FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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JOHN WALK,	)	
Petitioner-Appellant,	)	Filed May 28, 1985
vs.	)	
STATE OF IOWA,	)	5-123 84-330
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Warren County - M. C. Herrick, Judge.

Petitioner appeals from the district court's denial of his application for postconviction relief from his conviction of four counts of receiving and concealing stolen goods in violation of Iowa Code section 712.1 (1975). AFFIRMED.

Francis Hoyt, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Pamela Greenman, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., Donielson, and Hayden, JJ.

Petitioner appeals from the district court's denial of his application for postconviction relief from his conviction of four counts of receiving and concealing stolen goods in violation of Iowa Code section 712.1 (1975). He asserts that he was denied effective assistance of counsel at trial because: (1) counsel failed to call a witness who would have given exculpatory testimony; (2) counsel did not make a timely motion for mistrial when a prosecution witness referred to petitioner's prior trial; (3) counsel did not question a prosecution witness about the exact nature of items found at petitioner's residence; (4) counsel failed to object to the prosecutor's closing argument which implied that petitioner participated in the theft of the items found at his residence; and (5) counsel did not request an alibi instruction. Petitioner also claims that his appellate counsel was ineffective for not raising on appeal the issue of the effectivenss of trial counsel and for not appealing the overruling of petitioner's motion to suppress evidence obtained in an allegedly illegal search.

Petitioner was charged with four counts of receiving and concealing stolen goods in violation of Iowa Code section 712.1 (1975) after a search of his residence. Petitioner filed a motion to suppress which was overruled. Petitioner's first trial resulted in a hung jury. At the second trial petitioner was represented by a different attorney who belonged to the same law firm as his first attorney. The motion to suppress was renewed and once again overruled. Petitioner was convicted on all four counts. The conviction was affirmed by this court. State v. Walk, No. 60414 (Iowa Ct. App., Sept. 21, 1978). Petitioner filed the present application for postconviction relief which was denied by the district court after a hearing.

Ordinarily a proceeding under the Uniform Postconviction Procedure Act (Iowa Code chapter 663A) is at law. Where, as here, a violation of a constitutional safeguard is raised, we make our own evaluation of the totality of the

circumstances. This is the equivalent of a de novo review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

In this postconviction proceeding petitioner carries the burden of proof and is required to establish the facts by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). In order to establish that he was denied his sixth amendment right to effective assistance of counsel, petitioner must show: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). There is a presumption that counsel is competent. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). "The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Id. To satisfy the prejudice requirement petitioner must show that "the error constitutes a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). We may examine the prejudice component of an ineffectiveness claim before determining whether counsel's performance was deficient. Taylor, 352 N.W.2d at 685.

I. Petitioner's first allegation is that his trial counsel did not call Arnold Baldwin to testify on his behalf. Baldwin would have testified that he put the stolen items in petitioner's basement without petitioner's knowledge while petitioner was on vacation. Petitioner attributes this deficiency to counsel's failure to interview him prior to trial.

We are concerned about petitioner's assertion that trial counsel never interviewed him prior to trial. Certainly interviewing the defendant is one of the critical requirements for effective representation. However, under the facts of this case we find no prejudice to petitioner from counsel's failure to call Baldwin as a witness.

Arnold Baldwin was petitioner's son-in-law at the time of trial. He was originally listed as a State's witness but was not called to testify by the State either. Baldwin told the county attorney and several police officers that the stolen property was located in petitioner's basement. Baldwin further stated that he had been with petitioner when petitioner stole some of the items and that petitioner had informed him that other items were stolen. If Baldwin had been called to testify on petitioner's behalf he could have been impeached with these prior inconsistent statements as well as his affinity with petitioner and his prior felony convictions. Furthermore, the prior statements would have implicated petitioner in the theft of the goods. The decision not to have Baldwin testify was clearly a tactical one. Counsel is not ineffective for tactical decisions even if they do not produce the desired result.

II. At trial the State called Harold Ginther to testify regarding items stolen from Cliff's Travel Town. On direct examination the county attorney asked the following questions:

> Q. Now did you make a police report out—assist in making a police report out, as pertains to the stolen articles which you had?
>
> A. Yes, I did.
>
> Q. And have you testified in a prior hearing concerning these articles?
>
> A. Yes.
>
> * * *
>
> Q. Do you know the defendant, John Walk?
>
> A. I don't know him. I have seen him at the lot.
>
> Q. At your lot in Des Moines?
>
> A. (Witness nodding head.)
>
> Q. When would this have been?
>
> A. Well, you know, to give a day or a time I wouldn't know, I see so many people, but I recognized him at the last trial when I was here.

After cross-examination petitioner's counsel moved for a mistrial based on these references to petitioner's first trial which resulted in a hung jury. The trial court overruled the motion on the grounds that the information was not intentionally elicited by the county attorney, and there was no prejudice because the information was stated in a way which would not have aroused the attention of the jury.

Petitioner argues that his attorney was ineffective for failing to move for a mistrial as soon as the grounds for it first became apparent. Petitioner claims that the motion as made was not timely and did not preserve the issue for review. See State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980). Assuming, without deciding, that the motion was untimely we find that petitioner has not shown the requisite prejudice. The trial court addressed the motion and overruled it. A trial court has wide discretion in ruling on motions for mistrial. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). We could not say that the trial court abused its discretion in this case. The reference to the prior trial was brief, vague, and the jury's attention was not directed toward it.

III. At petitioner's trial the police officers who searched petitioner's house testified concerning the items found there. Officer Berry testified he found "a chain hoist, mini bike, bunch of police equipment and CB's and Craig AM-FM tape players." Officer Turner testified he found a "key making machine." Petitioner asserts that the police equipment was a police scanner radio and that the key making machine was a key duplicating machine. He claims his attorney should have clarified these misstatements.

Petitioner has failed to show any specific prejudice resulting from the allegedly incorrect terminology. Furthermore, petitioner testified at trial regarding these items and could have corrected the terminology at that time. We note, however, that petitioner on cross-examination agreed to the county

attorney's use of the term "key making machine." We cannot say counsel was ineffective for failing to present the jury with the exact names of these items.

IV. Although closing arguments were not reported, petitioner testified at the postconviction hearing that the county attorney in closing argument commented on evidence that petitioner had been seen at several places from which the items found in petitioner's basement had been stolen and implied that petitioner was involved in the theft. Petitioner argues that his attorney should have objected to these impermissible references to other crimes with which petitioner was not charged. See State v. Johnson, 222 N.W.2d 483, 485 (Iowa 1974).

This contention is without merit. There was evidence in the record that petitioner had been seen at these places and had inquired about merchandise which was eventually stolen. A prosecuting attorney may argue all permissible inferences which reasonably flow from the record and do not misstate the facts. State v. Phillips, 226 N.W.2d 16, 19 (Iowa 1975). The supreme court has recently held that it is permissible for the jury to consider evidence that the defendant may have stolen the property when he is charged with the crime of theft by exercising control over stolen property. State v. Washington, 356 N.W.2d 192, 195 (Iowa 1984).

V. Petitioner's final allegation of ineffectiveness of trial counsel concerns failure to request an alibi instruction. Petitioner contends he was on vacation when the stolen goods were placed in his basement without his knowledge.

An alibi instruction is appropriate when the defendant was not present at the time and place the offense was committed. See Iowa Uniform Jury Instruction No. 211. In this case petitioner was at home exercising control over the property at the time of the search. His defense is not an alibi but a challenge to the knowledge requirement of the offense. Therefore, counsel was not ineffective for failing to request the instruction.

VI. Finally, petitioner alleges that he was denied effective representation by his appellate counsel. First defendant claims that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel. Since we have considered petitioner's claims regarding ineffectiveness of trial counsel and have found them to be meritless, appellate counsel was not ineffective for not asserting these claims in the direct appeal of petitioner's case.

Petitioner also claims appellate counsel was ineffective for not challenging on appeal the trial court's overruling of petitioner's motion to suppress the evidence obtained from the search of petitioner's residence. We have examined the motion to suppress, the search warrant, information for search warrant, and magistrate's endorsement to search warrant application. We find no grounds on which to question the legality of the search. Petitioner has failed to meet his burden of proof on this issue.

AFFIRMED.