

IN THE COURT OF APPEALS OF IOWA

No. 5-664 / 94-2095

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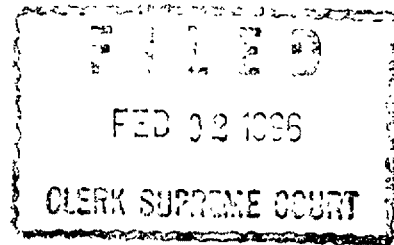
STATE OF IOWA,

Plaintiff-Appellee,

vs.

REGINALD ANDREW NOLING,

Defendant-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey,
Judge.

Reginald Noling appeals the judgment and sentence entered upon his conviction, following a jury trial, of failure to appear in violation of Iowa Code section 811.2(8) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, **Paul** L. Martin, County Attorney, and Gregg R. Rosenblatt, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Defendant-appellant Reginald Andrew Noling was convicted, following a jury trial, of failure to appear in violation of Iowa Code section 811.2(8) (1995). The charge was filed when defendant failed to appear at the specified time at the county sheriff's office to begin serving a prison sentence. Defendant's sole issue on appeal is the district court erred in refusing to instruct the jury of his mistake of fact theory of defense. We affirm.

Defendant was convicted of accessory after the fact to third-degree burglary and was scheduled to begin serving a two-year prison sentence at noon on May 16, 1994.

Defendant's attorney in the accessory after the fact proceedings testified he had told defendant on May 13, 1994, defendant was ordered to appear on May 16, 1994, to serve his sentence. It was stipulated defendant did not report to the county jail on May 16, 1994.

Defendant challenged the charge of failure to appear. His theory of defense was he made a mistake of fact and should therefore be resolved of any criminal responsibility for failing to report.

Defendant claimed a conversation he had with a police officer led him to believe he did not need to appear. Defendant testified he had a conversation at his home with Mason City police officer Rick Crowell on May 16, 1994. The testimony was the officer spoke to defendant about a school bus defendant had parked in his

driveway. The officer told defendant he needed to move the bus. Defendant said he told the officer he did not have time to move the bus because he had to go to prison that day. Defendant said the officer told him he did not need to go to prison.

The officer testified and denied he told defendant he did not have to report to jail on May 16.

Defendant's trial attorney asked the court to include language regarding a mistake or accident in the instruction addressing "with specific intent." The trial court overruled the request and the issue of "specific intent" was submitted to the jury in the following instruction:

"Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.

Because determining the defendant's specific intent requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude a person intends the natural results of his acts.

Defendant was found guilty as charged. The court sentenced him to a term of imprisonment not to exceed five years.

Defendant appeals. He argues the district court erred in refusing to instruct the jury on his defense of mistake of fact. The State argues the instructions encompassed defendant's theory of defense.

A defendant is entitled to a mistake of fact instruction if the mistake is reasonable under the circumstances and an act is taken under a bona fide mistaken

belief. *State v. Freeman*, 267 N.W.2d 69, 70 (Iowa 1978); *see also State v. Stewart*, 445 N.W.2d 418, 421-22 (Iowa App. 1989).

Willful failure to appear is a specific intent offense. *State v. Williams*, 445 N.W.2d 408, 409 (Iowa App. 1989). Ignorance or mistake of fact, if reasonable and not due to carelessness or negligence, is a defense to a crime of intent. *Freeman*, 267 N.W.2d at 70. Ordinarily a defendant is entitled to have instructions presented relating to any theory of defense for which there is foundation in the evidence if he or she makes a timely request and it sets out a correct declaration of law. *Stewart*, 445 N.W.2d at 421. There is no error in denying an instruction where the substance of the requested instruction is included in other instructions. *State v. Seehan*, 258 N.W.2d 374, 379 (Iowa 1977); *State v. Tensley*, 249 N.W.2d 659, 662 (Iowa 1977); *State v. Robinette*, 216 N.W.2d 317, 318 (Iowa 1974). A mistake of fact would, under its definition, make it impossible for defendant to form a criminal intent. *Freeman*, 267 N.W.2d at 71. Mistake of fact nevertheless remains a separate and distinct issue notwithstanding its relation to the State's duty to prove a criminal intent. *Id.*

We agree with defendant the instruction given did not adequately instruct the jury a mistake of fact could be considered on the issue of defendant's intent to commit the crime. This, however, does not justify reversal. A defendant is entitled to such an instruction only if the mistake is reasonable under the circumstance. Defendant had been in court when he was convicted of third-degree burglary and sentenced. His

lawyer told him to report. There is nothing reasonable in defendant's contention that because a policeman told him he did not have to go to prison he would believe he did not have to go. There was no evidence supporting a finding the mistake of fact defendant alleged was reasonable. He is entitled to an instruction only if the alleged mistake of fact is reasonable. *Freeman*, 267 N.W.2d at 70. We affirm.

AFFIRMED.

Habhab, J., concurs; Cady, J., specially concurs.

001112

CADY, J.

I concur with the result reached by the majority, but would conclude Noling failed to adequately preserve error. Noling never requested an instruction on the defense of "mistake of fact", but only asked the court to join the general intent instruction with specific intent instruction to emphasize the intent element of the crime required the act to be done voluntarily, "not by mistake or accident." The instructions, as a whole, informed the jury Noling's actions had to be "willful" and "not accidental." The instructions given by the trial court adequately considered Noling's claim.