IN THE COURT OF APPEALS OF IOWA

No. 1999-354 (9-607) / 98-1850
Filed February 23, 2000

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FEB 2 3 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT WILLIAM HALL,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers and Patrick J. Madden, Judges.

Defendant-appellant, Robert Hall, appeals his conviction following a guilty plea to burglary in the third degree in violation of Iowa Code sections 713.1 and 713.6A (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, William E. Davis, Scott County Attorney, Kelly G. Rains and Robert Weinberg Assistant County Attorneys, for appellee.

Considered by Huitink and Mahan, J.J., and Honsell, S.J.*

Senior judge assigned by order pursuant of Iowa Code Section 602.9206 (1999).

HONSELL, S.J.

Mr. Hall pled guilty to burglary in the third degree in violation of Iowa Code sections 713.1 and 713.6A (1997). At the plea hearing Mr. Hall testified he entered the backyard of the property of a neighbor and removed items "in the backyard, under the patio." He denied entering the residence. Mr. Hall later told the presentence investigator the property he took was "on the back porch." At the restitution hearing, Mr. Hall said, "I went through the gate, chain link gate. And right about two feet on the other side was a patio, and that's where I picked it up at." Mr. Hall did not file a motion in arrest of judgment. The court imposed a five-year indeterminate sentence. Mr. Hall appeals, contending that his trial counsel provided ineffective assistance of counsel by permitting him to plead guilty in the absence of a factual basis to support the crime charged by the State. He asserts that because he did not enter "occupied structure," he didn't commit the crime to which he pled guilty.

I. Standard of review. We review claims of ineffective assistance of counsel de novo. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a defendant must prove there is a reasonable probability but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

II. The Iowa Criminal Code sections relevant to this appeal are as follows. Section 713.1, provides:

> 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 such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.
>
> Section 702.12, defines an "occupied structure" as follows:
>
> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure " whether or not a person is actually present.

Section 713.6A provides: All burglary which is not burglary in the first degree or burglary in the second degree is burglary in the third degree. Burglary in the third degree is a class "D" felony.

III. Citing *State v. Baker*, 560 N.W.2d 10 (Iowa 1997), Mr. Hall argues burglary involves more than acting "upon an occupied structure" or appurtenance. *Id.* at 13-14. He asserts it also involves whether he "broke, entered or remained upon such an area" without right, license, or privilege. *See* Iowa Code § 713.1. He asserts that the appurtenance in this case carried an implied right of access to the general public and one who abuses that right of implied access is a potential trespasser, but not a burglar.

In *Baker*, the court determined that a driveway was an appurtenance to a structure as contemplated by Iowa Code section 702.12. State v. Baker, 560 N.W.2d at 13. In *State v. Hill*, 449 N.W.2d 626 (Iowa 1989), the court determined that a fenced in area used for storage came within the mandate of Iowa Code section 702.12. *Id.* at 628.

IV. In *State v. Pace*, 602 N.W.2d 764 (Iowa 1999) the court examined our burglary statutes and the addressed subject matter in light of the following principles: (1) What is the intended meaning of the definition of "occupied structure" as set forth by the legislature; (2) is the subject matter sought to be defined consistent with the fundamental common law concept of burglary as an offense against security of occupancy; (3) does the resulting determination pass constitutional muster? *Id.* at 768-773.

In discussing (2) the court states:

> Thus, outdoor furniture located on a deck or a patio, or a bench located on a porch or stoop, would be indicia of the type of occupancy that could bring an appurtenance into the definition of an occupied structure. *See People v. Thompson*, 319 N.W.2d 568, 569 (Mich. Ct. App. 1982) (issue of whether a porch with two chairs and a rug constituted a dwelling house was properly left for the jury).

Pace, 602 N.W.2d at 771.

Mr. Hall admits he entered the fenced back yard and patio area. He disputes that the State proved he was without right, license, or privilege to do so. However, Mr. Hall stated during his plea colloquy as follows: Question – "And did you have any authority from anyone to go in and take the property?" Answer – "Not legitimate, no." His own testimony belies his claim based on an implied right of access. He testified he went to the [redacted] and looked in, then saw furniture in the fenced back yard, entered the yard, and removed the furniture. He suggests in his brief normal access to the home might have been through the fenced back yard. *See State v. Hill*, 560 N.W.2d at 628. His own initial approach, however, was not through the fenced back yard. He did not think he had the right to enter the fenced back yard and take the furniture. We find

nothing in the record to suggest any implied right of access to the public to the area Mr. Hall entered. We find a factual basis for the plea. Consequently, trial counsel could not have been ineffective if allowing Hall to plead guilty when no factual basis existed.

AFFIRMED.