

FILED

MAY 30 1980

165

IN THE COURT OF APPEALS OF IOWA
IOWA SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed May 30, 1980

vs.)

CHARLES EDWARD JACKSON,)

Defendant-Appellant.)

0-116

63570

Appeal from Linn District Court - Louis W. Schultz, Judge.

Defendant appeals conviction for third degree sexual abuse, in violation of section 709.4, supplement to the Code 1977. - AFFIRMED.

Mark Meyer & Jerald W. Kinnamon, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Eugene Kopecky, Linn County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Charles Edward Jackson, appeals conviction for third degree sexual abuse, in violation of section 709.4, supplement to the Code 1977. We affirm.

Jackson was convicted by a Linn County jury for third degree sexual abuse and sentenced to ten years in prison. Jackson raises three issues on appeal: was his waiver of the right to appear and testify at a hearing on a suppression motion made knowingly, voluntarily, and intelligently; did he receive effective assistance of counsel; and did the trial judge violate Iowa R. Crim. P. 18(17)(c) [now Iowa R. Crim. P. 18(9)(c)] by being absent from the courtroom during final arguments?

I. Waiver of appearance at suppression hearing.

On the first day of Jackson's trial a hearing on his motion to suppress oral statements made to interrogating officers was held. Jackson was not present at the hearing because he was participating in laboratory tests, the results of which were to be used by defense counsel. The suppression hearing consisted of testimony of police officers and concerned, in part, the waiver of rights form signed by Jackson during interrogation. The trial court ruled the statements sought to be suppressed were voluntarily made and, therefore, admissible. The court also found Jackson voluntarily waived his right to be present at the suppression hearing.

During trial, Jackson testified when he signed the waiver of rights statement during interrogation, it was a blank form. He also testified he was only joking when he talked to police. Jackson now claims that testimony should have alerted the trial court on the necessity of his presence during the suppression hearing and he argues the trial court erred by not reconsidering the motion to suppress in light of his testimony at trial.

Although Jackson couched this issue as one of voluntariness of the waiver of right to be present during the suppression hearing, the central question is whether the trial court erred by not reconsidering the suppression ruling sua sponte. Clearly, the initial waiver of the right to be present was voluntary; Jackson requested not to be present so he could undergo examination relevant to defense preparation. The later decision whether to review the ruling on the suppression motion was a matter within the discretion of the trial court. See State v. Richards, 229 N.W.2d 229, 233 (Iowa 1975).

The record here shows the trial court did not abuse its discretion by not reconsidering the suppression motion. The trial court had before it the printed waiver

form signed by Jackson as well as the testimony of Officer Huston. It could compare that evidence with Jackson's trial testimony and reasonably could conclude the motion to suppress correctly was overruled. Jackson failed to seek reconsideration of the motion at trial and the trial court did not abuse its discretion by not reconsidering the motion to suppress sua sponte.

II. Effective assistance of counsel.

Jackson contends he was denied effective representation of counsel in violation of United States and Iowa constitutional right to counsel provisions. He claims defense counsel inadequately prepared for trial and relies on facts in the record including his failure to be present at the suppression hearing, counsel's failure to call other witnesses at the suppression hearing, and counsel's preparation for eliciting testimony, especially the expert testimony of defense witness Dr. Weland and the testimony of witness Pledge. The effect of the inadequate preparation, Jackson claims, is testimony of witnesses was not fully developed nor sufficiently protected from cross-examination by the State. Jackson further claims he did not receive adequate legal advice regarding his statements to the interrogating officers and his rights underlying such statements.

A criminal defendant receives effective assistance of counsel if the performance of counsel is within the range of normal competency of practicing attorneys. State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Not every mistake in strategy and tactics qualifies as ineffective assistance, Long v. Brewer, 253 N.W.2d 549, 588 (Iowa 1977), and the review of professional performance is to be made in light of the press of trial and trial preparation. Kellogg v. State, 288 N.W.2d 561, 566 (Iowa 1980). Under these standards, we find Jackson was not denied effective assistance of counsel. Decisions relative to the suppression hearing were tactical in nature and did not constitute inadequate assistance. Trial preparation was within the normal range of competency. See e.g. Kellogg, 288 N.W.2d at 565-566.

III. Absence of trial judge during final argument.

Jackson asserts the trial court judge improperly absented himself from the courtroom during closing arguments. He contends the absence was contrary to Rule 18(7)(c) and, although he admits no prejudice appears from the record, he claims the absence was prejudicial because, among other things, the jury might be given the impression final arguments are to be accorded little weight. Jackson claims he was not

given the opportunity to request the trial judge's presence during final argument because "the Court affirmatively told Defendant and the State it would not be present." However, the trial court clearly indicated "If there's any problem, gentlemen, I will be available." Jackson could have objected to the trial court's absence or requested the final arguments be recorded. He did not. Since issues not raised in the trial court may not be raised for the first time on appeal, see State v. Rand, 268 N.W.2d 642, 650 (Iowa 1978), this issue is not preserved for review.

We have reviewed Jackson's contentions and hold the judgment of the trial court should be affirmed.

AFFIRMED.