IN THE COURT OF APPEALS OF IOWA

No. 8-512 / 07-0383
Filed August 27, 2008

CARL UTAH SKAGGS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Dan F. Morrison, Judge.

Carl Skaggs appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Dennis McKelvie of McKelvie Law Office, Grinnell, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Michael W. Mahaffey, County Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Carl Skaggs appeals the district court decision denying his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

Following a jury trial, Skaggs was convicted of sexual abuse in the third degree in November 2000 and sentenced to a prison term not to exceed ten years. Skaggs asserted at trial that the victim made sexual advances toward him. The victim was mentally incompetent, however, and the jury did not find Skaggs had a defense of consent. The jury found sufficient evidence supported all three elements of the crime. In September 2002 this court affirmed the district court's decision, but preserved for postconviction relief his ineffective assistance of counsel claim regarding the infringement of his Fifth Amendment right against self-incrimination.

Skaggs filed a postconviction relief application in December 2003, raising several issues involving his trial, two of which are now on appeal: (1) his trial counsel was ineffective for failing to object to a line of questioning during the State's cross-examination that infringed on his Fifth Amendment right to self-incrimination and (2) his appellate counsel failed to argue on direct appeal that certain police officers were allowed to testify on matters that required expert testimony although they were unqualified to give such expert testimony. After a hearing on the postconviction application, the district court denied Skaggs' application and request for a new trial in January 2007. He appeals.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Those claims concerning alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Id.*; *State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721. Our review of a court's evaluation of an issue raised by a defendant in a postconviction application is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520.

III. Issues on Appeal.

A. Ineffective Assistance of Trial Counsel.

Skaggs contends his trial counsel was ineffective by failing to object to prosecutorial misconduct at his trial. He argues the State infringed upon his Fifth Amendment right against self-incrimination during cross-examination by improperly asking him about his decision not to tell the police his side of the story.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a

preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam*, 745 N.W.2d at 721. We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721. Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *Id*. However, "strategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments which support the particular level of investigation conducted." *Id.*; *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984)). Ineffective assistance of counsel claims "involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." *Ledezma*, 626 N.W.2d at 143.

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Ledezma*, 626 N.W.2d at 143. A

reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722.

Skaggs claims the following line of questioning posed during cross-examination by the State during Skaggs' testimony amounted to prosecutorial misconduct:

> Q. Your testimony now is that she [the victim] was trying to make a sexual advance to you at Rock Creek? A. Yes sir, by rubbing on me, trying to sit close to me.
>
> Q. Really? A. Yeah.
>
> Q. And you didn't say that on direct examination with Mr. Stiefel, did you? You said that she said something about you touching her bottom.
>
> . . . .
>
> A. Yes. According to Sergeant Hanssen's report, she stated that I touched her on the bottom momentarily which might I point out has changed from person to person.
>
> Q. Did you ever tell Sergeant Hanssen that? A. Why would I need to tell him that? He's the one who wrote it.
>
> Q. Did you ever tell him about the fact that she was sexually advancing you? A. Why would I talk to Sergeant Hanssen?
>
> Q. Tell him your side of the story. A. Sorry, I've lived in Los Angeles. I know how cops are. I do not like 'em.
>
> Q. Don't trust 'em? A. No. There's certain cops I just know that I won't get along with.
>
> Q. How do you know that? A. First of all, when they arrest me fraudulently or when they're standing in the hallway talking to a police that has fraudulently arrested me—
>
> Q. That happened to you in Los Angeles? A. No, that happened to me in Grinnell.
>
> . . . .
>
> Q. . . . So the jury should be selective in terms of whom it believes, but it should believe everything that you have said here today in court because it is the truth? A. Well, sir, whenever I have proof, undenial [sic] proof, that I've been fraudulently arrested, whenever I have undenial [sic] proof that records are missing in this case that points the finger to lying officers, when I have undenial [sic] proof that the officers are stating things that are not true, would you care for me to reiterate on that or has the preliminary hearing slipped your mind too?
>
> Q. You never talked to the officers, did you? A. No, sir. I don't believe in it.

Skaggs argues the prosecutor's questions constituted a violation of his rights under the Fifth Amendment. He contends he had no duty to talk to the police or reveal incriminating evidence and that it is improper for the prosecutor to point out, in front of the jury, that he chose to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 99 (1976); *State v. Metz*, 636 N.W.2d 94, 97-98 (Iowa 2001). He argues his counsel was ineffective by failing to object to the prosecutorial misconduct that resulted in prejudice and denied him a fair trial.

The district court utilized a multistep analysis to determine, first of all, if prosecutorial misconduct existed. *State v. Graves*, 668 N.W.2d 860, 869-70 (Iowa 2003). The district court concluded that while misconduct was shown, resulting prejudice was not established. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). "It is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Id*.

We agree with the district court that misconduct was shown. We can find no valid explanation for this line of questioning. However, we agree with the district court that prejudice was not established on either the issue of prosecutorial misconduct or the overriding issue raised in the ineffective assistance of counsel claim.

Skaggs' counsel was well aware of the potential Fifth Amendment issue prior to trial as evidence by a filing of a motion in limine that was granted by the district court. Skaggs himself brought up the Rock Creek incident prior to any questioning on this issue by the prosecutor. The prosecutor's questioning was

limited in scope and duration. In addition, the record contains strong evidence of Skaggs' guilt.

Furthermore, Skaggs' trial counsel explained his trial actions through his testimony in the postconviction action. Skaggs' counsel testified that he did not object to the prosecutor's questions regarding Sergeant Hanssen as part of Skaggs' trial strategy:

> Q. . . . Did you have a reason for not objecting to those questions? A. I did.
>
> Q. And what was that, please? A. Well, part of our defense theory was that the police investigation had been incomplete, and with regard to Carl Skaggs, our position was that a good police investigation would, at a minimum, have included the police asking Carl, "What happened? What's your side of the story?" And the facts at trial, as developed before trial through deposition, indicated the police officer had never even once contacted Carl and asked Carl, "What's your side of the story?"
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> And so at the trial, when the prosecutor asked Carl under cross examination, "Why didn't you tell the police your story," that was a question we liked, because the answer was, "They never asked." And our theory was that made the investigation incomplete and defective, and along with other things, then, would perhaps cast doubt on the reliability of the State's case. And so our trial strategy was, that was a good question to have asked, and we argued from it ourselves, that that pointed out that the investigation was incomplete.
>
> Q. Did any answers come from that question that you felt hurt Carl's case? A. No, because I believe Carl answered the questions honestly, which was, number one, he did not want to talk to the police. He did not trust the police. And that was our theory on the defense, was that you can't trust the police investigation in this particular case.

In light of the totality of the circumstances, an incomplete investigation theory was one of the few strategies available to Skaggs. We cannot say this strategic decision amounted to ineffectiveness of his trial counsel. We therefore affirm denial of Skaggs' postconviction relief application with regard to this issue.

B. Police Officers' Testimony.

Skaggs alleges his trial counsel was ineffective for failing to object to testimony by certain police officers on matters he claims they were not qualified to offer testimony on. In addition, he alleges appellate counsel was ineffective for failing to argue the issue on direct appeal. These issues were not pursued at the postconviction hearing, and the district court concluded Skaggs had abandoned the issue. Following the issuance of the district court ruling, Skaggs applied for a "resumed" or "further" hearing. The district court denied the application. We find no error in either ruling by the district court. We therefore conclude the issue was abandoned and will not address it further.

AFFIRMED.