

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 24 1985

CLERK SUPREME COURT

STATE OF IOWA,)

398

Plaintiff-Appellee,)

Filed September 24, 1985

vs.)

CHARLES MELVIN HOLLADAY, JR.,)

5-391
84-1772

Defendant-Appellant.)

Appeal from the Iowa District Court for Muscatine County - J. L. Burns,
Judge.

Defendant appeals from his conviction burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. He asserts that he was denied effective assistance by trial counsel's failure to challenge the suggestiveness of identification procedures. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and David L. Dorff, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

James Curtis is the owner of a used car and body shop. On the evening of June 29, 1984, James and his thirteen-year-old daughter, Angela, went to the shop. When they arrived, James heard a door slam inside the building. The only light inside came from a candy machine and a clock. He and Angela observed a man carrying an armload of things across the showroom floor. The Curtises left the shop and called the police.

When the police arrived at the shop, the man was gone. James described the appearance of the man he had observed as "dark hair and a beard, mustache, red and black plaid shirt, open in front, blue jeans, probably five-foot-eight, five-foot-ten." While Officer Gries investigated inside the shop, James went into the tavern next door and spotted a man, Holladay, who looked like the burglar, except he did not have on a plaid shirt. James informed Officer Gries and they decided to have Angela make an identification also. Before viewing the suspect, Angela described the appearance of the man she observed in the shop to Officer Gries. Her description differed from her father's. By her observation, the man had a beard, wore a black hat with Island Auto Salvage on it, and a white T-shirt, cut off at the shoulder, with a blue box on the front. Officer Gries directed Angela's attention to the back porch of the tavern and Angela positively identified Holladay as the burglar.

Officer Gries then arrested Holladay, brought him over to the Curtis' shop, and walked him across the showroom under the same lighting that had existed in the shop at the time of the burglary. James and Angela again positively identified Holladay.

At the police station, James and Angela observed Holladay once more through a two-way glass and verified the identification.

At the time of trial, Holladay's attorney did not attempt to suppress the Curtis' identification testimony. However, he vigorously cross-examined both James and Angela Curtis regarding their ability to identify Holladay. At the close of the State's case, Holladay's counsel moved for a directed verdict of acquittal and to dismiss on the ground that the State failed to present sufficient evidence to warrant presenting the case to the jury. The defense motions were overruled. During the presentation of the defense, Holladay's counsel called several alibi witnesses and Holladay himself.

The jury found Holladay guilty of second-degree burglary and he was sentenced for a term of incarceration not to exceed ten years.

The only question Holladay raises on appeal is whether he was denied effective assistance of trial counsel because his attorney did not challenge the procedures employed to identify him as being impermissibly suggestive. When a defendant relies on a specific omission to prove ineffective assistance of counsel, two conditions must be demonstrated:

- (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
- (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Effective counsel is one whose performance under the totality of the circumstances is within the range of normal competency. Losee, 354 N.W.2d at 243. Ordinarily, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980).

Holladay is directly appealing from his burglary conviction. There has been no evidentiary hearing regarding the ineffective assistance claim. There-

fore, Holladay's counsel has had no opportunity to respond to the charges made against him. The Iowa Supreme Court in State v. Coil, 264 N.W.2d 293 (Iowa 1978) was confronted with an ineffective assistance of counsel claim in this same procedural posture. The supreme court's reasoning in Coil disposes of the case at hand.

There are cases when incompetency is so glaring that we are justified in saying so upon an examination of the record. Ordinarily, however, we should be slow to do so on what amounts to an ex parte hearing. Counsel may, indeed, have had good reason for each step he took or failed to take. There is nothing in counsel's conduct so obviously wrong that it defies explanation or excuse

Id. at 296.

We find no basis on which to hold Holladay's trial counsel performed deficiently so as to deprive Holladay of a fair trial.

AFFIRMED.