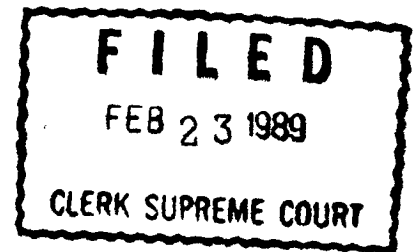


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
MICHAEL JAMES DOWNS,)
Defendant-Appellant.)

8-689
88-171

382

Appeal from the Iowa District Court for Polk County
(No. 36385 & 36386), Theodore H. Miller, Judge.

Defendant appeals from his conviction and sentence on one count of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5, one count of attempted burglary, in violation of sections 713.2 and 713.6, and one count of possession of burglar's tools, in violation of section 713.7, imposed after a bench trial in district court. **AFFIRMED.**

Raymond Rogers, Acting Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; and Joseph Weeg, Assistant County Attorney, for plaintiff-appellee.

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

PER CURIAM

The defendant, after a bench trial held December 9, 1987, appeals his conviction and sentence of burglary in the second degree, Iowa Code § 713.5 (1987), of attempted burglary, Iowa Code §§ 713.2 & 713.5 (1987), and possession of burglar's tools, Iowa Code § 713.7 (1987). We affirm.

The defendant's sole contention on appeal is ineffective assistance of counsel. We note that claims of ineffective assistance of counsel are generally reserved for postconviction review by appellate courts because of the seriousness of the claim to counsel whose performance is being challenged, as well as to the fairness of the proceedings in which the ineffective assistance is alleged to have occurred. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1976). There are cases, however, where the supreme court has deemed the trial record sufficient to make that determination. Id.; State v. Hildebrandt, 405 N.W.2d 839 (Iowa 1987). We believe such circumstance exists here.

We review claims of ineffective assistance of counsel de novo. Hildebrandt, 405 N.W.2d at 841. The defendant must prove that his counsel at trial failed to perform an essential duty and that his counsel's failure to perform this duty prejudiced him. The defendant has the burden of proving his claim of ineffective assistance of counsel by a preponderance of the evidence. Id.

Our supreme court in Taylor v. State summarized the law in regard to an ineffective assistance of counsel claim:

The person claiming that his trial attorney was ineffective, depriving him of his sixth amendment right to counsel, must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Petitioner has the burden to prove both of these elements by a preponderance of the evidence.

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Petitioner must overcome a presumption that counsel is competent. . . . The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency.

In deciding the second component of a claim of ineffectiveness of counsel, prejudice, we have required the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." The United States Supreme Court has recently articulated the following test for determining whether specified errors of counsel have resulted in the required prejudice.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (citations omitted)

Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

Downs first contends trial counsel was ineffective in failing to move for judgment of acquittal on the ground the State failed to identify him as the man who committed the alleged crimes. To prevail in this respect, Downs must

establish by a preponderance of the evidence "(1) that counsel failed to perform an essential duty and (2) that prejudice resulted." State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). The State argues the defendant has failed to meet its burden of proof. We agree.

The facts surrounding this incident are not complex. Carl McPherson testified that he heard a noise at his home and went to the window where he observed a man with a cast on his arm dressed in a "blue knit-type shirt, sweat-type shirt, blue jeans and athletic shoes" trying to pry open one of his windows with a bar. A few hours later, after Downs was apprehended by police about two blocks from the McPherson residence wearing the same clothes, with his arm in a cast and with a tire iron, McPherson identified the defendant as the man he saw at his window.

The police had found the defendant asleep in the driver's seat of a car parked in a garage of a residence two blocks from McPherson's. It was discovered that the sunroof on the car had been torn, the radio was partially removed from its encasement, and the tuning knobs to the radio were missing. The police found four radio knobs in the defendant's shirt pocket and a pry bar and flashlight. The owners of the vehicle testified they did not own the latter two objects. As it relates to the pry bar, the police officer took it to the McPherson residence and, after he inserted it in the groove made by the intruder, he found they matched perfectly.

Mr. McPherson testified that he positively identified the defendant just two hours after the attempted burglary at the McPherson home. "At the time when I saw him, I had no doubt that he was the individual whom I had seen outside of my window and tried to enter the house." Mr. McPherson had previously given a detailed description of the defendant, what he was wearing, and the fact that he had a cast on. The man McPherson identified later that evening in the squad car fit that description.

At the trial, McPherson testified that he didn't recognize the defendant: "The gentleman I see at the end of the table looks like he could be the individual. I don't remember the mustache and he's minus a cast." When we couple the earlier identification with the surrounding circumstances, it is clear that a fact question as to identification had been created. After defense counsel advised the court that he was not going to move for a judgment of acquittal, the trial court observed that the State had made "a prima facie case" and defense counsel agreed. Defense counsel so agreed--not because he was ineffective, but because it was true.

Since there was no basis on which to move for acquittal, defense counsel was correct. We conclude that Downs can show neither a failure to perform an essential duty nor that the proceedings would have been any different had defense counsel made such a motion.

We reach the same conclusion as to the defendant's second contention. In that contention, the defendant argues that trial counsel was ineffective in not moving for judgment of acquittal on the ground that there was insufficient evidence to prove the intent element of the charges against him. He asserts defense counsel breached a duty by not asserting an intoxication defense to negate intent.

To support this contention, defendant argues that the evidence substantiates that the defendant was asleep in a car when found and that the witnesses had a difficult time waking him. There is testimony that defendant's breath smelled of alcohol, and that his condition was "a little shakey."

But it is evident why the intoxication defense was not used, for to do so would be contrary to the defendant's own statements. He testified at trial that he was disoriented but that he unequivocally had nothing to drink that day and he also testified that he had not ingested any drugs, medicine, or pain killers that day. In order for his defense counsel to argue as Downs now suggests, defense counsel would have to have contradicted his client's own testimony.

Because Downs cannot demonstrate that defense counsel breached an essential duty by bringing up the intoxication issue, which would have been in direct contradiction with

Downs' own testimony, his claim of ineffectiveness must fail. For these reasons, we affirm the conviction of the defendant.

AFFIRMED.