaches upon initiation of adversary criminal judicial proceedings." *State v. Peterson*, 663 N.W.2d 417, 426 (Iowa 2003). Adversarial criminal judicial proceedings may be initiated by formal charge, preliminary hearing, indictment, information, or arraignment. *Id.* (citing *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882, 32 L. Ed. 2d 411, 417 (1972)).

Curtis asserts that Article I, section 10 of the Iowa Constitution creates a greater right to counsel than the Sixth Amendment to the United States Constitution. Article I, section 10 provides, "In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall . . . have the assistance of counsel." The Sixth Amendment, however, applies to "all criminal prosecutions." Curtis claims the Iowa constitutional right to counsel is greater than the right found in the federal Constitution, and because of this the Iowa constitutional right should attach prior to the initiation of adversarial judicial proceedings, such as during nontestimonial identification proceedings.

Section 810.8(8) provides, "That the right to counsel shall apply during nontestimonial identification procedures, including the right of indigent persons to appointed counsel." Curtis claims the phrase, "right to counsel" recognizes there is a constitutional, rather than merely a statutory, right to counsel that has attached during nontestimonial identification procedures. He claims that if

nontestimonial identification procedures are invoked against a person, a constitutional right to counsel attaches at that time and continues through any criminal prosecution.

Article I, section 10 of the Iowa Constitution applies only to criminal proceedings. *Atwood v. Vilsack*, 725 N.W.2d 641, 650-51 (Iowa 2006). The Iowa provision was enacted "to correct the imbalance between the position of an accused and the powerful forces of the State in a criminal prosecution." *Newsom*, 414 N.W.2d at 359. It guarantees an accused the right to the effective assistance of counsel for the accused's defense in criminal proceedings. *See State v. Hensely*, 534 N.W.2d 379, 382 (Iowa 1995). The Iowa Constitutional provision generally has been interpreted the same as the Sixth Amendment regarding the right to counsel. *See State v. Majeres*, 722 N.W.2d 179, 182 (Iowa 2006).

Furthermore, we believe section 810.8(8) creates a statutory right to counsel during nontestimonial identification proceedings, rather than recognizing an existing constitutional right that has attached at the initiation of nontestimonial identification proceedings. It is clear the Iowa legislature may create a statutory right to counsel when there is no constitutional right present. *See, e.g.* Iowa Code § 232.113 (termination of parental rights proceedings); § 229A.6(1) (sexually violent predator proceedings); § 804.20 (person arrested or restrained of liberty); § 822.5 (postconviction proceedings).

In *State v. Nagel*, 458 N.W.2d 10, 12 (Iowa Ct. App. 1990), we discussed the right to counsel under section 810.8(8) where a defendant was informed of

his right to apply for court-appointed counsel during nontestimonial identification procedures, but had not requested counsel. We stated, "In the constitutional context, it has been determined a defendant informed of his right to counsel must exercise that right by indicating he wants the assistance of counsel, and we find a similar approach is appropriate in this matter." *Nagel*, 458 N.W.2d at 12 (citation omitted). This discussion assumes section 810.8(8) creates a statutory right to counsel, and compares this to a constitutional right. *See id.*

We conclude Curtis has failed to show he received ineffective assistance of counsel due to counsel's failure to further argue that a constitutional right to counsel arose at the time nontestimonial identification proceedings were invoked against him. Section 810.8(8) creates a statutory right to counsel during nontestimonial identification procedures. We will not find counsel engaged in ineffective assistance due to failure to raise a meritless claim. *See Hildebrand*, 405 N.W.2d at 841.

V. Corroboration of Confession

After the jury verdict in this case, Curtis filed a motion for new trial and motion in arrest of judgment, raising the issue of whether his confession was supported by corroborating evidence. The district court denied these motions on the record during the sentencing hearing. Curtis claims he received ineffective assistance from appellate and postconviction counsel from failing to claim the district court improperly ruled on this issue.

Iowa Rule of Criminal Procedure 2.21(4) provides, "The 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." The requirement of corroborating evidence for a defendant's confession is intended to reduce the incidence of convictions based on false confessions." *State v. Douglas*, 675 N.W.2d 567, 572 (Iowa 2004).

The rule requires the State to produce corroborating evidence independently linking the defendant to the offense. *Id*. at 569. "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. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994). Corroborating evidence does not need to prove the offense beyond a reasonable doubt, or even by a preponderance of the evidence. *State v. Polly*, 657 N.W.2d 462, 467 (Iowa 2003).

There is evidence in the record to corroborate Curtis's confession. Shortly after the murder Curtis asked a former girlfriend if she "would still love him if he was a murderer." Curtis stated he was wearing Nike or New Balance shoes, and an imprint of a New Balance shoe was visible on Davidson's shoulder. Curtis stated he was at Davidson's apartment between midnight and 1:00 a.m., and Davidson's computer showed no activity after 12:55 a.m. In addition, Davidson's injuries were consistent with Curtis's statements as to how the murder was committed.

We conclude Curtis has failed to show he received ineffective assistance due to counsel's failure to challenge the district court's ruling denying Curtis's post-trial motions raising the issue of whether his confession was corroborated by other evidence. Again, we will not find counsel engaged in ineffective

assistance due to failure to raise a meritless claim. *See Hildebrand*, 405 N.W.2d at 841.

We affirm the decision of the district court denying Curtis's application for postconviction relief.

AFFIRMED.