FILED
JAN 31 1978
CLERK SUPREME COURT

99

IN THE COURT OF APPEALS OF IOWA

| | | |
|---|---|---|
| STATE OF IOWA, | ) | |
| Appellee, | ) | Filed January 31, 1978 |
| vs. | ) | 322 / 60279 |
| ROBERT EDD LONEY, | ) | |
| Appellant. | ) | |

Appeal from Lee District Court - William S. Cahill, Judge.

Defendant appeals conviction of crime of escape alleging ineffectiveness of counsel and error in overruling motion for continuance. - Affirmed.

Leona Durham, Iowa City, for Appellant.

Richard C. Turner, Attorney General of Iowa, and Jim Hoffman, Lee County Attorney, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Robert Edd Loney appeals his conviction by jury of the crime of escape from the penitentiary in violation of § 745.1, The Code. At the time of the alleged escape, defendant was serving a life sentence at the state penitentiary in Fort Madison. Upon a finding of guilt, § 745.1 provides the defendant shall be punished by imprisonment in said penitentiary for a term not to exceed five years, to commence from and after the expiration of the term of his previous sentence.

On October 12, 1976, defendant was charged by a county attorney's information with escape in violation of § 745.1, The Code. He was arraigned on October 22, 1976, pled not guilty and requested a speedy trial. Trial was set for November 16th. On November 9th, the trial court rescheduled the trial for November 15th to accommodate a crowded docket. On November 12th, Loney moved for a continuance to allow him more time to complete preparation of pre-trial motions and in the motion, he waived speedy trial. Hearing on the motion was held on November 15, 1976, immediately before trial.

In addition to the motion for continuance, which was overruled, defendant orally made a motion for change of venue, which was not supported by affadavits as required. See §§ 778.2-.3, The Code. The motion was based on the contention the public was influenced by publicity surrounding the escape. Loney also moved to dismiss for failure to hold a preliminary examination; to dismiss because he was held incommunicado for 34 days, from September 3 to October 7, in what the state allegedly told him was a quarantine from something unspecified while the case was being sent to the county attorney for possible prosecution; to dismiss for double jeopardy since he had already been punished by the prison; to dismiss because he was charged as a habitual criminal which is not usual in escape cases; and for the judge to disqualify himself for prejudice for deciding the motion for continuance before hearing was held. All motions were overruled and the jury trial began immediately thereafter.

Defendant Loney is represented by two different attorneys on appeal and each has filed briefs. Defendant's trial counsel alleges the trial court erred in denying Loney's request for a continuance because it denied him the opportunity to prepare

an adequate defense. In a brief recently filed by defendant's new appellate counsel, defendant alleges he was denied the effective assistance of counsel in violation of the laws and constitution of the State of Iowa and guaranteed by the 6th and 14th Amendments to the Constitution of the United States. He also argues he was denied the equal protection and due process of law required by the 14th Amendment and the laws of Iowa. We address each issue raised in the interest of justice and pursuant to our statutory duty. Section 793.18, The Code.

Defendant's initial contenion is that the trial court erred in not sustaining his motion for continuance. The granting or refusing a motion for continuance rests largely on the sound discretion of the trial court and such discretion is very broad. State v. Cowman, 212 N.W.2d 420, 423, (Iowa 1973); State v. Williams, 207 N.W.2d 98 (Iowa 1973). Only where there is an abuse of judicial discretion will the reviewing court interfere with the action of the trial court in passing upon a motion for continuance. **Cowman,** supra. Where the motion is filed without delay, alleging a cause not stemming from the movant's own fault or negligence, the court must determine whether substantial justice will be more nearly obtained by granting the request. State v. Birkestrand, 239 N.W.2d 353, 360 (Iowa 1976); rule 183(a), Rules of Civil Procedure (See § 780.2, The Code).

The record indicates that trial counsel was notified prior to November 9th that the trial would be rescheduled to November 15th. The actual order was signed November 9th. On November 12th, defendant filed his motion for continuance. Counsel was prevented from filing on the 11th because the courthouse was closed for a legal holiday. The primary reason given for the request was that defendant needed more time to prepare an adequate defense. In support of this argument he stated his inability to obtain the necessary affadavits for his motion for change of venue. However, neither defendant nor either of his two counsel state that such affadavits supporting the change of venue were readily available. Of the first seventeen jurors examined, only two said they had read of the escape in the newspaper; one of these recalled the incident but only in generalities.

The trial court based its rejection of the motion on two grounds: first, an unusually heavy trial calendar with thirteen jury trials in the next six weeks;

second, an expressed dissatisfaction with inmates who refuse to waive their right to speedy trial and then at the last moment ask for additional time in which to file unspecified motions.

The standard for the trial court was whether substantial justice would be more nearly obtained by granting the requested motion. The trial court decided the question adversely to defendant. Defendant has not suggested what further defense to the charge could have been prepared had the motion been granted. We are not justified in holding he was denied a fair opportunity to prepare his defense or that the refusal of a continuance was an abuse of discretion. State v.Berenger, 161 N.W.2d 798, 802 (Iowa 1968). We find no abuse of discretion.

Defendant's second contention presented by his new counsel is that he was denied effective assistance of counsel guaranteed by the United States and Iowa Constitutions. In support of such argument, defendant cites the failure to precure the necessary affadavits required for a change of venue based upon an inability to receive a fair trial. Sections 778.2-.3, The Code. Additionally, Loney cites the lack of written motions and briefs in support thereof, trial counsel's unfamiliarity with the bare facts of the case, his resulting inability to effectively cross-examine the state's witnesses or call witnesses in defendant's favor, his waiver of opening statement, his failure to make a single objection and resting without calling a single witness.

It is presumed that a court-appointed counsel for an indigent defendant acts properly. The burden of proof is on defendant to establish his counsel was ineffective and he did not have a fair trial. State v. Kendall, 167 N.W.2d 909, 910-11 (Iowa 1969). To warrant finding a deprivation of due process, such circumstances must include "an affirmative factual basis demonstrating counsel's inadequacy of representation." Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974). When lack of preparation is asserted as the basis of denial of proper representation, the entire record must be examined and the totality of circumstances evaluated to determine counsel's effectiveness. The test is whether in all the circumstances counsel's performance was within the range of normal competency. State v. Massey, 207

N.W.2d 777, 779-80 (Iowa 1973).

Defendant was an inmate at the State Penitentiary at the time of his escape. He is classified as "close custody" because he is serving a life sentence. He was arrested in Burlington, Iowa, after having been seen driving a car reported as stolen; he was apprehended after a foot pursuit. Defendant has never claimed he had permission to be out of the penitentiary, that he did not escape or that he had other justifiable reasons for leaving. On appeal defendant points only to what his trial counsel did or did not do, but offers no evidence as to what might have been done, what tactics should have been used or defense offered. Defendant has not carried his burden. **Kendall**, supra. Defendant has also failed to show that trial counsel's waiver of opening statement, failure to object and resting without calling a single witness, was other than trial strategy given the nature of the offense and circumstances. After a review of the entire record, we cannot say that the totality of the circumstances demonstrates a lack of or inadequate preparation so as to deprive defendant of adequate counsel. **Massey**, supra.

Defendant's final argument is that he was denied equal protection and due process of the law because the trial court allegedly discriminated between inmates and non-inmates and held the former to a higher standard of justification with regard to a continuance. The issue before the court was defendant's motion for continuance and his status as an inmate was not determinative. We are convinced the result would be the same were defendant not an inmate. From a review of the record we do not find defendant was denied due process or the equal protection of the laws by the trial court.

Affirmed.