

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

JAMES CLIFFORD NEWMAN,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

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4-316
83-843

Appeal from the Iowa District Court for Polk County - C. Edwin Moore,
Senior Judge.

Petitioner appeals from denial of his application for postconviction relief
based on ineffective assistance of counsel. AFFIRMED.

Charles Harrington, Appellate Defender, and Fern Shupeck, Assistant
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Marcia Mason, Assistant
Attorney General, for respondent-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J.

Petitioner, James Newman, appeals from denial of his application for postconviction relief based on ineffective assistance of counsel. Newman claims he was denied effective assistance of counsel in several particulars, including failure to preserve error on the issue whether Iowa Code section 713.1 (Supp. 1978) was unconstitutionally vague, failure to raise the issue of sufficiency of the evidence, failure to move to sever his trial from the trial of codefendants, and other alleged failures of trial counsel. We affirm.

In 1978 Newman and two friends were charged with second degree burglary for breaking into a coin changing machine. All three were convicted following a trial in which the only evidence consisted of the minutes of testimony. Newman's conviction was affirmed in an opinion holding that the definition of burglary under the new criminal code encompassed the act of breaking into a coin changing machine. State v. Newman, 313 N.W.2d 484, 487 (Iowa 1981). That opinion also held that error had not been preserved on the issue whether the burglary statute was unconstitutionally vague. Id. at 485. Newman was represented by Nicholas S. Krpan both at trial and on appeal.

Newman later filed a petition for postconviction relief, claiming he was denied his sixth amendment right to effective assistance of counsel. His claim was heard in March 1983, and postconviction relief was denied. Newman has appealed.

I. Scope of Review. This application for postconviction relief alleges several failures of trial counsel constituted ineffective assistance of counsel. When a defendant relies on a specific act or omission to prove ineffective assistance, he must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). However, we need not "approach the inquiry in the same order or even address both components of the inquiry if the defendant makes an insufficient

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showing on one. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2069-70, 80 L. Ed. 2d 674, 699 (1984).

In Miles, 344 N.W.2d at 234-35, the Iowa Supreme Court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982). Essentially, the Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id., (emphasis in original). The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982).

On review of the fifth circuit's decision in Strickland, the United States Supreme Court enunciated a test for prejudice that was more stringent than the standard employed by the fifth circuit. The Court first stated that the benchmark for judging any claim of ineffectiveness is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, ___ U.S. at ___, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The Court then stated the test:

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at ___, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

The Court further stated that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at ___, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

II. The Merits of the Ineffectiveness Claim. Newman has raised several particular grounds he claims constituted ineffective assistance of counsel. We examine them individually below. Our examination finds Newman has not met his burden of showing prejudice; he has not shown a reasonable probability sufficient to undermine confidence that the outcome of his case was unreliable or unjust.

1. Vagueness. We reject the contention that failure to preserve the issue whether the burglary statute, Iowa Code § 713.1 (Supp. 1978), was unconstitutionally vague prejudiced Newman. Such prejudice could occur only if the issue would have been resolved in Newman's favor. We conclude it would not have been resolved in his favor.

The Iowa Supreme Court reviewed the test for vagueness in State v. Lee, stating:

The test for vagueness is well established: A statute is void for vagueness under the due process clause of the fourteenth amendment if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926). "A penal statute must give a person of ordinary intelligence fair warning of what is prohibited, and, in order to avoid arbitrary and discriminatory enforcement, it must provide an explicit standard for those who apply it." State v. Pilcher, 242 N.W.2d 348, 353 (Iowa 1976). A statute is not unconstitutionally vague if the meaning of the "words used can be fairly ascertained by reference to similar statutes, other judicial determinations, reference to the common law, to the dictionary, or if the words themselves have a common and generally accepted meaning." Id. (quoting State v. Williams, 171 N.W.2d 521, 527 (Iowa 1969), cert. denied, 398 U.S. 937, 90 S. Ct. 1837, 26 L. Ed. 2d 268 (1970)).

315 N.W.2d 60, 62 (Iowa 1982) (emphasis added).

This is in accord with Rose v. Locke, which stated, "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." 423 U.S. 48, 50, 96 S. Ct. 243, 244, 46 L. Ed. 2d 185, 188 (1975) (emphasis added). A small amount of uncertainty

about the meaning of the statute does not necessarily mean fair warning was not given. See id.

We conclude the burglary statute, Iowa Code § 713.1 (Supp. 1978), gave fair notice and was not unconstitutionally vague. Section 713.1 provided:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure or area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief, such occupied structure or place not being open to the public, . . . commits burglary. (Emphasis added).

We believe the phrase "area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft" would give a person of ordinary intelligence fair warning that a coin changer was protected by the statute. "A sealed and locked coin changer has four walls, a top and bottom. The secure exterior of the machine surrounds a mathematically quantifiable volume. It is thus an enclosed area under the plain language of the statute." State v. Newman, 313 N.W.2d at 486.

Newman argues that the 5-4 split decision in State v. Newman and the subsequent amendment of section 713.1 by the legislature cast doubt on our conclusion. We disagree. Our inquiry in this instance is not into legislative intent or into the correctness of the legal reasoning used to ascertain such intent. Rather, our inquiry is into whether a person of ordinary intelligence would be fairly warned by the language of the statute. The amendment of section 713.1 relates to legislative intent. The dissent in State v. Newman also related to legislative intent, raising sophisticated legal arguments about the proper construction of the word "place" without addressing the phrase that modifies that word. Thus, neither of the items cited by Newman is relevant to the issue of fair warning, and neither item changes our conclusion that the modifying phrase we cited earlier gives fair warning to a person of ordinary intelligence. Newman has failed to show prejudice from the failure to preserve error on the vagueness issue.

2. Sufficiency of Evidence. We reject Newman's claim that failure to attack the sufficiency of the evidence upon which he was convicted prejudiced him. We conclude that, had the issue been preserved and raised on appeal, it would have been decided against Newman.

Newman was convicted on an aiding and abetting theory. To support this theory:

[t] he record must contain substantial evidence to show that the accused assented to or lent countenance and approval to the criminal act either by active participation in it or in some manner encouraging it prior to or at the time of its commission. Although the accused's mere presence is not enough, the requisite participation can be inferred "from circumstantial evidence including presence, companionship and conduct before and after the offense is committed." Fryer v. State, 325 N.W.2d 400, 406 (Iowa 1982).

State v. Miles, 346 N.W.2d 517, 520 (Iowa 1984) (emphasis added). Viewing the evidence in its light most favorable to the verdict, see id., we find sufficient evidence to infer that Newman assented to the burglary. When the burglary was discovered, he was in close proximity to the person drilling on the coin changer. When that person and another friend lied, saying they were authorized to change the locks, Newman made no objection to their statements. Finally, Newman arrived at the scene of the crime with the other codefendants and fled that scene with them also. We cannot conclude Newman was "merely present" at the scene of the crime. He has not shown a reasonable probability that a challenge to sufficiency of the evidence would undermine confidence in the outcome of his case. Therefore, he has failed to show prejudice.

3. Motion to Sever. We reject Newman's claim that failure to move to sever his trial from the codefendants' trial prejudiced him. In State v. Snodgrass, 346 N.W.2d 472 (Iowa 1984), the Iowa Supreme Court held that denial of severance is prejudice which denies a fair trial when the defenses conflict to the point of being irreconcilable and mutually exclusive, when the "'core' of the codefendants' defenses were . . . completely antagonistic to each other." Id. at 476

(emphasis in original). Newman has made no such showing. In fact, the defenses of all three codefendants were identical. Therefore, Newman has failed to show prejudice.

4. Other Claims. We have considered Newman's other claims. Keeping in mind that our benchmark is whether counsel's conduct prevents the trial from being relied on as producing a just result, Strickland, ___ U.S. at ___, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93, we find his other claims to be without merit.

AFFIRMED.