

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 29 1982

CLERK SUPREME COURT

CARL BARRY HEIMBECK,)

Plaintiff-Appellant.)

Filed December 29, 1982

vs.)

231

STATE OF IOWA,)

2-351

Defendant-Appellee.)

67892

Appeal from Scott District Court - J. Hobart Darbyshire, Judge.

Petitioner appeals from the trial court's denial of postconviction relief alleging ineffective assistance of counsel. REVERSED AND REMANDED.

Robert J. Kromminga, Des Moines, Iowa, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and M. J. Blink, Assistant Attorney General, for defendant-appellee.

Heard en banc.

In 1979, petitioner Carl Heimbeck, was convicted after a jury trial of robbery in the first degree, a violation of Iowa Code section 711.2. In 1981 he filed the present application for postconviction relief, contending that his attorney in the 1979 trial had rendered ineffective assistance in numerous ways. The trial court concluded petitioner had not met his burden to prove ineffective assistance of counsel. Petitioner has appealed, challenging that conclusion. We reverse and remand this case for a new trial.

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.

A. Appellate Counsel and Failure to Pursue a Direct Appeal. Petitioner alleges he was denied effective assistance of counsel. The trial court found that petitioner was in fact denied effective assistance of appellate counsel but found that he had not met his burden of proving that his trial counsel was ineffective and therefore denied postconviction relief. The issue of the effective assistance of appellate counsel is neither raised nor briefed by the parties, accordingly we are bound by the trial court's finding that appellate counsel rendered ineffective assistance.

The remaining issues are those which might have been raised on direct appeal.

Postconviction relief is not a means for litigating claims that were or should have been properly presented at trial or on direct appeal. § 663A.2. Any claim not properly raised at trial may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. [citation omitted]

Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). The issue of ineffective assistance of counsel must be raised on direct appeal in order to be properly considered in postconviction proceedings unless the defendant can show sufficient reason for not doing so. Id. at 235. Ineffective assistance of appellate counsel is a sufficient reason for failing to assert an issue on direct appeal. Id. (citing Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980)). We thus address the merits of petitioner's contentions.

B. Trial 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).

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)).

Petitioner claims that several acts and omissions of his trial counsel constitute ineffective assistance. The alleged acts and omissions are: 1) failure to move for a mistrial after the prosecutor read the wrong trial information to the jury charging petitioner with first degree robbery committed on another day; 2) failure to object to testimony regarding petitioner's arrest for attempted burglary in Geneseo, Illinois; 3) failure to object properly to the introduction of a shotgun, knife, nylon stockings, two-way radios, a box of shotgun shells, two pairs of gloves, a broken machete and two flashlights which were unrelated to the crime in question; 4) failure to make a motion to suppress the contents of a briefcase; 5) failure to object and move for a mistrial based upon the on-the-stand assertion of his fifth amendment rights by an accomplice; and 6) failure to object to the testimony of a police officer regarding hearsay statements made by an accomplice. Petitioner contends that this is an instance where counsel's failure to preserve error is so "egregious that it denies a defendant the constitutional right to effective assistance of counsel." See Washington v. Scurr, 304 N.W.2d at 235. We agree with petitioner and order a new trial for petitioner.

Petitioner's trial counsel testified he did not want to seek a mistrial because he did not want to lose what he believed to be a favorable jury. Trial counsel attempts to explain these failures away by arguing that his trial tactics and strategy involved the State's inability to identify petitioner and that his silence was prompted by his decision not to give undue emphasis to the evidence by

objecting. Early in the trial, however, the second witness, the victim Yasser Haleem, identified petitioner as the perpetrator of the crime, yet trial counsel continued with the identification strategy.

We are also cognizant of the highly inflammatory and prejudicial aspects of the prosecutor's reading of the wrong trial information to the jury. The jury was read an information charging petitioner and one Kevin Lee Kimmel with robbery in the first degree for a robbery committed on the 8th day of September, 1978. The court admonished the jury to disregard the erroneous trial information, thereafter the prosecutor read the information charging petitioner with first degree robbery on the 9th day of September, 1978. We do not consider the information itself to be evidence, however, this information could create a highly prejudicial impression on the jury. "[E]rror usually may be cured by such warning [admonition] to the jury—unless the impression created upon the jury thereby is so strong as to have prejudiced the defendant." State v. Peterson, 189 N.W.2d 891, 897 (Iowa 1971). The prejudicial aspects of evidence of other crimes and criminal activity has long been recognized by the Iowa courts. E.g., State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979).

Later in the trial Kevin Lee Kimmel, who was referred to as an accomplice in the trial information erroneously read to the jury, invoked his fifth amendment rights when called to testify by the State. A finding of reversible error has been predicated on the following circumstances:

(1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of a jury;

(2) that the prosecutor knew in advance or had reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose;

(3) that the witness had a right to invoke his privilege;

(4) that defense counsel made timely objection and took exception to the prosecutor's misconduct; and

(5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury.

State v. Whitfield, 212 N.W.2d 402, 408 (Iowa 1973) (quoting 86 A.L.R.2d 1443, 1444-1445 (1962)).

A review of the record reveals that the witness Kevin Lee Kimmel was implicated in the criminal activities with petitioner by the prosecutor's reading of the wrong trial information. When called at trial as a witness for the State, Kimmel invoked his right to remain silent upon the prosecutor's asking whether Kimmel had ever been arrested in "Geneseo," Illinois. After Kimmel had been excused the State called Steve Hawkins, an investigator for the Illinois State's Attorney office, to testify. Hawkins stated that petitioner and Kimmel were arrested for attempted burglary in Henry County, Illinois. He further testified that upon their arrest he had an opportunity to discuss the crime charged in the correct information with Kimmel. Hawkins testified that Kimmel told him "he [Kimmel] was a participant in the armed robbery of the drive-in, and that he had an accomplice, and he named that accomplice as Carl Berry Heimbeck." All these matters were admitted into evidence without objection by defense counsel.

The record further shows that the prosecutor should have known that Kimmel would invoke his fifth amendment right. Kimmel had told the prosecutor previously that he might invoke the privilege. Hawkins in fact testified that Kimmel had told Hawkins and the prosecutor the day before trial that he would refuse to testify at petitioner's trial. Knowing that Kimmel would probably refuse to testify, the prosecutor still called Kimmel to the stand.

It is improper for a prosecutor to require a witness to claim his privilege against self-incrimination in the presence of the jury when, as in this case, the prosecutor knows or has reason to anticipate the witness will assert it. [citations omitted.]

This principle is recognized in ABA Standards, The Prosecution Function, § 4.7(c) (1971):

A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of the privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct.

When an alleged accomplice invokes the privilege in the presence of the jury, prejudice arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination.

State v. Allen, 224 N.W.2d 237, 240-41 (Iowa 1974).

Had trial counsel moved for a mistrial, there was more than a possibility that trial court would have granted the motion.

Examining the entire record in this case, we conclude that the acts and omissions of defense counsel were much more than mere miscalculations in trial strategy and tactics. We cannot give countenance to such by saying they fell within the normal range of competency. On the basis of our examination of the totality of the circumstances, we conclude that petitioner was denied his constitutional right to the effective assistance of counsel. We thus reverse trial court's judgment and remand this case for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.