STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1034

Chao Yang, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 6, 2008
Affirmed
Harten, Judge*

Olmsted County District Court
File No. K7-93-3001

Charles L. Hawkins, 150 South Fifth Street, Suite 3260, Minneapolis, MN 55402 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, David F. McLeod, Assistant County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

In this postconviction proceeding, appellant Chao Yang challenges his two second-degree murder convictions, arguing that the postconviction court abused its discretion in denying his claim of newly-discovered evidence, that the translation of his trial was inadequate, and that his waiver of the right to testify was unknowing and involuntary. Because we see no abuse of discretion and conclude that the translation was adequate and that appellant knowingly and voluntarily waived his right to testify, we affirm.

FACTS

In 1993, Blia Yang and her unborn son were murdered. In 1994, a jury convicted appellant of two counts of second-degree murder. Appellant received two consecutive 306-month sentences. On direct appeal, he challenged his conviction and his sentences; both were affirmed. *State v. Yang*, 533 N.W.2d 81 (Minn. App. 1995), *review denied* (Minn. 30 August 1995).

In 1998, a polygrapher who had examined appellant reported that appellant's physiological responses to questions and answers about the murders were not those usually associated with deception.

In 2001, another prison inmate allegedly told appellant that the inmate's deceased brother-in-law had confessed to murdering Blia Yang.

In September 2005, appellant petitioned for postconviction relief, challenging, among other things, the Hmong translation performed at his trial. In August 2006, an

evidentiary hearing was held to determine the adequacy of the translation and whether any inadequacy substantially affected appellant's right to a fair trial.[1]

In September 2006, the postconviction court denied appellant's request for relief. He challenges the denial, arguing that the postconviction court abused its discretion in denying his claim of newly-discovered evidence, that the translation at trial was inadequate, and that his waiver of the right to testify was involuntary.[2]

D E C I S I O N

1. Newly-discovered Evidence

This court will not disturb the decision to grant or deny a new trial on the ground of newly-discovered evidence absent an abuse of discretion. *State v. Rhodes*, 657 N.W.2d 823, 845 (Minn. 2003). To obtain a new trial on that basis, a petitioner must establish that the newly-discovered evidence is not doubtful and that it would produce an acquittal or a more favorable result. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997); *State v. Caldwell*, 322 N.W.2d 574, 588 (Minn. 1982). Appellant relies on two pieces of

[1] Appellant also sought the removal of the judge who had conducted his trial. That judge recused, and another district court judge was appointed to adjudicate appellant's postconviction claims.

[2] This waiver-of-the-right-to-testify claim is problematic for two reasons. First, appellant could have raised it, but did not, on direct appeal. Any claim known and not raised on direct appeal will not be considered in a postconviction petition. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). The claim is therefore barred by *Knaffla*. Second, in his postconviction petition, appellant raised the claim only as one element of an ineffective-assistance-of-counsel claim. A party may not "obtain review by arguing the same general issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Therefore, this claim is not properly before us. We nevertheless address it in the interest of justice. *See* Minn. R. Civ. App. P. 103.04 (permitting our review of any matter as the interest of justice may require).

newly-discovered evidence: the alleged confession to the murders by another person and the polygraph report indicating that appellant was not being deceptive when he denied committing the murders.

a. The Alleged Confession

Appellant claims to have newly-discovered evidence that another person, Lee Moua, confessed to the murder of Blia Yang. Lee Moua was killed by his wife, Sue Her, in a 1996 murder-suicide. The only evidence supporting Moua's alleged confession appears in appellant's 2005 affidavit, in which he states that: (1) when he was in Stillwater prison in 2001, he spoke to another prisoner, Chia Vue; (2) Vue said his wife was Sue Her's sister; thus, Moua was Vue's brother-in-law; (3) Sue Her told Vue that Moua had told her that he killed Blia Yang; and (4) when Moua visited them, both Sue Her and Moua talked about Moua having murdered Blia Yang.

Vue provided an affidavit that contradicts appellant's: he states that neither Moua nor Sue Her ever told him that Moua murdered Blia Yang, that to the best of his knowledge, Moua did not murder Blia Yang, and that Vue would testify accordingly. Thus, appellant's newly-discovered evidence is doubtful, because it is contradicted by Vue's affidavit, and it would be unlikely to produce a different or more favorable result at trial. The district court did not abuse its discretion in denying the motion for a new trial based on this evidence.

b. The Polygraph Report

Appellant also presents as newly-discovered evidence the report of a 1998 polygraph examination indicating that appellant's physiological responses when he gave negative answers to questions about whether he killed Blia Yang were not those usually associated with deception. Appellant concedes that Minnesota courts, relying on *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), have rejected polygraph evidence. *See, e.g., State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985), *cert. denied* 476 U.S. 1141 (1986). Nonetheless, he argues that polygraph evidence should be admitted under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). But Minnesota has not adopted the *Daubert* standard, concluding that it is less rigorous. *State v. Traylor*, 656 N.W.2d 885, 891 (Minn. 2003). "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W. 2d 283, 286 (Minn. App. 1987), *review denied* (Minn. 18 Dec. 1987). The district court did not abuse its discretion in denying a new trial based on appellant's newly-discovered polygraph evidence.

2. Hmong Interpretation at Trial

"[I]n evaluating the translation of testimony, this court asks whether the testimony was on the whole adequate and accurate." *State v. Sanchez-Diaz*, 683 N.W.2d 824, 835 (Minn. 2004) (quotation omitted). "It is important to bear in mind that translation is an art more than a science, and there is no such thing as a perfect translation." *Id*. (quotation omitted). Yer Stewart, a woman, was the interpreter for appellant's trial.

To support his claim of inadequate interpretation, appellant presented a witness

who in July 2000 provided an affidavit saying that

(1) during appellant's trial, she had told his lawyer that he should use an interpreter while conversing with appellant because appellant had allegedly told the affiant that he did not understand what his lawyer said;

(2) appellant told the affiant that, for cultural reasons, he did not want a woman interpreter;

(3) the affiant attended the trial and observed that the interpreter did not translate into Hmong all the testimony of the English-speaking witnesses, particularly the scientific testimony.

At the postconviction evidentiary hearing, this witness testified that she first informed the trial court of her perceptions of the inadequacy of the trial translation six years later. She also testified that she had attended only parts of the trial; that she does not speak Hmong; that she communicated with appellant in English and that he spoke and read some English; that during the trial, appellant sat between his attorney and the interpreter, that the affiant was some feet behind them and could not see their faces, and that the judge was in front of them and could see their faces; and that neither the judge nor appellant's attorney mentioned any concerns about the translation during trial. She also agreed that appellant was able to ask for clarification if he did not understand a word.

The interpreter, a native speaker of Hmong who has a degree in English literature from the University of Minnesota, also testified. She said that appellant was "quite fluent" and "was able to communicate with his attorneys in English just fine and vice

versa." She also said that: (1) because the Hmong language has no term for DNA, she and appellant agreed ahead of time that she would use the term DNA when translating into Hmong; (2) translating the scientific evidence was difficult but not impossible; (3) she had no recollection of appellant ever saying that he could not understand her translations; and (4) appellant had agreed to having her serve as his translator.

Appellant's trial attorney testified that appellant "spoke English well enough, and understood English well enough that there were times when . . . I met him with him in the jail conference room without an interpreter." He also testified, "I was very impressed with the interpreter that we had for that trial, and when an English speaking person was testifying I heard her over my right shoulder interpreting just as I can hear the interpreter now interpreting for [appellant]."

The record supports the postconviction court's determination that translation during appellant's trial was, on the whole, adequate and accurate.

3. Waiver of Right to Testify

The waiver of the right to testify must be voluntary and knowing. *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). Appellant claims that his waiver was not knowing or voluntary because his counsel did not advise him of his right to testify. But the record shows that appellant's counsel did advise appellant of his right to testify. In chambers, appellant answered, "Yes," when his attorney asked if they had discussed "whether or not it would be a good idea for you to testify"; appellant also said he understood the advantages of not testifying, including avoiding cross-examination, and that he wished to

follow his attorney's advice, which was that his not testifying was more likely to lead to a favorable verdict.

Appellant's waiver of his right to testify was knowing and voluntary. Accordingly, he is not entitled to a new trial on that basis.

We conclude that the postconviction court did not abuse its discretion in denying appellant's postconviction petition.

Affirmed.