

IN THE COURT OF APPEALS OF IOWA

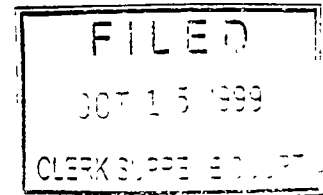
No. 1999-280 (9-510) / 98-2026

Filed October 15, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL TODD BROWN,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott Co County, Bobbi M. Alpers,
District Judge.

Defendant appeals his conviction of robbery in the second degree.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, William E. Davis, County Attorney, Michael J. Walton, Assistant County
Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

000396

MILLER, J.

Defendant-Appellee Michael Todd Brown appeals his conviction of robbery in the second degree in violation of sections 711.1 and 711.3 of the Code of Iowa. He raises several claims of ineffective assistance of counsel. We preserve two of his claims of ineffective assistance for a post conviction proceeding, but find the others to be too general to allow us to address the allegations or preserve them for a post conviction proceeding. We affirm.

Background facts: In mid morning of March 29, 1997 Lisa O'Haver arrived at Trimale Patrick's house to give Patrick's girlfriend, Laura, a ride to work. Laura was already gone, and Patrick asked O'Haver to give his friend, the defendant Michael Todd Brown, a ride downtown. She agreed to, and did so.

According to O'Haver, Brown kept asking if she had any money and asking to borrow money, and when they arrived downtown Brown grabbed her, pushed, hit and kicked her to get the purse, tore the purse, and escaped with most of \$400 she had in her purse. According to Brown, O'Haver dropped him off at the bus depot, a downtown location different than the location to which she testified she delivered him, and he did not ask her for money, touch her purse or have any confrontation or struggle with her.

The state charged Brown with robbery in the second degree in a trial information filed September 11, 1997. Brown was arraigned and entered a plea of not guilty on the same day, trial began October 5, 1998 and on October 6 the jury returned

a verdict finding Brown guilty as charged. On November 5, 1998 the Court entered a judgment of conviction and sentenced Brown to serve a term of no more than ten years. Brown now appeals.

Ineffective assistance claims. Brown claims his trial counsel was ineffective in: (1) failing to file substantial pretrial motions; (2) waiving opening statement, after having reserved it; (3) failing to object to questions asked of the defendant which revealed that he was represented by a court-appointed attorney; (4) failing to call witnesses to rebut the state's allegations that Brown made a statement to the victim's husband during a break in the trial; (5) failing to call witnesses to rebut the state's allegation that brown confronted the witness Trimale Patrick during a break in the trial; and (6) failing to adequately investigate and prepare the case for trial.

Brown acknowledges that each of the first five claims standing alone would not serve as a basis for finding ineffective assistance counsel. However, citing *Wycoff v. State*, 382 N.W.2d 462, 473 (Iowa 1986), he urges that when combined and considered together with his sixth claim the first five alleged failures constitute sufficient cause to question the fairness of his trial and the justness of the verdict of guilty. He urges that by reason of trial counsel's failure to adequately investigate, the record is incomplete as to the possible existence of exculpatory evidence and is thus inadequate to decide his sixth claim of ineffective assistance on direct appeal. He requests that this sixth claim be preserved for a post conviction proceeding.

The state agrees that Brown's sixth claim should be preserved, and accordingly we will do so. It urges that his first, second, fourth and fifth claims are too general in nature to allow us to address them on direct appeal or preserve them for a post conviction proceeding. We agree. It suggests that although Brown's third claim is sufficiently specific to be addressed on direct appeal, it should not be addressed because Brown's counsel should have an opportunity (in a post conviction proceeding) to explain his actions. We again agree.

Allegations of ineffective assistance may be too general in nature to allow the court to either address them or preserve them for a post conviction proceeding. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. ... The [defendant] must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. ...

Id.

Brown complains that counsel filed no substantial pretrial motions. However, he does not state what motion or motions should have been filed or how any such motion would have affected the outcome of the case or aided the defense. He complains that counsel waived opening statement, which he had reserved. However, he does not state what counsel should have said in opening statement, or how he believes an opening statement would have changed the outcome or aided the defense.

Both of these two claims are therefore too general and lacking in specifics to allow us to address them or preserve them for a post conviction proceeding. *Id.*

We also note that ordinarily such decisions as whether or not to file pretrial motions or make an opening statement will not support a claim of ineffective assistance of counsel because such tactical or strategic decisions are properly left to counsel and a defendant is bound by the decisions of counsel regarding such matters. *See, e.g., Sallis v Rhoads*, 325 N.W. 121, 123 (Iowa 1982). Brown does not claim or show that any reason exists why he should not be bound by trial counsel's decisions regarding these two matters.

Brown complains that counsel failed to call witnesses to rebut the state's allegation that he confronted the victim's husband during a break in the trial. He also complains that counsel failed to call witnesses to rebut the state's allegation that he confronted the witness Trimale Patrick during a break in the trial. He acknowledges that he had contact and communication with these two persons during breaks in the trial. He acknowledges a confrontation with the victim's husband, but asserts it was instigated by the victim's husband. He asserts his communication with Trimale Patrick was merely social conversation. However, while complaining of counsel's failure to call witnesses concerning events that he acknowledges participating in, he does not state who any such witness or witnesses might be, or what their testimony might have been. **Both of these two claims are therefore too general and lacking in specifics to allow us to preserve them for a post conviction proceeding.**

Brown claims that counsel was ineffective for failing to object to questions asked of him which revealed that he was represented by a court-appointed attorney. Brown testified at trial. On cross-examination the state attempted to show that Brown was unemployed at the time of the alleged robbery, perhaps to show a need for money and a motive to commit robbery. When Brown insisted he was employed, the following questions and answers followed, without objection:

"Q. So what were you doing at that time? A. I was doing landscaping. Q. You had a court-appointed attorney, didn't you? A. Yes, sir, I did. Q. That was based on your income? A. Yes, sir. Q. It was based on the fact you didn't have a job? A. I did have a job, sir. Q. Yet you got a court-appointed attorney? A. Yes, sir.

App. 87.

The state provided no evidence, either before or after this exchange, that Brown was not employed at the time of the alleged robbery. Implicit in this claim of ineffective assistance is a claim that evidence that Brown was represented by court-appointed counsel is irrelevant and prejudicial. The state apparently agrees that it might be, suggesting that Brown's counsel should have an opportunity to explain his actions. We agree and find it appropriate to preserve this claim for a post conviction proceeding.

Summary. We affirm Brown's conviction and sentence. We preserve for a possible post conviction proceeding his claims that trial counsel was ineffective in (1) failing to adequately investigate and prepare for trial, and (2) failing to object to

questions asked of Brown which revealed that he was represented by court-appointed counsel.

Affirmed.