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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

411

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 4, 1986
vs.	)	6-61 85-297
DENVER ALLEN WHITELY,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Muscatine County (1513-684), J.L. Burns, Judge.

Defendant-appellant appeals from a judgment following his conviction for burglary in the second degree. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and Stephen J. Petersen, County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 412

Defendant-appellant (Whitely) appeals from a judgment following his conviction for burglary in the second degree. We affirm.

Whitely first argues that the trial court erred in overruling his motion to suppress his confession.

An individual may waive his constitutional right to remain silent. State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976). The State bears the burden of proof as to whether such waiver was given knowingly, voluntarily, and intelligently. Id. Our scope of review is de novo since the voluntariness of waiver of constitutional right to remain silent and voluntariness and the subsequent inculpatory statements are of constitutional magnitude. State v. Whitsel, 339 N.W.2d 149, 153 (Iowa 1983).

We first examine whether Whitely's waiver of his right to remain silent under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 644 (1966) was knowing, intelligent, and voluntary.

Whitely insists that he requested assistance of an attorney at least four times during the interrogation by Officer Haveman. The trial court in its ruling found "no credible evidence" that (Whitely) had stated that he wanted an attorney present or that he chose to remain silent until one was present. Despite our de novo review, we grant deference to the findings of a trial court which had the opportunity to observe Whitely's demeanor as he testified and assess his credibility.

We find Whitely's Miranda rights are inapplicable to this case since he never clearly invoked those rights. Whitely, at most, made weak inquiries to whether he needed the help an attorney could provide. Such an inquiry does not constitute a statement amounting to a request for counsel. State v. Whitsel,

339 N.W.2d 149, 153 (Iowa 1983); State v. Johnson, 318 N.W.2d 417, 430-31 (Iowa 1982). Whitely, through his conversation with Officer Haveman, clearly understood his right to an attorney and that questioning would cease if he stated a desire for counsel's presence. He did not invoke this right. Thus we find that Whitely's waiver of his Miranda rights was knowing, intelligent, and voluntary.

We next examine the record to determine whether Whitely's confession was induced by a promise of leniency by Officer Haveman.

The Iowa Supreme Court has barred the use of a confession obtained through promises of leniency. State v. Hodges, 326 N.W.2d 345, 348 (Iowa 1983); State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984); State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983).

Here Whitely received only an explanation of what charge the police would file based on what crime Whitely had committed. Haveman's statements to Whitely cannot be construed as a promise of leniency if Whitely confessed to the burglary.

We further find from the totality of the circumstances that Whitely's interrogation was not of sustained, exhaustive duration nor was it accompanied by threats or force. Whitely's decision to confess was free and unconstrained and not the product of coercion. Accordingly, the trial court properly overruled Whitely's motion to suppress.

Whitely also asserts that the confession should have been suppressed because Officer Haveman excluded Whitely's wife from the interrogation in violation of Iowa Code § 804.20.

We find Whitely waived his right to suppress based on the statutory ground as he failed to make a timely objection. The trial court set August 13, 1984, for filing of pretrial motions. Whitely's motion to suppress, filed July 13, 1984, did not include the statutory ground asserted here. Whitely would have us view

a posthearing memorandum which mentioned this ground as a timely objection to admission of the confession. We decline to do so. We find the trial court properly applied waiver to Whitely's tardy assertion of the section 804.20 ground as this ground was not asserted in a timely manner. We make this finding in light of State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977) in which the court wrote:

> Absence of a timely objection is a waiver of the right to suppress evidence. Matters not raised in trial court, including constitutional question, may not be effectively asserted for the first time on appeal. Every ground of exception which is not particularly specified is to be considered as abandoned. One attempting to exclude evidence, whether by objection or motion, had a duty to indicate the specific grounds so as to alert the court to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible.

Whitely's reference to the section 804.20 ground in a posthearing memorandum was not sufficient to place the issue before the trial court.

Whitely's second assignment of error attacks the trial court's overruling of his discovery motions regarding a fire which occurred in the burglarized factory about the same time as the burglary.

This court reviews a trial court's rulings on discovery demands under an abuse of discretion standard. State v. Grimme, 338 N.W.2d 142, 144 (Iowa 1983). The right of a defendant to depose witnesses for the State is subject to reasonable regulation. State v. Gates, 306 N.W.2d 720, 725 (Iowa 1981). For an error in administration of discovery to provide grounds for reversal, Whitely must show prejudice of his substantial rights. Id.

Whitely fails to show affirmatively that the trial court abused its discretion in overruling his motions for discovery as he must to succeed. State v. Grimme, 338 N.W.2d 142, 144 (Iowa 1983). Whitely's efforts to depose Officer Haveman and Fire Chief Ziegenhorn regarding the fire were based on a mere possibility

that their responses "may contain exculpatory evidence or evidence which is material to the preparation of the defendant's defense." Whitely had already deposed Officer Haveman regarding the burglary charges against him. He was not charged with arson and the arson and burglary of the button factory were never alleged to be related. Thus, the trial court's denial of further deposition was a reasonable act of regulation and not an abuse of discretion.

For Whitely to establish a need to depose Chief Ziegenhorn, he had to show special circumstances since Chief Ziegenhorn was not to be called as a witness in the burglary trial. Iowa R. Cr. P. 12(2). A mere assertion that the deposition might provide exculpatory evidence is insufficient to establish a need for additional deposition.

Although the minutes of testimony alleged a connection between the fire and the burglary, testimony at the trial regarding the fire was offered only to demonstrate the reason the police went to the factory where the burglary was subsequently discovered. Information regarding the fire was not relevant to the burglary charge which was the only jeopardy Whitely faced in the trial.

Finally we address Whitely's contention that he received ineffective assistance from counsel by the defense attorney's decision against moving for a judgment of aquittal. A person alleging his trial counsel was ineffective must fulfill a twofold obligation. He must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Taylor v. State, 352 N.W.2d 683, 684-85 (Iowa 1984). In assessing the effectiveness of trial counsel's efforts, we require more than a showing that a trial strategy failed. In deciding the second element we must find a reasonable probability that, had counsel not erred, the trial result would have been different. Id.

The record on a direct appeal, however, is ordinarily insufficient to adjudicate a claim of ineffective assistance of counsel. State v. Schoelerman,

315 N.W.2d 67, 71 (Iowa 1982); State v. Steltzer, 288 N.W.2d 557, 566 (Iowa 1980); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). It is preferable that the claim be litigated in postconviction proceedings where an evidentiary hearing may be required in order to provide an opportunity for trial counsel to explain strategy or tactics underlying his performance. See State v. Coil, 264 N.W. 2d at 296.

Although the state of the record is inadequate to show why trial counsel chose the action or nonaction that he pursued, counsel could have concluded, after seeing the state's evidence, that such a motion would have been meaningless. The failure to challenge the sufficiency of state's evidence can be a purposeful decision made by counsel and certainly one well within the range of normal competency. See State v. Heidebrink, 334 N.W.2d 344, 347 (Iowa App. 1983).

Counsel knew the State's evidence included Whitely's possession of pop cans reasonably thought to have come from the items taken in the burglary. That evidence also indicated that Whitely formerly worked in an area of the factory near the point where the burglars entered. Bernard Hahn, president of the company, testified that Whitely was one of only a few present or former employees who knew the layout of the area damaged by the burglars and who knew the location in the plant where tools used in the burglary were stored.

From the above and other evidence, the trial court could have found sufficient corroboration for Whitely's confession. The decision not to challenge the existence or sufficiency of corroborative evidence could have been based on a belief that such a motion would have been frivolous. The decision against raising such a challenge is within the normal range of competency. Whitely has not met his burden to show counsel's assistance was ineffective.

AFFIRMED.