IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-331 (9-584) / 98-1499
Filed December 13, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE CHRISTIANSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil and J. G. Johnson, District Associate Judges.

Defendant appeals his convictions for assault on a peace officer and interference with official acts. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Douglas Eichholz, Joel Dalrymple, and Bradley Walz, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

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HUITINK, P.J.

I. Background Facts and Proceedings.

On January 27, 1997, Christianson was taken to the Black Hawk County jail following his arrest for operating while intoxicated. When he allegedly became verbally abuse and disruptive, officers entered his cell to subdue him. In the ensuing struggle, Christianson allegedly assaulted one or more sheriff's deputies.

Based on this incident, the State charged Christianson with assault on a peace officer causing injury, assault on a peace officer, and interference with official acts The jury found him guilty of the lesser-included offense of assault on a peace officer and guilty of interference with official acts causing injury. Christianson was sentenced to a $250 fine and $75 surcharge on each count and 365 days in the county jail, all but ten days suspended for each count, both sentences to run concurrently.

On appeal, Christianson argues (1) the trial court erred in denying defense counsel's motion to withdraw as counsel, (2) the trial court erred in excluding defense witnesses, and (3) trial counsel was ineffective.

II. Motion to Withdraw.

Our standard of review is whether the court abused its discretion in denying the defense counsel's motion to withdraw as trial counsel. *State v. Malone*, 511 N.W.2d 423, 424 (Iowa App. 1993).

In *Webb* the court held:

> We have stated that a defendant must demonstrate sufficient cause to warrant the appointment of substitute counsel. *State v.*

> *Hutchison*, 341 N.W.2d 33, 41 (Iowa 1983). Such justifiable dissatisfaction with appointed counsel includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). Further, the court must balance "the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice." *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992) (citations omitted).

State v. Webb, 516 N.W.2d 824, 828 (Iowa 1994). To show actual conflict a defendant must point to specific instances in the record to suggest an actual conflict or impairment of interests. *State v. Duncan*, 435 N.W.2d 384, 386 (Iowa App. 1988).

Christianson contends the court violated his right to counsel by denying attorney Ackerman's motion to withdraw and Ackerman's request for substitute counsel before trial. We disagree. The district court denied trial counsel's motion to withdraw under the following analysis:

> The court finds no basis upon which to allow counsel for the defendant to withdraw from representation of the defendant. Defense counsel in essence requested to withdraw because he felt uncomfortable representing the defendant in a case in which the defendant alleges police brutality. The court finds no substantive reason which would require the withdrawal of counsel for the defendant other than his own subjective desires. The court concludes that the motion by defense counsel to withdraw should be denied.

In this case, Ackerman was the defendant's third court-appointed attorney. Five days before trial, trial counsel filed his motion to withdraw. Christianson was scheduled to go to trial on the OWI charge and the interference charges on December 9, 1997, which was the same day as the hearing on the motion to withdraw. Providing substitute counsel at this point would have disrupted prompt and efficient

administration of justice. Last minute requests to substitute counsel must not be allowed to become a tactic for delay. *Webb*, 516 N.W.2d at 828; *see also State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995) (holding the court has substantial discretion in ruling on such matters, especially when the motion is made on the eve of the trial). We conclude the trial court did not abuse its discretion in denying defense counsel's request for substitute counsel.

III. Exclusion of Defense Witnesses.

We review the record to determine if the court abused its discretion. The sanctions under rule 12(4) are discretionary and will be reversed only if the trial court abuses its discretion. *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994). An abuse of discretion will not generally be found unless the party whose rights have been violated suffered prejudice. *Id.*

During the trial defense counsel wanted to call four witnesses to testify. The State objected to calling these witnesses because they were not listed by the defendant and the State had not been notified. Christianson claims the State received a handwritten list of witnesses. However, Christianson did not follow up by filing it with the court. Thus, the new attorney representing the State did not have a copy of the list in his files. The court therefore excluded the defense witnesses.

Christianson argues that the trial court erred in excluding defense witnesses. We disagree. We look to Iowa Rule of Criminal Procedure 12(3)&(4) which provides:

> 3. ***By State.*** At or before the time of the taking of a deposition by a defendant under subsection 1 or 2 of this rule, the defendant shall *file* a written list of the names and addresses of all witnesses expected to be called for the defense (except the defendant and surrebuttal witnesses), and the defendant will have a continuing duty before and throughout trial promptly to disclose additional defense witnesses. Such witnesses shall be subject to being deposed by the state. (emphasis added).
>
> 4. *Failure to comply.* If the defendant has taken depositions under section 1 of this rule and does not disclose to the prosecuting attorney all of the defense witnesses (except the defendant and surrebuttal witnesses) at least nine days before trial, the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the state from undue prejudice, order the exclusion of the testimony of any such witnesses.

Iowa R. Crim. P. 12(3)&(4).

In the present case, the list of alleged witnesses was never filed with the court. Rule 12(3) requires the defendant to file the names and addresses of all expected witnesses for the defense and imposes a continuing duty to disclose any additional defense witnesses. In determining whether the proposed witness was expected, our review is limited by the subjective test of Christianson's "expectation." *State v. Braun*, 495 N.W.2d 735, 742 (Iowa 1993).

It had been about a year and a half from the time of Christianson's arrest to the time of the trial. He had sufficient time to notify his attorney of these four witnesses. If these witnesses were of material importance, they would be "expected" to testify at trial in order to exonerate Christianson. Failure to properly notify the State of these witnesses was a breach of the defendant's duty under rule 12(3). *Braun*, 495 N.W.2d

at 742 (holding defendant's failure to notify the State of witnesses when defendant had three and one-half months from time of arrest until time of trial was breach of defendant's duty under rule 12(3)).

We find the trial court did not abuse its discretion in ordering the exclusion of the four witnesses. Iowa Rule of Criminal Procedure 12(4) allows courts to exercise its discretion in fashioning an appropriate sanction under the circumstances. *Babers*, 514 N.W.2d at 82. We affirm the trial court on this issue.

IV. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charges. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). However, if the claim is based on the failure to object to the admission of certain evidence, we can ordinarily adjudicate the claim on direct appeal if the evidence was admissible. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

A. Jury Instruction No. 5. Christianson complains of trial counsel's failure to object to jury instruction five regarding the intent requirement for the assault element of assault on a peace officer causing injury. We conclude this instruction was proper and counsel did not err in failing to object to the instruction.

The district court instructed the jury as to the offense of assault[1] on a peace officer causing injury. The district court's instruction provided in pertinent part:

> Instruction No. 5
>
> As to the offense of Assault on a Peace Officer Causing Injury, the State must prove the following elements:
>
> 1. On or about January 27, 1997, the Defendant, in the State of Iowa, did an act which was meant to cause injury or result in physical contact which was insulting or offensive to Anthony Thompson.

[1] Assault was defined in Instruction 8 as:

> An "assault" is committed when a person does an act which is meant to cause pain or injury or result in physical contact which was insulting or offensive to another or places another in fear of an immediate physical contact which would have been painful, injurious, insulting or offensive to him.

> 2. The Defendant had the apparent ability to do the act.
> 3. The Defendant knew Anthony Thompson was a peace officer at the time.
> 4. Defendant's act caused a bodily injury to Anthony Thompson as defined in Instruction No. 9.

Christianson argues the jury was required to find he did an act which was meant to cause injury *or result in physical contact* which was insulting or offensive to Anthony Thompson. He argues the wording of the instruction eliminated the general intent element from the second alternative of this section. He contends while the jury must find he did an act which "was meant to cause pain or injury" under the first alternative, under the second alternative, the instructions require only that he did an act which "result[ed] in physical contact." We disagree.

The jury was given the uniform instruction regarding general criminal intent:

> To commit a crime, a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of his acts.

In addition, the instruction mirrors the uniform jury instructions and we are reluctant to disapprove uniform jury instructions. *State v. Jeffries*, 313 N.W.2d 508, 509 (Iowa 1981). We do not believe, based upon our review of the entire record, that the general intent was a missing element in the instructions in the second alternative of the instruction. On the contrary, we believe the phrase "did an act which was meant to" clearly applies to both the phrases "cause injury" and "result in physical contact" in

the instruction. In addition, the court instructed the jury as to general intent instruction.

For the foregoing reasons we find Christianson failed to demonstrate he was prejudiced by his trial counsel's failure to lodge a proper objection to the district court's instruction of the jury. We affirm on this issue.

B. Jury Instruction No. 7. Christianson also complains the jury was not instructed properly regarding the "act which is within the scope of the lawful duty or authority of that officer." The district court's interference with official acts instruction provided in pertinent part:

> Instruction No. 7
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> As to the offense of Interference with Official Acts Causing Injury, the State must prove the following elements:
>
> 1. On or about January 27, 1997, in the State of Iowa, the Defendant knew that Anthony Thompson and David Bishop were peace officers engaged in their duty of supervising the Defendant in regard to his arrest for Operating While Intoxicated.
>
> 2. The Defendant knowingly resisted or obstructed one or more of these persons in the performance of this act.
>
> 3. In so doing, the Defendant caused a bodily injury (as defined in Instruction No. 9) to a peace officer.
>
> If the State has proved Elements No. 1, No. 2 and No. 3, the Defendant is guilty of Interference with Official Acts Causing Injury.
>
> If the State has proved Elements No. 1 and No. 2 but has failed to prove Element No. 3, the Defendant is guilty of Interference with Official Acts.
>
> If the State has failed to prove either Element No. 1 or Element No. 2, the Defendant is not guilty.

Christianson claims the instruction was so lacking in proper statutory language that the jury had no guidance regarding the important issue of what constituted the officer's "official" act. We disagree. The jury instruction described Deputy

Thompson's and Bishops's duties as "supervising the defendant in regard to his arrest for operating while intoxicated." We find this language adequately describes the official duties of the officers.

Christianson also claims jury instruction number seven was in error because of the absence of an instruction alerting the jury to the fact mere threats could not be considered interference substantially prejudiced his rights to a fair trial. Jury instruction number eleven provides "resist" means to oppose intentionally, interfere with or withstand. "Obstruct" means to hinder intentionally, retard or delay. Also, the uniform jury instructions provides in its comments an additional instruction regarding verbal threats should only be included "if verbal harassment is the means of resistance or obstruction." II Iowa Crim. Jury Instructions 1910.2 (1988). We find the district court properly excluded this instruction because Christianson was accused of physically attacking rather than verbally threatening the officers. So the jury was properly instructed regarding what constitutes "interference."

Even if we were to find counsel breached any essential duty, the record clearly established Christianson's failure to prove he was prejudiced by counsel's actions.

C. Exclusion of Defense Witnesses. Christianson also raises his exclusion of defense witnesses argument discussed above. Because we have decided these issues on their merits in this direct appeal, this claim is not preserved for postconviction relief proceedings.

D. Independent FBI Investigation. Finally, Christianson argues ineffective assistance of counsel because counsel allegedly failed to investigate facts discovered by an FBI investigation of official misconduct at the Black Hawk County jail. We conclude there is an inadequate record for us to adjudicate Christianson's claim without counsel's explanation. We therefore preserve this ineffective assistance of counsel claim for postconviction proceedings.

We accordingly affirm the judgment of the district court.

AFFIRMED.