Publication Name: THE GAZETTE Publication Date: 11/07/1999 Edition: IC, Section: A, Page: 1

Headline: Unpopular defense

Intro: **Erdahl's long crusade wins retrial in Quad Cities murder case**

Byline: Lynn M. Tefft, Source: Gazette staff writer

Iowa City Gazette

IOWA CITY - From the minute he met convicted murderer Sherman White in the Fort Madison penitentiary in 1983, Iowa City attorney Clemens Erdahl was convinced White shouldn't be there. So, for the last 16 years, Erdahl has advanced a tedious and time-consuming appeal to win White's release.

"When Sherman told me what had happened, how he'd been railroaded, forced to be there and is spending the rest of his natural life in prison, I believed then and believe now that it was an injustice," Erdahl said.

That belief has fueled Erdahl through a case so complicated he's devoted whole weeks at a time to it, so intensive he's retreated to a monastery to work on it, so exhausting he had to hand it off to his partner for a couple of years.

He's received the court-appointed attorney rate - about one-third his normal hourly rate - for about two-thirds of his work.

Erdahl's work paid off last month, when a panel of judges from the Eighth Circuit Court of Appeals ruled that White, 45, is entitled to a new trial because the state withheld crucial evidence in his 1972 Scott County case.

Bob Brammer, spokesman for Iowa Attorney General Tom Miller, declined to comment on the ruling except to say that the state has asked for a rehearing by all nine circuit court judges.

Advancing the same arguments he had in lower courts, Erdahl prevailed after he won access to new evidence that buttressed one of his key points - police memoranda that showed investigators influencing the testimony of a witness who labeled White as a key participant in the crime.

But Erdahl's work on White's behalf likely is not over. If the nine judges agree to review the case, another years-long round of briefs and arguments will begin.

If the judges decline, the state must decide whether to try White again or release him. Erdahl said he will be one of the attorneys who will represent White if there is a new trial.

The case has put Erdahl at the center of whirlwind in the Quad Cities, where the recent turn of events has resurrected ugly memories of one of the area's bloodiest rampages.

Not that Erdahl is unaccustomed to being a lightning rod for controversy. Clients in his 20-year law career have included Lary Morgan, a 38-year-old Missouri man found guilty of the abduction, sexual assault and murder of 9-year-old Anna Marie Emry of Grinnell in 1994.

A magistrate appointed Erdahl to represent Morgan, citing the attorney's experience in defending people accused of serious crimes.

Other high-profile clients include accused armed robber Michael Constantino in 1995 and Robert Sirovy, accused in the kidnap and sexual abuse of a prison guard in 1990. Erdahl currently is defending James Frank Miller, 17, who is accused of helping beat Frank Boyd to death last summer and burn his body.

Iowa Citians also know Erdahl from his time on the City Council, from 1977 to 1985.

Erdahl was an undergraduate at the University of Iowa when one of the Quad Cities' most infamous crimes happened. Five men busted into the Shamrock bar in Davenport on Jan. 19, 1972, killing a bartender and two patrons and injuring three other patrons.

White, 18 at the time, maintains to this day that he was forced to participate in the robbery and ran as soon as shots were fired. The state argued that White in fact had "cased" the bar before the robbery.

Erdahl said he believes White was convicted of murder, robbery and assault, despite substantial evidence to support his innocence, because prosecutors bore "understandable pressure" from the Quad Cities community to get convictions.

Glen McGhee and Tommy Cunningham also were convicted of murder. McGhee remains incarcerated at a high-security prison in Marion, Ill. Cunningham was killed in prison. Eugene Orr and Clayton Vesey each spent about 12 years in prison after being convicted of lesser charges.

The man driving the car that night, Michael Mann, also argued he had been coerced and was never charged. Mann - who has told Erdahl that White was essentially in the same situation as he - had parents to stand up for him, Erdahl said. White's parents had died some years before. White's three sisters and brother were supportive, he said, but limited in their ability to advocate for White.

Moreover, it seemed to Erdahl that even those in a better position to defend White were letting him down. By the time Erdahl met White in 1983, White's post-conviction appeal was about to be dismissed for lack of action by a previous court-appointed attorney, who saw no use in pursuing it.

"It was an 11th hour problem at that point," Erdahl said.

The day he met White, Erdahl was in Fort Madison on behalf of a client and a case he doesn't remember. But he was so convinced by White's story that he took over that case and persuaded the Iowa Supreme Court to remand the case back to the post-conviction trial stage.

It would be years before White was vindicated in the federal courts, however. All state remedies had to be exhausted before the case could be appealed.

Erdahl dug deep into the state appeal, taking depositions from the attorneys who had represented White at the trial, the jurors and the witnesses who testified.

At the trial for post-conviction relief, Erdahl argued that the prosecution during the trial alluded to a statement White allegedly made to police about "killing all the witnesses," after agreeing not to introduce the statement.

Erdahl also argued that the jury was tainted because a juror was observed talking to a family member of one of the victims.

Denied at the post-conviction trial, Erdahl again appealed the case to the Iowa Court of Appeals. That court also denied the appeal but noted it did not necessarily approve of the way the jury matter was handled.

Thus the state proceedings ended in 1986, sending the case into the federal courts. Erdahl began fighting an even more protracted fight.

Attempting to craft airtight arguments on a number of ways White was wronged, including that his statement to the police was involuntary and inadmissible at trial because it was induced by a promise of leniency, Erdahl combed documents and conducted hours of interviews. He spent days at a time at the University of Iowa College of Law library conducting research.

It was a tug of war in slow motion - Erdahl would advance an argument or make a motion and the state would ask for a reconsideration. Each step took two or three years.

"Both sides want to make sure things are right because there's so much finality to it," Erdahl said.

Ironically, some of the evidence most crucial to Erdahl's victory was the result of an argument forwarded by the Iowa Attorney General's office. Responding to the allegation that the prosecution had illegally used information from White's statement to police, the attorney general's office asserted that prosecutors could have obtained that information elsewhere.

A judge granted Erdahl's motion to see the files that contained that information. Erdahl found police memoranda indicating that Al Stouffer had been coached into fingering White as an assailant, when previously he had named Cunningham.

The prosecution had withheld the memoranda from White's attorneys at trial, thus denying White a chance to fairly defend himself. Erdahl had the evidence that ultimately would persuade the court that White deserved a new trial.

But such victories came with a price. Erdahl actually gave up the case for a couple years in the early 1990s. He was replaced for a short time by another court-appointed attorney, then his partner Bruce Nestor took over.

"There's a lot of tension and anxiety with a case like this. At times it seems pretty hopeless," Erdahl said.

"Both Sherman and I thought new blood would be helpful."

Erdahl took on the case full time again five years ago.

He said White is "cautiously optimistic and apprehensive" about the court's latest ruling.

"There's still the possibility of his not being released," Erdahl said. "One can only imagine how it feels to come this close and not get one's freedom after this many years. And to be re-entering society - a lot has changed in 27 years."

"It won't be over until I shake Sherman White's hand outside the penitentiary," he said.

On March 19, 2003, Clemens Erdahl and the Reverend Ed Mutum met Sherman White, Jr., outside the Newton Correctional Facility. He was given a ride home to the Quad Cities a free man for the first time in 31 years and two days. Clemens had worked on Sherman's case for 20 years by that time.

Sherman White, Appellant, v. James Helling, Acting Warden, Iowa State Penitentiary, Appellee.

No. 98-3604SI

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

194 F.3d 937; 1999 U.S. App. LEXIS 25834

June 15, 1999, Submitted
October 19, 1999, Filed

SUBSEQUENT HISTORY: [**1] As Corrected October 21, 1999. Rehearing En Banc and Rehearing Denied December 6, 1999, Reported at: *1999 U.S. App. LEXIS 32034.*

PRIOR HISTORY: On Appeal from the United States District Court for the Southern District of Iowa. 86-cv-50599. Honorable Donald E. O'Brien.

DISPOSITION: Judgment of the District Court reversed and cause remanded with instructions.

LexisNexis(R) Headnotes

COUNSEL:

Counsel who presented argument on behalf of the appellant was Clemens Erdahl of Iowa City, IA.

Counsel who presented argument on behalf of the appellee was Thomas J. Miller, AAG, Des Moines, IA. Mary Tabor, Attorney General, also appeared on appellee's brief.

JUDGES: Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and BYRNE, n1 District Judge.

n1 The Hon. William Matthew Byrne, Jr., United States District Judge for the Central District of California, sitting by designation.

OPINIONBY: RICHARD S. ARNOLD

OPINION: [*939] RICHARD S. ARNOLD, Circuit Judge.

A jury convicted Sherman White of two counts of robbery with aggravation, three counts of murder, and two counts of assault with intent to commit murder. White was sentenced to three terms of life imprisonment without parole, two terms of thirty years' imprisonment, and three terms of twenty-five years' imprisonment, all to run concurrently. White's conviction and sentence were affirmed in his initial appeal, and upheld again when he sought postconviction relief. See *State v. White, 223 N.W.2d 173 (Iowa 1974); White v. State, 380 N.W.2d 1 (Iowa App. 1985).*

White then filed a petition for habeas corpus relief. The District Court denied the petition, and later denied White's motion to reconsider. [**2] White now appeals. He raises a number of issues in his appeal, including a claim that material, exculpatory evidence was withheld by the state and a claim that he received ineffective assistance of counsel. We hold that material exculpatory evidence was withheld from White, the state trial court, and the jury. White must be released or given a new trial.

I.

On January 19, 1972, White and five other men were involved in a robbery at the Shamrock Tavern in Davenport, Iowa. n2 The bartender and two of the bar's patrons were shot and killed during the robbery. Other patrons at the bar were also injured. White himself did not shoot or assault anyone. White was tried separately from the other defendants and raised a coercion defense at his trial. The jury apparently did not believe that White had been forced to participate in the robbery, however, and found him guilty of eight felonies.

n2 The five other men involved in the robbery were Glenn McGhee, Tommy Cunningham, Eugene Orr, Clayton Vesey, and Michael Mann. Mann was the only one not charged. The State

appears to have accepted his contention that whatever part he played was coerced. The other defendants received sentences of varying lengths.

[**3]

Other facts of the case are relevant to the various claims that White is pressing on appeal, but we think the issues can be best understood if we state these facts in connection with the discussion of each individual issue.

II.

White argues that a statement he made to the police on March 9, 1972, confessing to his involvement in the crime, [*940] was not voluntary. n3 On the morning of the second day of his trial, White moved to suppress the statement. White argued that the police officers induced him to give his statement with a promise of leniency -- that he would be prosecuted only for the robbery, and not the murders. White's trial counsel was apparently not aware of this claim until the morning of the second day of the trial. The court, with the agreement of both parties, decided to defer a suppression hearing until the state was ready to introduce the statement. Both parties agreed not to make any references to the statement until after the hearing. During the state's opening argument, however, and again during its cross-examination of White, the state did refer to information contained in the statement. White's counsel did not object, and the court never held a suppression hearing. [**4] White's lawyer had apparently decided in the meantime that parts of the statement were favorable to his client, and that it was just as well for the statement, or parts of it, to come in.

n3 The State argues that this point was procedurally barred. The involuntariness of the statement, it says, was never argued in the state courts as such, but only in the context of a claim that White's trial counsel was ineffective for not having properly objected to the use of the statement. We do not stop to resolve this procedural-bar argument, because the state court's finding that the statement was voluntary, which we discuss in text, is sufficient to dispose of both the involuntariness claim and its ineffective-assistance derivative.

White argued in the post-conviction proceeding in the state courts that use of the statement violated his rights because, having been made in response to a promise of leniency, the statement was involuntary and therefore inadmissible as a matter of federal constitutional law. But the Iowa [**5] Court of Appeals found that "the statement was voluntarily given because it was not induced by a promise of leniency ...." *White v. State, 380 N.W.2d at 4.* This finding has fair support in the record and is therefore binding on a federal court exercising habeas jurisdiction. The written statement itself recites that "no threats or promises have been made to me to induce me to furnish a statement." Appellee's Appendix (App.) 113. An officer present at the time testified that he made no promises to White. App. 80. And White's own testimony about the alleged promise of leniency was somewhat equivocal. At one point in his testimony he indicated merely that he was "under the impression that I wouldn't be prosecuted." App. 98. Only later, in response to a leading question from his lawyer, did White specifically claim he had been promised he would be charged only with robbery, and not murder. We hold that the state court's finding that the statement was not induced by a promise of leniency is fairly supported by the record. We therefore reject petitioner's first argument.

III.

Petitioner's next argument relates to the alleged misconduct of a juror, Mrs. Mary Voss. During [**6] the trial, a member of the defense team observed the juror conversing with a spectator, Mrs. Marian Forsythe. Defense counsel promptly reported the conversation to the court, and a hearing was held in chambers. It developed that the spectator was a sister of one of the murdered men, so, on its face, the conversation was a matter of concern. The juror testified that she had known the spectator from 18 years earlier, that she had not known that the spectator was related to one of the victims, that she was merely inquiring about the health of Mrs. Forsythe's child, and that they did not discuss the case. She further stated that the conversation would have no bearing on her decision as a juror. The court denied the defense motion for a mistrial and admonished Mrs. Voss to have no more conversations of the kind.

[*941] Petitioner argues that his trial counsel was ineffective for not going more deeply into the matter. Counsel, it is said, should have called Mrs. Forsythe to testify in chambers about the circumstances and content of the conversation. Our initial inquiry is whether counsel's omission caused his representation of Mr. White to fall below acceptable professional standards. See *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* [**7] We must resist the temptation to use hindsight to require that counsel's performance have been perfect. Only reasonable competence, the sort expected of the "ordinary fallible lawyer," *Nolan v. Armontrout, 973 F.2d 615, 618 (8th Cir. 1992),* is demanded by the Sixth Amendment. Having weighed the matter carefully, we believe the Iowa Court of Appeals was correct in stating as follows:

> While petitioner's brief indicates certain aspects of this issue could have been handled more favorably for petitioner, we are unwilling to find that trial counsel's conduct was outside the bounds of normal competency.
>
> Despite the inconsistencies highlighted by White, even at this juncture, conflicting testimony persists as to when the conversation occurred and whether the juror's judgment was skewed as a result of the conversation.

White v. State, 380 N.W.2d at 5.

In a related contention, petitioner claims not merely that his trial lawyer was insufficiently diligent in exploring the issue, but that the juror said she was biased in fact. During the in-chambers proceeding we have referred to, Mrs. Voss testified unequivocally that, before the conversation in question, she had not even known that Mr. Forsythe had a brother, let alone that her brother was one of the victims of the crime. "I never knew she had a brother. Never knew her maiden name or anything." App. 68. [**8] The juror did not know of the relationship between the spectator and the murder victim until the court, at the beginning of the in-chambers proceeding, informed her of this fact.

Later, petitioner was able to develop some evidence to the contrary. During post-conviction proceedings in the state courts, Mrs. Voss, who was called again to testify, this time on deposition, first said she did not know if the conversation had taken place before or after she was selected to sit on the trial jury. This is important because, during voir dire, standard questions about acquaintance between potential jurors and any friends or relatives of victims of a crime had been put, and Mrs. Voss had not responded to these questions. So, if in fact she had conversed with Mrs. Forsythe before being selected to sit on the jury, an inference might be drawn that she had concealed information on voir dire. (It is also possible that, even if the conversation took place at the earlier point, Mrs. Voss did not realize the relationship until being informed by the court at the later in-chambers proceeding.) Mrs. Voss then followed up this testimony by saying that she was "pretty sure [the conversation] was before [**9] [she was] chosen as a juror." App. 111. Mrs. Forsythe, moreover, apparently testified that the conversation took place before Mrs. Voss was sworn in as a juror. App. 112. On the other hand, Brenda White, the petitioner's sister, testified that conversations she observed between the juror and Mrs. Forsythe took place after the jury had been selected. App. 94. Perhaps, as petitioner urges, several conversations, not just one, took place, but the record is equivocal. Again we agree with the Iowa Court of Appeals:

380 N.W.2d at 5. In this habeas corpus case, petitioner is attempting to upset the judgment of a court of competent jurisdiction, and the burden is on him to establish facts that would justify such relief. We conclude that he has not done so.

IV.

Petitioner's next point concerns the efforts of his trial lawyer to exclude the in-court identification made by one of the [*942] surviving victims of the crime, Al Stouffer. This witness was [**10] playing cards with friends in the Shamrock Tavern the night the robbery took place. He was ordered to hand over his wallet and to lie on the floor. At trial, he identified petitioner as the man to whom he gave his wallet. Petitioner now argues that this in-court identification should have been excluded under *Manson v. Brathwaite, 432 U.S. 98, 53 L. Ed. 2d 140, 97 S. Ct. 2243 (1977),* because it was the result of impermissible suggestion by the police, suggestion that created a very substantial likelihood of misidentification. The question is what trial counsel did to try to keep this testimony out, and whether what he did met the Strickland standard of reasonable professional conduct.

At trial, counsel in fact did object to the introduction of this testimony. Procedures used during a line-up were placed in issue, and a police officer was called to testify about them. The Court then overruled the defense objection. Later, counsel moved to strike the identification testimony, claiming that the witness himself had conceded that he had first identified petitioner, during a pretrial interview by the police, after being shown a single photograph of petitioner. The trial [**11] court never formally ruled on this motion, but the testimony was not stricken, so the motion was, in effect, denied. The nature of the procedures used with the witness before trial was in dispute. He did testify that he had seen a photograph of petitioner, but also stated that he had been shown other photographs at the same time. Further, the witness said that no one had tried to prompt him or to lead him to an identification.

Petitioner's principal criticism of his trial counsel is that no pretrial motion to keep the identification out was made, and, therefore, no evidentiary hearing on the question, outside the presence of the jury, was ever held. We can readily agree that it would have been better practice to make such a motion, but we are not convinced that

there is a reasonable probability that such a pretrial hearing would have resulted in a decision to exclude the testimony. If we look at some of the factors courts weigh in deciding issues of this kind, see *Neil v. Biggers, 409 U.S. 188, 199-200, 34 L. Ed. 2d 401, 93 S. Ct. 375 (1972),* we can see that Stouffer had a good look at the man who asked for his wallet, that, when he testified in court, he was paying [**12] a high degree of attention, and that he was positive that White was the person who had asked him for his wallet. Trial counsel made considerable headway in his cross-examination of Stouffer, but, in the end, the witness stood firm: he was "pretty sure" that White had been the man who demanded the wallet, and was "positive in my mind" on that subject. App. 57. On the whole, we are persuaded that the accuracy of Stouffer's identification of White was a question properly left to the jury, which heard all of the cross-examination and was able to weigh Stouffer's demeanor and degree of assurance. We stress that in coming to this conclusion we consider only the facts and circumstances that were available to trial counsel at the time. Other facts have since come to light, facts that we will discuss in detail in the next section of this opinion, but, for purposes of the present point, which concerns only the performance of trial counsel, we must lay these subsequently discovered facts to one side.

For these reasons, we reject petitioner's contention that his trial lawyer was ineffective in a constitutional sense in connection with the in-court identification made by Al Stouffer.

V.

We come [**13] at last to the most troubling part of the case, petitioner's contention that the State withheld from him evidence that would have cast substantial doubt on Mr. Stouffer's testimony. To put this issue into context, we need at this point to recount the procedure followed by the District Court with respect to the claim of withheld evidence.

[*943] With leave of court, counsel for White in the habeas proceeding conducted discovery. New evidence, never before revealed, came to light. This evidence included six exhibits, now numbered petitioner's exhibits 2-7. They are in the record before this Court. App. 103-09. The exhibits consist of notes and memoranda from police files. Petitioner made a motion to expand the record to include this new material. The District Court initially granted the motion, but then, in response to a motion for reconsideration filed by the state, reversed itself and refused to include the new material in the record. The basis of the state's motion was the Supreme Court's decision in *Keeney v. Tamayo-Reyes, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992),* which, the State argues, prohibits receipt of evidence by a federal habeas court if the evidence [**14] had not been offered in the state courts, absent a showing of cause and prejudice.

In addition, after the District Court entered judgment dismissing the petition, counsel for petitioner filed a timely motion under Fed. R. Civ. P. 59(e) to alter or amend the judgment. Petitioner himself filed a pro se "motion for a new trial." In this submission, petitioner, among other things, complained that his habeas counsel had failed to raise the issue of knowing and intentional withholding of exculpatory evidence by the Scott County Attorney. The District Court treated petitioner's submission as a supplement to the Rule 59(e) motion submitted by counsel. The court denied the motion, holding, with respect to the claimed failure to disclose exculpatory evidence, that it had already dealt adequately with the issue.

In our view, it was error for the District Court to refuse to expand the record as requested. In the first place, Keeney, the State's main reliance, does not erect an absolute barrier to the receipt of new evidence by a habeas court. As we have held, see *Clemmons v. Delo, 124 F.3d 944, 951 (8th Cir. 1997),* cert. denied, *118 S. Ct. 1548 (1998),* [**15] Keeney holds only that a district court is not required to hold an evidentiary hearing, or otherwise consider new evidence, when that evidence, though reasonably available at the time, was not offered in the state courts, unless a petitioner can show cause for the failure to offer the evidence, and prejudice resulting from the failure. n4 Notwithstanding the failure to offer evidence in the state courts, a district court still had n5 discretion to receive it, and it may choose to do so under proper circumstances. Furthermore, the very point urged by petitioner here is that the evidence in question, documents from police files, was not previously made available to him, though the prosecution had a duty, under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963),* to make the information available if it was exculpatory. See *Strickler v. Greene, 527 U.S. 263, 144 L. Ed. 2d 286, 119 S. Ct. 1936, 1952 (1999)* (prosecution's withholding of exculpatory evidence contributed to petitioner's establishing cause for failure to raise Brady claim prior to federal habeas). In this Court, the state does not argue that the evidence was reasonably available [**16] to petitioner at any point before the filing of the federal habeas case, nor does it assert any excuse for not having revealed the evidence to counsel for petitioner before trial, the time when an obligation under Brady attaches. Instead, the state argues [*944] simply that the evidence was not exculpatory, and even this argument is confined to one item of evidence, an alleged statement by Michael Simmons, a classmate of the defendants, to the effect that a planning meeting had