

IN THE COURT OF APPEALS OF IOWA

No. 5-330 / 94-810

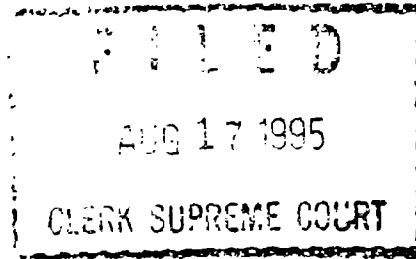
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JESSIE E. HAYES,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Rodney J. Ryan, Judge.

Defendant appeals his conviction and sentence for one count of lascivious acts with a minor in violation of Iowa Code section 709.8 (1993). **AFFIRMED.**

Kathy Goudy, Des Moines, for appellant.

Thomas J. Miller, Attorney General. Angelina M. Smith, Assistant Attorney General, **John Sarcone**, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

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

HABHAB, J.

On November 15, 1993, the defendant, Jessie Hayes, was charged by trial information with lascivious acts with a child in violation of Iowa Code section 708.9 (1993). Hayes was charged with fondling a four-year-old girl as she sat in his lap watching television in his home. Hayes had been drinking heavily at the time of the alleged incident. Several persons who were also watching television at the time of the incident were listed as witnesses in the trial information. At the time of his arrest, Hayes stated to the police officers he had an alcohol blackout and did not remember the incident.

Hayes, unrepresented by counsel, waived a preliminary hearing. On December 22, 1994, Hayes, now represented by counsel, was arraigned on the trial information charging two counts of lascivious acts with a minor. Trial was set for March 9, 1994. On March 8, 1994, defense counsel filed three motions in limine, a notice of intoxication defense, a notice of diminished responsibility, and a motion for continuance. Hayes also filed a motion to dismiss trial counsel.

A hearing was held on the continuance and dismissal of counsel issues. Hayes appeared at the hearing. Defense counsel stated he was not ready for trial the next day and moved for a continuance. The State indicated it was willing to continue only if Hayes waived his speedy trial rights. The State additionally stated if trial was held the next day, an amended trial information including an habitual offender notice would be filed against Hayes, but that it would hold off filing the amendment if Hayes

waived his speedy trial rights and plea negotiations continued. Hayes stated he wanted to present the favorable testimony of two eye witnesses. Hayes signed a waiver of his speedy trial rights and withdrew his motion to dismiss trial counsel.

On March 9, 1994, the State filed an amended trial information charging Hayes with one count of lascivious acts with a minor and provided application for habitual offender status pursuant to section 902.8. On March 16, 1994, a bench trial was held in which Hayes waived his right to a jury trial and stipulated to the minutes of the amended trial information. The habitual offender charge was dismissed by the State. On March 28, 1994, the district court entered a guilty verdict. Defense counsel noted that the State had charged Hayes under the wrong code section and corrected the code citations for the record, changing the code section from 708.9 to 709.8. On May 16, 1994, the district court entered judgment.

Hayes appeals.

Hayes has two contentions on appeal. First, Hayes argues he did not receive adequate notice of the proposed amendment to the trial information which severely enhanced the penalties he was facing. Second, Hayes maintains his trial counsel was ineffective.

I. *Proposed Amendment to Trial Information.* Hayes argues he was denied his right to a fair and speedy trial¹ due to a lack of adequate notice regarding a

¹ It cannot go unnoticed that this case went to trial within the statutorily mandated ninety-day period following the filing of the trial information.

proposed amendment to the trial information. Iowa Rule of Appellate Procedure 14(a)(5) requires the appellant to state how and where each issue raised on appeal has been preserved. No such statement has been provided by Hayes in his brief. In addition, we fail to find any objection stated in the record which would support a finding that error was preserved. Issues which are not presented in the trial court may not ordinarily be raised for the first time on appeal. *Connor v. State*, 362 N.W.2d 449, 457 (Iowa 1985). The issue is deemed waived and we decline to consider it.

II. *Ineffective Assistance of Counsel.* Hayes raises four claims of ineffective assistance. Our ultimate concern in claims of ineffective assistance is with "the fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Id.* at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32 (citation omitted).

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test, appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Such claims may be decided on direct appeal if the defendant fails to show one of the two prongs. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993).

Hayes's first contention is his trial counsel failed to timely file pre-trial motions. Hayes argues these failures resulted in continuations which provided the State with the opportunity to amend the trial information by adding a habitual offender claim.² We find this claim must fail on direct appeal since Hayes cannot meet the prejudice prong of the ineffective assistance of counsel test.

Hayes cannot show prejudice because he cannot show a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. This is due to the fact that the State was prepared to amend the trial information whether or not there was a continuation. Even if we were to find trial

² Our supreme court has held that an allegation of recidivism pursuant to section 902.8 "does not define a separate crime but merely constitutes a predicate for enhanced punishment." *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985). "[B]eing a habitual criminal is not a crime The habitual criminal statute goes only to punishment meted out to one who has committed multiple designated offenses." *State v. Hanna*, 277 N.W.2d 605, 608 (Iowa 1979).

counsel was late in filing motions. Hayes has failed to provide a basis for finding prejudice. This claim must fail.

Hayes's second contention is his trial counsel failed to obtain a ruling on pre-trial motions. The pre-trial at issue are three motions in limine, two notices of defense, and a request for an expert witness. We find the claim must fail on direct appeal since Hayes cannot meet the breach of an essential duty prong of the ineffective assistance of counsel test.

In a hearing before the court, counsel for both sides agreed the State would dismiss the habitual offender allegation in exchange for the defendant's stipulation to a bench trial based solely on the minutes of testimony.³ This stipulation obviated the need for a ruling on the motions in limine since such motions merely preclude reference to evidence in front of the jury before the admissibility of the evidence has been determined. The function of a motion in limine is not to exclude the evidence itself. *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971). Rulings on the notices of defense and the request for an expert witness were also not needed since, according to the stipulation, the court was only to consider the minutes of testimony in determining whether Hayes was guilty or not. We find trial counsel did not breach an essential duty in this case since the stipulation, agreed to by defendant, rendered rulings on the pre-trial motions moot.

³ The defendant personally informed the court that he understood and was in agreement that a bench trial was to be held based solely on the minutes of testimony

Hayes's third contention is his trial counsel failed to assert Hayes's choice of defense. Hayes specifically wanted to pursue the defenses of intoxication and diminished responsibility. We also find this claim must fail on direct appeal since Hayes cannot meet the breach of an essential duty prong of the ineffective assistance of counsel test.

To begin with, the record shows defense counsel did, in fact, pursue the defenses upon which Hayes wanted to rely. Defense was late in filing the proper notices of defense, in part, because Hayes had told his attorney he would accept a plea agreement. In addition, Hayes voluntarily forfeited his right to the defenses when he agreed to stipulate to a bench trial based solely on the minutes of testimony. We find no breach of an essential duty in this case since trial counsel did actively pursue the requested defenses and through Hayes's own actions the court was kept from considering them.

Hayes's final contention is his trial counsel failed to note a mistake in the trial information. Specifically, the trial information erroneously charged Hayes under Iowa Code section 708.9, instead of Iowa Code section 709.8. We find the claim must fail on direct appeal since Hayes cannot meet the prejudice prong of the ineffective assistance of counsel test. Hayes is unable to show the prejudice which resulted from the alleged failure to notice a typographical error in the trial information. Hayes cannot show a reasonable probability that, but for his counsel's alleged error, the result of his proceedings would have been different.

Accordingly, we affirm Hayes's conviction.

AFFIRMED.