FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed March 24, 1981
Plaintiff-Appellee,	)	
vs.	)	0-389 64075
LESTER PAUL ALLEN,	)	
Defendant-Appellant.	)	

Appeal from Polk District Court - John N. Hughes, Judge.

Defendant appeals from his conviction of burglary in the first degree, in violation of sections 713.1 and 713.2, The Code 1979, alleging that he was denied effective assistance of counsel at trial. - AFFIRMED.

Alfredo G. Parrish, of Parrish & Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General for plaintiff-appellee.

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

Oxberger, C.J., took no part.

PER CURIAM

Defendant, Lester Paul Allen, appeals from his conviction of burglary in the first degree, in violation of sections 713.1 and 713.2, The Code 1979, alleging that he was denied effective assistance of counsel at trial. We affirm.

After defendant received a directed verdict in a trial on a murder charge in early June, 1979, he left Iowa and did not return until shortly before the day of his burglary trial, which commenced on July 30, 1979. After defendant's burglary conviction on August 1, 1979, he changed attorneys, and filed a motion for a new trial on the grounds that his trial attorney, William Kutmus, rendered ineffective assistance at trial. A hearing was held on the motion on September 24, 1979. Afterwards the trial court denied the motion and sentenced defendant to a period of incareration not to exceed twenty-five years.

The sixth amendment to the United States Constitution guarantees criminal defendants the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L. Ed.2d 799, 804 (1963). The sixth amendment is made obligatory on the states by the fourteenth amendment to the United States Constitution. Id. The right to counsel means the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14, 25 L. Ed.2d 763, 773 n.14 (1970); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974); State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). The test for judging the quality of representation accorded a criminal defendant who challenges the competency of his attorney is whether in all the circumstances counsel's performance was within the range of normal competency. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); State v. Kellogg, 263 N.W. 2d 539, 544 (Iowa 1978). Defendant has the burden of proving ineffectiveness of counsel. Veverka, 271 N.W.2d at 750; State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978). In order to sustain his burden defendant must establish an affirmative factual basis demonstrating counsel's inadequacy of representation, Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976). Not every mistake in strategy or trial tactics qualifies as ineffective assistance of counsel. Long, 253 N.W.2d at 558.

Much of defendant's ineffective assistance claim centers around Kutmus' alleged failure to effectively exploit an alibi defense. At the hearing on the motion for a new trial, defendant testified that prior to his departure from the state, he alerted Kutmus

to the fact that he had an alibi defense on the burglary charge. Kutmus, according to defendant, responded that defendant should "hold off everthing" until later. Defendant said that he had two copies of a list of at least ten alibi witnesses and that he gave his mother, Helen Allen, a copy. According to Helen Allen, approximately one week after defendant left the state, she contacted Kutmus and stated that she had a copy of the list, and Kutmus said that he did not want the list. Helen Allen testified that at the time she did discuss the alibi witnesses with Kutmus. Defendant alleges that Kutmus failed to render effective assistance of counsel because he failed to properly conduct pre-trial investigation on the alibi defense, failed to interview alibi witnesses in a timely fashion, failed to subpoena several of the alibi witnesses, and did not comply with Iowa R. Crim. P. 10(10)(a)(1), which requires advance written notice of an alibi defense.

Kutmus never received the list of alibi witnesses until the day of trial. Prior to trial, Kutmus, in requesting leave of the court to permit defendant to put on alibi testimony, stated, "It has come to my attention this morning that we do have alibi testimony." At that time Kutmus requested and the trial court granted permission to produce three alibi witnesses. Kutmus' testimony was not taken in the hearing on the motion for a new trial, and he therefore was unable to state when he was alerted to the alibi defense. In light of these facts we do not consider defendant to have established an affirmative factual basis demonstrating Kutmus' inadequacy of representation in handling the alibi defense, since it is unclear as to when Kutmus actually was informed of the alibi defense, and the defense was in fact presented.

Defendant claims Kutmus rendered ineffective assistance due to a failure to depose any witnesses prior to trial and due to a failure to inform defendant that a co-defendant was going to testify against him at trial. Defendant cites no authority that either of Kutmus' actions may be a ground for finding ineffective assistance. Failure to cite authority in support of an issue may be deemed a waiver of that issue. State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976); State v. King, 225 N.W.2d 337, 343 (Iowa 1975); Iowa R. App. P. 14(a)(3). We deem the issue waived. Even on the merits defendant's position is unsuccessful. Competency of counsel does not necessarily mean that witnesses must always be deposed; in a given situation depositions may be unnecessary or bad strategy or be inadvisable for other reasons. Bizzett v. Brewer, 262 N.W.2d 273, 276 (Iowa 1978). Also, trial counsel's failure to tell a criminal defendant what witnesses

would testify against him does not constitute ineffective assistance absent a showing of how the defendant was prejudiced. 25 Mich. App. 596, 598, 181 N.W.2d 794, 795 (1970). In the instant case defendant did not show how Kutmus' action prejudiced him and therefore has not established ineffective assistance.

Defendant also contends that Kutmus' failure to have a conference with defendant concerning the burglary charge until the day of trial was ineffective assistance. Defendant's contention is weakened by the fact that he left Iowa immediately after his murder trial and did not return until immediately before the burglary trial, substantially cutting down on Kutmus' opportunity to confer with him. In fact, defendant states that Kutmus did have one phone conversation with him prior to the burglary trial. Defendant has produced no evidence that the conversation less effectively prepared himself and Kutmus for trial than more conversations would have. There is no evidence that Kutmus attempted to call defendant more often but without success. Defendant testified that he phoned Kutmus seven or eight times, but had only one call returned. However, there is no evidence that defendant's calls were made all in one day or on seven or eight different days, nor that Kutmus' return call was not in response to seven or eight calls that defendant placed in a single day. In light of the doubts concerning Kutmus' opportunity to confer with defendant and concerning the meaning of his limited number of conferences with defendant, defendant has not sustained his burden of proving that the limited number of conferences constituted ineffective assistance.

Defendant contends that Kutmus' failure to move for a change of venue or a continuance constituted ineffective assistance. Defendant contends that the necessity of such a motion was called for by extremely adverse and pervasive publicity that surrounded his murder trial. Defendant presented no media evidence of adverse publicity, but even if he had, it would not have evidenced ineffective assistance of counsel. Mere exposure to news accounts does not thereby prejudice jurors. Murphy v. Florida. 421 U.S. 794, 795, 95 S. Ct. 2031, 2034, 44 L. Ed.2d 589, 592 (1975). At the hearing on the motion for a new trial the trial court stated:

> [T]he Court distinctly recalls and there is no question in the Court's mind but that Mr. Kutmus did fairly and effectively inquire of all prospective jurors as to whether or not they knew Mr. Allen or heard anything about him or anything involving him, and the various jurors all answered that question in the negative, and there was no disclosure at all that there was any

> acquaintance with or recognition of Mr. Allen. . . .
> [I]t would seem to the Court as to whether or not a Motion for Change of Venue should have been attempted in the case of the Burglary charge was a decision that would be made by an attorney based upon his experience and his professional judgment, and that it would not be proper for the Court or anybody else to try to second-guess an attorney on that kind of a decision, particularly where there is nothing to indicate that any kind of a showing would have been made that would compel the granting of a Motion for a Change of Venue.

Given Kutmus' ascertainment that the jurors had no prior familiarity with defendant his failure to move for a change of venue or a continuance did not constitute ineffective assistance and represented a reasonable exercise of professional judgment.

We find that under all the circumstances Kutmus' performance fell within the range of normal competency, and consequently, the trial court did not err in overruling defendant's motion for new trial.

AFFIRMED.