IN THE COURT OF APPEALS OF IOWA

No. 2-285 / 91-1000

FILED
AUG 27 1992
CLERK SUPREME COURT

DONALD ROLAND,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, James R. Havercamp, Judge.

Roland appeals following a district court ruling denying his application for postconviction relief concerning his conviction for first-degree robbery. **AFFIRMED.**

Donald Roland, Anamosa, pro se.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce Ingham, Assistant County Attorney, for appellee.

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

SACKETT, J.

Applicant-appellant Donald Roland appeals a trial court ruling denying his application for postconviction relief. Roland contends he was denied effective assistance of trial, appellate, and postconviction counsel. We affirm.

In June 1989, Roland was charged with first-degree robbery while armed with a dangerous weapon. After a jury trial, he was convicted of first-degree robbery and sentenced to a term of twenty-five years pursuant to section 711.1 and section 902.9(1), with a minimum sentence of five years under section 902.7. Roland filed an application for postconviction relief under Iowa Code chapter 663A. After a hearing, the trial court denied his application. Roland appeals contending (1) he was denied effective assistance of trial counsel, (2) the trial court's communications with the jury were in error, (3) the jury was not properly instructed, (4) the trial court failed to submit the required interrogatory, (5) he was denied effective assistance of appellate counsel, and (6) he was denied effective assistance of counsel on his postconviction relief petition. We affirm.

Roland allegedly robbed a bar. Roland was well-known in the bar, and he allegedly had been there earlier in the evening on the night of the alleged robbery. Roland returned to the bar late in the evening. Roland was known to the bartender. Roland told the bartender he was going

to rob her. The bartender did not believe Roland until he pulled out a gun and told the bartender to turn over money. The bartender emptied several cash registers and gave the money to Roland. While the bartender was giving Roland money, a customer came into the bar and asked for a beer, which he was given. Roland pulled out his gun and demanded the customer's wallet. Roland told the bartender to open the casino game machines, and he took the money out of the machines. Roland put the money in a sack, and told the bartender to go to the bathroom and stay there until he left. Roland left and was subsequently arrested. The police seized his pickup truck.

The bartender, who knew Roland, testified that based on Roland's actions, she was of the opinion Roland was drunk at the time.

Prior to trial, the State offered a plea bargain wherein Roland could plead guilty to second-degree robbery. Roland rejected the State's offer, but offered to plead guilty to second-degree robbery if the State would release his pickup truck.

The case proceeded to trial. The trial court instructed the jury on first-degree robbery, and the lesser offenses of second-degree robbery and assault. The instruction as to the elements of these offenses read as follows:

> The State must prove all of the following elements of Robbery in the First Degree:

> 1. On or about the 26th day of May, 1989, the defendant in order to carry out an intended theft or assist in his escape, with or without stolen property, threatened Deborah Wright Geronzin with or purposely put her in fear of death or immediate serious injury and had the apparent ability to kill or seriously injure her.
> 2. The Defendant had the specific intent to commit a theft.
> 3. The Defendant was armed with a dangerous weapon.
> If the State has proved all three elements, the defendant is guilty of Robbery in the First Degree.
> If the State has proved elements 1 and 2 but not element 3, the defendant is guilty of Robbery in the Second Degree.
> If the State has proved element 1 but not elements 2 and 3, the defendant is guilty of assault.
> If the State has failed to prove element 1, the defendant is not guilty.

After deliberating under this instruction for some time, the jurors sent the court the following note:

> Your Honor, we have a question on Instruction No. 14. There seems to be no provision for finding the Defendant guilty on items one and three but not guilty on item two.
> What is the criteria for finding the Defendant guilty in the second degree? Please specify.

In response, the court, with the assistance of the defendant and his trial counsel, prepared the following amended instruction:

> The State must prove all of the following elements of Robbery in the First Degree:
> 1. On or about the 26th day of May, 1989, the Defendant in order to carry out an intended theft or assist in his escape, with or without stolen property, threatened Deborah Wright Geronzin with or purposely put her in fear of death or immediate serious injury and had the apparent ability to kill or seriously injure her.
> 2. The Defendant had the specific intent to commit a theft.

> 3. The defendant was armed with a dangerous weapon.
>
> If the State has proved all three elements, the defendant is guilty of Robbery in the First Degree.
>
> If the State has proved elements 1 and 2 but not element 3, the defendant is guilty of robbery in the Second Degree.
>
> If the State has proved elements 1 and 3 but not element 2, the defendant is guilty of Assault with a Dangerous Weapon.
>
> If the State proved element 1 but not elements 2 and 3, the defendant is guilty of Assault.
>
> If the State has failed to prove element 1, the defendant is not guilty.

The parties agreed to submit the amended instruction. However, before the amended instruction was given to the jury, the court attendant informed the court the jury had reached a verdict. The trial court refused to accept the jury's verdict and sent the jury the amended instruction. The court appears to have instructed the jury as to this element outside the presence of Roland. The jury returned a verdict finding Roland guilty of first-degree robbery. Roland was then sentenced to twenty-five years in prison, including a minimum sentence of five years for using a firearm in the commission of the crime.

The court did not submit a special interrogatory concerning Roland's use of a firearm, but the jurors were given the following instruction:

> You are instructed that a gun is defined as a dangerous weapon.

Roland appealed. The supreme court affirmed Roland's conviction in a per curiam opinion.

The defendant then filed his petition for postconviction relief alleging ineffective assistance of trial and appellate counsel. Following a hearing, the trial court denied Roland's application for postconviction relief. It is from this trial court ruling Roland now appeals.

Roland contends he was denied effective assistance of trial, appellate and postconviction counsel in numerous respects.

When a defendant in a criminal trial makes a sixth amendment claim his or her counsel was not effective, we consider his or her claim and we review "the fundamental fairness of the proceeding whose result is being challenged." See Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We review de novo. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). To succeed on showing his attorneys were not effective, Roland must prove by a preponderance of the evidence that (1) his attorney or attorneys failed to perform an essential duty, and (2) he was prejudiced as a result of the attorney's failure to perform. See Risdal, 404 N.W.2d at 131-32. The defendant must show his attorney or attorneys did not operate within the normal range of professional competency. See State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987), and there is a reasonable probability that, were it not for his attorney's errors,

the result of the proceeding would have been different. Id. A defendant is entitled to effective counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 395-98, 105 S. Ct. 830, 836-37, 83 L. Ed. 2d 821, 829-31 (1985); Schertz v. State, 380 N.W.2d 404, 412 (Iowa 1985).

With these principles in mind, we address the series of reasons Roland has raised contending his trial attorney was not effective. These reasons fit under several categories, and we consider them as categories.

Roland contends his attorney was not effective in advising him about a guilty plea. In this regard, Roland contends his trial counsel did not properly advise him about the maximum term for conviction of robbery in the second degree, did not adequately advise him of his responsibility for attorney fees, and did not correctly handle his offer to plead guilty if the pickup were returned. Roland contends he was prejudiced by his attorney's advice because if he had realized that second-degree robbery only carried a sentence of ten years and the pickup would in all likelihood have to be released, he would have accepted the State's offer to plead guilty to second-degree robbery. The trial court did not address this issue, and the State has not addressed it in its brief. The defendant's brief does not show where in the record the issue was called to the attention of the judge holding the hearing on his postconviction relief petition.

In our review of the record, we are not able to find this issue was raised at the trial court level. It is not our responsibility to search the record, and we may deem an argument waived if there is not a proper citation to the record. See Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 174-75 (Iowa 1990). We therefore find it unnecessary to address it on appeal.

Roland next contends his attorney did not correctly handle the issue of lesser-included offenses of robbery in the first degree. Roland contends his trial counsel was not adequately informed on the lesser-included offenses of robbery in the first degree; his trial attorney should have assured that the jury was originally instructed on assault with a dangerous weapon as a lesser-included offense of robbery in the first degree; his trial attorney did not correctly respond to the jury's request for additional instruction; his trial attorney did not properly respond after the jury advised the court it had arrived at a verdict; Roland did not understand what was transpiring at the time.

The law of lesser-included offenses has been in a state of flux. See State v. Turecek, 456 N.W.2d 219, 222-23 (Iowa 1990); State v. McNitt, 451 N.W.2d 824, 824-25 (Iowa 1990); State v. Royer, 436 N.W.2d 637, 642-43 (Iowa 1989); State v. Jeffries, 430 N.W.2d 728, 730-41 (Iowa 1988). Furthermore, Roland has not shown that if the

lesser-included offense had been handled differently the result of his trial would have been different. The evidence supported a finding of first-degree robbery.

Roland also contends his attorney should not have used an intoxication defense. Roland contends his appellate counsel told him juries rarely accept intoxication defenses. Intoxication can be an excuse for a crime when the person's mental capacity is affected so as to prevent the person from forming the necessary criminal intent. See State v. Watts, 223 N.W.2d 234, 239 (Iowa 1974). The unique facts of this case lend themselves to an intoxication defense. The bartender, who was the principal witness against Roland, knew him and testified he was intoxicated. Furthermore, Roland was well-known by the bartender he robbed at gun point. We do not accept Roland's contention that it was unlikely the jury would accept an intoxication defense under these circumstances.

Roland next claims the trial court did not properly communicate with the jury, and the jury was not properly instructed. We have determined Roland has failed to show a reasonable probability that if other instructions had been given, the result of the trial would have been different. We affirm the trial court on this issue.

Roland next contends the trial court erred by imposing a minimum sentence of five years imprisonment under Iowa Code section 902.7 without giving the jury a special

interrogatory asking them to determine if Roland used a firearm in committing the crimes. See Iowa R. Crim. P. 6(6), 21(2). Roland's trial attorney did not object to the procedure the trial court followed. To succeed on this issue, Roland must show he was prejudiced. The evidence supporting the conviction involved Roland's use of a gun. Roland has not shown prejudice.

Roland contends his appellate counsel was ineffective for failing to raise certain issues. We examine his argument on this issue and find we have either addressed his challenges in this opinion or they are without merit.

Roland's last contention is that his counsel on his application for postconviction relief was not effective. We review his contentions on this matter and find we have either discussed them or find them to be without merit, except for Roland's contention that the issue on the question of whether his pickup could be forfeited was never fully developed in the postconviction hearing. We find the record before us insufficient to allow us to address that issue. We affirm.

AFFIRMED.