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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Christopher Jerome SALAZAR, Appellant.

No. A08-0264.
|
April 14, 2009.

West KeySummary

1 **Criminal Law** Effect of Grant of Immunity

110 Criminal Law
110II Defenses in General
110k42 Immunity to One Furnishing Information or Evidence
110k42.6 Effect of Grant of Immunity

The criminal case of a defendant police officer, who faced criminal charges for providing alcohol to minors, was not tainted by compelled statements given during an internal-affairs investigation. The internal affairs investigator provided no information to the police department that charged the defendant officer. The prosecutor testified that the decision to charge the defendant officer was made solely on information from the police department and that the case file contained no information from any other investigative body. Minn. R. Prof. Conduct 1.10(b)(2).

Stearns County District Court, File No. K0-06-1705.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN, Janelle P. Kendall, Stearns County Attorney, Sarah E. Hilleren, Assistant County Attorney, St. Cloud, MN, for respondent.

James M. Ventura, Wayzata, MN, for appellant.

Considered and decided by KLAPHAKE, Presiding Judge; PETERSON, Judge; and BJORKMAN, Judge.

UNPUBLISHED OPINION

PETERSON, Judge.

***1** In this appeal from convictions of two counts of aiding and abetting furnishing alcohol to minors and one count of indecent exposure, appellant argues that (1) the district court erred in finding that his criminal case was not tainted by compelled statements given during an internal-affairs investigation, (2) his codefendant's acquittal precludes his aiding-and-abetting convictions, and (3) the state failed to comply with its discovery obligations. We affirm.

FACTS

Appellant Christopher Salazar, a Benton County sheriff's deputy, lived with John Dirksen, a Wright County sheriff's deputy. Appellant also rented a room in the basement of his house to H.P.

On February 12, 2006, H.P. was visited by her 16-year-old sister and her sister's 16-year-old friend. At around 2:36 a.m., appellant and Dirksen entered H.P.'s part of the basement, woke H.P. and the two girls, and told them that it was "underage consumption night and to get upstairs and ... come drinking with them." H.P. initially refused, but eventually followed the others to the kitchen, where many bottles of alcohol and glasses had been set out. Appellant began mixing alcoholic drinks, which either he or Dirksen handed to the visitors. H.P., who was pregnant, refused to drink and attempted to discourage the two underage girls from drinking. However, each girl ultimately drank a large quantity of alcohol. H .P. could not recall how much the girls consumed, but noted that her sister's glass "never got empty" because Dirksen kept refilling it.

Appellant and Dirksen both began to encourage the two girls to flash their breasts at them. H.P.'s sister refused, but her friend "finally gave in" and briefly exposed her breasts and/or buttocks. At some point, appellant and Dirksen borrowed H.P.'s cell phone and photographed their testicles, intending to send the pictures to H.P.'s fiancé as a joke. Appellant then shocked H.P. by walking over and "pull[ing] his penis out in front of [her]."

Several days later, after discussing the incident with her mother and fiancé, H.P. decided to report the incident to an officer with the St. Cloud Police Department. As a result, the St. Cloud Police Department initiated a criminal investigation of both appellant and Dirksen and notified the sheriff's offices where they worked, which prompted each office to begin an internal-affairs investigation.

Detective Sergeant Troy Heck conducted Benton County's investigation of appellant. During the investigation, Heck took a compelled *Garrity*[1] statement from appellant after giving him the appropriate warning that failure to discuss the incident could result in dismissal and that the contents of his statement would not be used in any criminal proceeding.

[1] *See generally Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (holding that compelled self-incriminatory statements during an internal-affairs investigation may not be used in subsequent criminal proceedings and requiring investigator to warn subject of investigation of consequences of making or refusing to make such statements).

Appellant was charged with two counts of aiding and abetting furnishing alcohol to a minor in violation of Minn.Stat. §§ 340A.503, subd. 2(1), .702(8), 609.05 (2004); one count of indecent exposure in violation of Minn.Stat. § 617.23, subd. 1(1) (2004); and one count of aiding and abetting procuring indecent exposure in violation of Minn.Stat. §§ 617.23, subd. 1(2), 609.05 (2004). Dirksen was also charged with all of these offenses, except indecent-exposure.

***2** In light of his *Garrity* statements, appellant requested a *Kastigar*[2] hearing to ensure that none of the statements he was compelled to make during the internal-affairs investigation were being improperly used to prosecute him. At the *Kastigar* hearing, Heck testified that he performed his internal-affairs investigation without assistance from anyone else and that he did not discuss his investigation with anyone from either the St. Cloud Police Department or the Stearns County Attorney's Office or disclose its contents to them. The only person to whom Heck disclosed the contents of appellant's *Garrity* statements was a deputy in the Benton County Sheriff's Office. This was confirmed by the officer in charge of the criminal investigation conducted by the St. Cloud Police Department, who testified that his contact with the internal-affairs investigation was limited to providing information to Heck and that he received no information from Heck. A Stearns County prosecutor testified that he made the charging decision based entirely on information provided by the St. Cloud Police Department and that the case file contained no information from any other investigative body. The district court found this testimony credible and concluded that the criminal proceedings were not tainted by the contents of appellant's *Garrity* statements.

[2] *See Kastigar v. United States,* 406 U.S. 441, 460, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972) (explaining that state has burden of showing that proposed evidence is derived from legitimate source independent of compelled testimony).

Following appellant and Dirksen's joint trial, the jury found appellant guilty on all counts, except aiding and abetting procuring indecent exposure, and acquitted Dirksen on all counts. This appeal followed.

DECISION

I.

Appellant argues that the state's failure to call H.P. and the two 16-year-old girls at the *Kastigar* hearing prevented the state from establishing that their trial testimony was not tainted by his compelled *Garrity* statements. When a police officer is compelled under threat of dismissal to give statements during an internal-affairs investigation of misconduct, the Fourteenth Amendment prohibits the use of those statements in subsequent criminal proceedings. *Garrity v. New Jersey,* 385 U.S. 493, 499-500, 87 S.Ct. 616, 620, 17 L.Ed.2d 562 (1967). Although the officer being investigated may be prosecuted for the underlying acts to which the statements relate, he is entitled to use-and-derivative immunity with respect to those statements. *State v. Gault,* 551 N.W.2d 719, 723 (Minn.App.1996) (applying *Kastigar v. United States,* 406 U.S. 441, 453, 460, 92 S.Ct. 1653, 1661, 1664-65, 32 L.Ed.2d 212 (1972)), *review denied* (Minn.

Sept. 20, 1996) *and appeal dismissed and order granting review vacated* (Minn. Feb. 27, 1997). Consequently, the district court must hold a *Kastigar* hearing to determine whether, and to what extent, criminal proceedings are tainted by the use of the defendant-officer's compelled *Garrity* statements. *See id.* (describing hearing requirements). On appeal, we review the constitutional question of taint de novo, but defer to the district court's findings on the underlying factual circumstances unless clearly erroneous. *See State v. Buchanan,* 431 N.W.2d 542, 551-52 (Minn.1988) (stating standard of review in a suppression-of-involuntary-confession context).

***3** At a *Kastigar* hearing, the state has the burden of proving by a preponderance of the evidence that it did not use the *Garrity* statements " 'in any respect' that could 'lead to the infliction of criminal penalties on [the defendant].' " *Gault,* 551 N.W.2d at 723, 725 (emphasis omitted) (quoting *Kastigar,* 406 U.S. at 453, 92 S.Ct. at 1661). Appellant contends that the state failed to meet this burden because it did not call any of the three fact witnesses. Appellant argues that calling these witnesses was necessary to establish that Heck did not taint them by revealing information gleaned from appellant's compelled statements when he questioned them during the internal-affairs investigation. Rather than calling only law-enforcement witnesses to testify about their agency's respective exposure to the contents of the *Garrity* statements, appellant argues that the state was required to call each fact witness and proceed through their testimony " 'line-by-line and item-by-item' " in order to demonstrate " 'that no use whatsoever was made of any of the [privileged statements] either by the witness or by the [investigator] in questioning the witness.' " *Id.* at 723 (first alteration in original) (quoting *United States v. North,* 910 F.2d 843, 872 (D.C.Cir.1990), *modified on other grounds,* 920 F.2d 940 (D.C.Cir.1990)).

The facts of this case distinguish it from the cases that appellant relies on in his argument. In *Gault,* for example, the city attorney's office's case file initially contained the defendant-officer's *Garrity* statements. *Id.* at 722. Once a prosecutor assigned to the case recognized the statements for what they were, the office attempted to purge itself of the taint by removing and sealing the problematic statements and reassigning the case. *Id.* Thus, the detailed inquiry that appellant contends is needed in this case was necessary in *Gault* because the city attorney's office responsible for prosecuting the defendant-officer was exposed to his *Garrity* statements and might have used the statements, even unintentionally, to develop its trial strategy. *Id.* at 724-25. Unlike *Gault,* however, the district court found that Heck did not disclose the contents of the internal-affairs investigation to either the police department conducting the criminal investigation or to the county attorney's office responsible for prosecuting appellant.

Appellant also relies on *North* to suggest that a witness-by-witness inquiry was necessary because Heck might have unintentionally used what he learned from appellant's compelled statements to formulate his questions when interviewing the three fact witnesses, thereby using that information to refresh their recollections. But in *North,* many of the fact witnesses had been directly exposed to the substance of defendant Lieutenant Colonel Oliver North's compelled testimony before Congress because the congressional hearings were broadcast live on national television and radio, replayed on the news, and extensively analyzed in the public media. *North,* 910 F.2d at 851, 863-64. In contrast, the witnesses here had no comparable exposure to appellant's statements, and Heck testified that the only person to whom he disclosed the *Garrity* information was a deputy at the Benton County Sheriff's Office. Also, although the state had the burden of proving that it did not use the contents of appellant's statements, appellant offered no evidence to rebut Heck's testimony, and the district court was entitled to find the testimony credible. *See State v. Sletten,* 664 N.W.2d 870, 876 (Minn.App.2003) (stating that weighing witness credibility is exclusive function of fact-finder).

***4** The evidence establishes that the criminal proceedings were effectively "screened off" from appellant's *Garrity* statements. *Cf.* Minn. R. Prof. Conduct 1.10(b)(2) (requiring law firms wishing to avoid an imputed conflict of interest when representing a party adverse to a lawyer's former client to subject that lawyer "to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation", 1.11 (similar rule for lawyer who is former or current public officer or employee), 1.12 (similar rule for lawyer who is former judge, arbitrator, or other third-party neutral). Consequently, we conclude that the district court did not err when it determined that appellant's criminal prosecution was not tainted by exposure to the *Garrity* statements.

II.

Appellant argues that Dirksen's acquittal on the aiding-and-abetting furnishing-alcohol-to-minors counts precludes his convictions on them. This argument is without merit.

Under the aiding-and-abetting statute, "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn.Stat. § 609.05, subd. 1. Appellant emphasizes the phrase "crime committed by another," but he ignores the subdivision of the statute that provides that "[a] person liable under this section may be charged with and convicted of the crime although the person who directly committed it has not been convicted." *Id.*, subd. 4. Thus, Dirksen's acquittal does not preclude appellant's conviction.

Also, the complaint charged appellant with "aiding and abetting *and being aided and abetted by another* " to furnish alcohol to each minor girl. (Emphasis added.) In other words, appellant was charged as both principal and accomplice. The jury's verdict reflects a finding that appellant, not Dirksen, was the principal.

III.

Appellant argues that he is entitled to a new trial because the prosecution failed to provide him with Heck's file from the internal-affairs investigation. This argument is without merit.

A prosecutor must, upon request, "allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case." Minn. R.Crim. P. 9.01, subd. 1. In addition, the prosecutor must permit defense counsel to inspect and reproduce any "relevant written or recorded statements and any written summaries ... of the substance of relevant oral statements made by [witnesses intended to be called at trial] to prosecution agents." *Id.*, subd. 1(1)(a).

The scope of a prosecutor's obligations under rule 9.01, extends only "to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office." *Id.*, subd. 1(8). Under the plain language of rule 9.01, the prosecutor's discovery obligations do not extend to the internal-investigation file in this case. The Stearns County Attorney's Office did not have possession or control of, or even access to, the contents of Heck's investigation. And Heck did not report to the Stearns County Attorney's Office with respect to an internal-affairs investigation conducted by the Benton County Sheriff's Office. Indeed, as the state astutely asserts, requiring the prosecutor to obtain the internal-investigation materials in order to give them to appellant would create a further *Garrity* issue in and of itself. Regardless of whether appellant was entitled to access these materials for *Kastigar* hearing purposes, requesting them from the prosecutor was not the appropriate channel.

***5 Affirmed.**

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NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Byron Lester GOLDTOOTH, Appellant.

No. A15–0077.
|
Sept. 6, 2016.
|
Review Denied Nov. 23, 2016.

Redwood County District Court, File No. 64–CR–12–1081.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, Minnesota and Steven S. Collins, Redwood County Attorney, Redwood Falls, MN, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Sara Martin, Assistant Public Defender, St. Paul, MN, for appellant.

Considered and decided by JESSON, Presiding Judge; HALBROOKS, Judge; and HOOTEN, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge.

***1** In this combined direct and postconviction appeal, appellant challenges the postconviction court's denial of relief and an evidentiary hearing and argues that the district court deprived him of his right to present a defense by excluding certain evidence. We affirm.

FACTS

In December 2012, appellant Byron Lester Goldtooth was charged by complaint with two counts of first-degree criminal sexual conduct. The complaint alleged that Goldtooth sexually penetrated C.L., his girlfriend's daughter, when C.L. was less than 13 years of age. Following a jury trial, Goldtooth was found guilty of both counts, and the district court entered convictions on both counts.

Goldtooth filed a notice of appeal from the convictions, but later moved to stay the appeal and remand to the district court for postconviction proceedings, and this court granted the motion. Goldtooth subsequently filed a petition for postconviction relief, arguing that (1) he was deprived of his right to be present at every critical stage of the proceedings; (2) the district court abused its discretion by denying his discovery motion without conducting an in camera review of C.L.'s records; and (3) the state committed a discovery violation by failing to disclose relevant information. In the alternative, Goldtooth argued that he received ineffective assistance of counsel. The postconviction court denied Goldtooth's petition without holding an evidentiary hearing. This consolidated appeal followed.

DECISION

I.

Goldtooth challenges the postconviction court's denial of his petition for postconviction relief and his request for an evidentiary hearing. "When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, [appellate courts] review the postconviction court's decisions using the same standard that [they] apply on direct appeal." *State v. Beecroft,* 813 N.W.2d 814, 836 (Minn.2012). When reviewing a postconviction court's denial of relief, "[t]he scope of [an appellate court's] review of factual matters is to determine whether there is sufficient support in the record to sustain the postconviction court's findings." *State v. Nicks,* 831 N.W.2d 493, 503 (Minn.2013). We review the postconviction court's factual findings for clear error and review its legal conclusions de novo. *Id.* "Ultimately, [appellate courts] review a denial of a petition for postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion." *Id.* "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). A district court must set a hearing on a petition for postconviction relief "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn.Stat. § 590.04, subd. 1 (2014).

Right to Be Present at Every Stage of the Proceedings

***2** Goldtooth first argues that he was deprived of his due process right to be present at every critical stage of the trial proceedings. Specifically, he claims that he was not present on March 6, at which time, according to an affidavit of his trial attorney, arguments regarding his discovery motion were held in chambers. As further support for this allegation, in his petition Goldtooth referenced the district court's March 14, 2014 order denying Goldtooth's discovery motion, which indicates that the matter came before it on March 6, 2014. In denying Goldtooth's petition, the postconviction court stated that the reference to March 6, 2014, was a clerical error and that the discovery motion was argued in open court on March 10, 2014, in Goldtooth's presence. [1]

A defendant in a criminal proceeding has a constitutional right under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to be present "at all critical stages of trial." *Ford v. State,* 690 N.W.2d 706, 712 (Minn.2005); *see also United v. Gagnon,* 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985). A critical stage of trial includes any proceeding where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *State v. Booker,* 770 N.W.2d 161, 165 (Minn.App.2009) (alteration omitted) (quotations omitted), *review denied* (Minn. Oct. 20, 2009). Minn. R.Crim. P. 26.03 also provides that a defendant must be present at arraignment, plea, and for every stage of trial, including jury selection, opening statements, presentation of evidence, closing arguments, jury instruction, any jury questions dealing with evidence or law, the verdict, and sentencing.

Goldtooth has not cited to a case that expressly holds that a discovery motion is a critical stage of a trial, and rule 26.03 does not specifically list a discovery motion as requiring his presence. Assuming his presence would provide a reasonably substantial relation to his opportunity to defend himself against the charge and reading rule 26.03 broadly to require his presence at every stage of trial, Goldtooth argues that he should have been present for the hearing on the discovery motion. However, we are not required to resolve this legal issue. Here, the postconviction court ruled that, based upon its review of the record, Goldtooth *was* present during the arguments regarding his discovery motion. The issue, then, is not whether Goldtooth had a right to be present at the discovery motion arguments, but whether the postconviction court abused its discretion by determining that the record conclusively shows that the discovery motion was heard in open court in Goldtooth's presence and denying his petition.

The record indicates that at a pretrial hearing on September 16, 2013, Goldtooth's attorney, acknowledging that he had just received 140 or 150 pages of discovery from the state, requested a trial date in early February 2014. However, on January 29, 2014, Goldtooth's attorney moved for a continuance of the trial until the state delivered "all requested discovery to the court for *in camera* review to determine what c[ould] be properly used." In a request for additional discovery filed the next day, Goldtooth demanded, among other things, that the state produce all of the records of C.L .'s encounters or communication with child protection or law enforcement, her complete educational and psychological testing records, and all of her hospitalization records.

***3** In a settlement conference attended by Goldtooth on February 3, 2014, Goldtooth's attorney acknowledged that "a good deal" of his discovery request had already been provided by the state, but stated that in his self-described "sort of a scattershot blanket request," he wanted the district court to provide a protective order and do an in camera review of any further records that were disclosed. Goldtooth's attorney explained that he wanted information for impeachment of C.L. regarding her propensity for making false allegations of sexual assault. There is no evidence that Goldtooth's attorney had any information that C.L. had ever made a previous false allegation of sexual abuse. At the settlement conference, after both parties had acknowledged C.L.'s privacy rights related to Goldtooth's discovery, the district court indicated that it wanted to protect those rights and limit the inquiry "into areas of [ ] [C.L.'s] life that do not have relevant evidence that would be pertinent," but might also have "embarrassing, or very personal information" that "would not be admissible under the Minnesota statutes or the [r]ules of [p]rocedure." The district court instructed the state to file any documents for an in camera review regarding their admissibility by February 20.

On February 20, 2014, the state filed a memorandum in opposition to Goldtooth's request for additional discovery, claiming that the request was vague and overly broad, and

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[1] We note that the same judge presided over Goldtooth's trial court proceedings and denied his postconviction petition.

[illegible]