FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

TOMMY LEWIS ENGLISH,)

Petitioner-Appellant,) Filed December 29, 1982

vs.)

203

STATE OF IOWA,) 2-411
2-67571

Respondent-Appellee.)

Appeal from Black Hawk District Court - Frank D. Elwood, Judge.

Petitioner appeals from the trial court's denial of postconviction relief on the basis of: 1) alleged ineffective assistance of counsel; and 2) alleged violation of petitioner's right of due process in applying Iowa Code § 906.5 (1981) to his conviction. AFFIRMED.

James F. Whalen of Dunbar, Dunbar & Whalen, Waterloo, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Joseph P. Weeg, Assistant Attorney General, for respondent-appellee.

Heard en banc.

Petitioner-appellent, Tommy Lewis English, was convicted of robbery in the first degree in 1979, following a jury trial. He filed a notice of appeal, but his appointed attorney sought permission to withdraw pursuant to Iowa R. App. P. 104 on the ground that the appeal was frivolous. Petitioner wrote a letter to the supreme court asking that the appeal not be dismissed but the supreme court did dismiss the appeal pursuant to rule 104(d).

Petitioner later filed the present application for postconviction relief. The trial court denied him relief and he appeals. He contends that his trial attorney rendered ineffective assistance by failing to investigate his case adequately, by failing to call alleged alibi witnesses, and by eliciting on direct examination of petitioner the nature of his prior felony convictions. He also contends that he was effectively denied his right to avoid self-incrimination. In this connection, he asserts that he was reluctant to testify in his own behalf, but felt he had no choice in light of his attorney's failure to use other alibi witness.

Finally, the defendant raises two complaints about the application of Iowa Code § 906.5 to his conviction. He contends that he was denied due process because he was given no notice prior to his incarceration that this statute would be applied to his case and because he consequently had no opportunity for a hearing on the question of whether he possessed the type of criminal record which triggers the statute. He also contends that application of the statute violated Iowa Rule of Criminal Procedure 6.5 and 18.9, which require, respectively, a supplemental indictment and a factual hearing on the existence of prior convictions if prior convictions will subject the defendant to an increased sentence. We affirm.

I. Scope of Review. In general, our review of postconviction rulings under Iowa Code § 663A.9 is on error and not de novo. The court, however, has said:

> that where, as here, there is an asserted violation of a basic constitutional safeguard we make our own evaluation of the totality of

> circumstances under which the ruling was made. E.g., Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). Whether we call such a review de novo or a review under the totality of circumstances our function is the same. We consider anew all the matters presented to, and which should have been considered by, the trial court and reach our own conclusion on whether the constitutional safeguard was violated. It makes no practical difference whether such a review is called de novo or one under the totality of circumstances. State v. Boren, 224 N.W.2d 14, 15 (Iowa 1974), cert. denied, 422 U.S. 1008, 95 S. Ct. 2630, 45 L. Ed 2d 671 (1975).

Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

II. Ineffective Assistance of Counsel. The general principles and standards governing our consideration of petitioner's claims that trial counsel rendered ineffective assistance were detailed by the court in State v. Aldape, 307 N.W.2d 32, 41-42 (Iowa 1981).

> General principles. The right to assistance of counsel, under the sixth amendment to the Federal Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. Powell v. Alabama, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 2d 158, 171-72 (1932); State v. Gambell, 262 N.W.2d 792, 795 (Iowa 1978). Effective assistance of counsel "means conscientious, meaningful representation." Scalf v. Bennett, 260 Iowa 393, 399, 147 N.W.2d 860, 864 (1967). The test for determining whether a defendant has been denied effective assistance of counsel is whether, considering all of the circumstances, the attorney's performance was within the normal range of competency. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).
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> A presumption exists that counsel is competent. Sims v. State, 295 N.W.420, 423 (Iowa 1980). Defendant has the burden of proof to establish by a preponderance of the evidence that counsel rendered ineffective assistance. Id. "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). To warrant a finding of ineffective assistance of counsel, the "circumstances must include 'an affirmative factual basis demonstrating counsel's inadequacy of representation.' " State v. Massey,

> 207 N.W.2d 777, 780 (Iowa 1973), (quoting In re Parker, 423 F. 2d 1021, 1025 (8th Cir.), cert. denied, 398 U.S. 966, 90 S. Ct. 2182, 26 L. Ed. 2d 551 (1970)).

To sustain his allegation of ineffective assistance, petitioner also must establish that he was prejudiced. State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978).

Defendant claims he was denied effective assistance of counsel due to trial counsel's: 1) failure to call alibi witnesses; and 2) eliciting the nature of defendant's prior felony convictions on direct appeal. The record reveals that the two alleged alibi witnesses were interviewed by trial counsel early in the case. From these interviews trial counsel learned that neither could substantiate defendant's alibi since neither was with him at the time of the crime. We find no basis for relief due to trial counsel's failure to call as witnesses two individuals who could not corroborate defendant's alibi. See Mays v. Estelle, 610 F. 2d 296, 297 (5th Cir. 1980) (not ineffective assistance of counsel when witness could not provide alibi).

The elicitation of the nature of defendant's prior felonies by defense counsel is not error in this instance. There is little dispute that defendant's prior felony convictions may have been used for impeachment purposes. See State v. Conner, 241 N.W.2d 447, 455 (Iowa 1976); State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974). As the trial court noted:

> It is not unusual for defense counsel to elicit information as was elicited; at least psychologically it is regarded as sometimes helpful to have the defendant truthfully acknowledge his prior felonies on direct examination rather than have it appear that the State made a point or uncovered something through the impeachment process. It seems to the Court that this is surely a judgment call.

See United States v. Bad Cob, 560 F. 2d 877, 883 (8th Cir. 1977). We agree with trial court's assessment of defendant's claim. Based upon our findings, we hold that defendant failed to sustain his burden of proof in establishing ineffective assistance of counsel. Accordingly, we affirm the trial court.

207

III. Application of Iowa Code § 906.5 (1981). On the basis of the court's decision in Bogue v. State, 309 N.W.2d 428, 430-31 (Iowa 1981), and for reasons stated therein, we find no merit to defendant's contention that he was denied due process by the application of section 906.5. See also Grout v. State, 320 N.W.2d 619 (Iowa 1982).

AFFIRMED.