IN THE COURT OF APPEALS OF IOWA

No. 0-818 / 00-433
Filed January 24, 2001

FILED
JAN 24 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY MARSHALL WASHINGTON, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Nancy S. Tabor, Judge.

Tony Washington appeals his conviction and sentence for robbery in the first degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Michael E. Wolf, County Attorney, for appellee.

Considered by Sackett, C.J., Vogel, J., and C. Peterson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2001).

C. PETERSON, S.J.

Tony Washington appeals from his conviction to a charge of robbery in the first degree in violation of sections 711.1 and 711.2 of the Iowa Code. Prior to trial a plea agreement was filed with the court wherein Washington agreed to plead guilty to a reduced charge of robbery in the second degree and the State would dismiss two separate assault charges.

Washington rendered the plea of guilty to the amended charge. In the colloquy with Washington by the court to establish the factual basis for the plea the following exchange occurred:

> THE COURT: . . . I just want you to at this time tell me what—tell me what happened that day at the convenience store in your own words.
> THE DEFENDANT: I can't say nothing happened. What I know from the robbery---
> THE COURT: Excuse me?
> THE DEFENDANT: It was an armed robbery there.
> THE COURT: Okay. What was your involvement in that.
> ***
> THE DEFENDANT: I didn't have no part in it.

Defense counsel then requested the matter continue with trial motions. The plea proceedings were adjourned, and the case proceeded to trial. After presentation of evidence the jury returned a unanimous verdict of guilty to the charge of burglary in the first degree. Washington was sentenced to serve an indeterminate twenty-five year sentence.

Washington contends that he was denied effective assistance of counsel at the time of the aborted plea proceedings. The State contends the conviction should be affirmed because Washington received a fair trial and there is no evidence to establish prejudice sufficient to set aside the conviction.

The primary objective in these proceedings by Washington is to preserve for future postconviction proceedings a claim of ineffective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984), concludes that to establish an ineffective-assistance-of-counsel claim under the Sixth Amendment of the United States Constitution, the defendant must show that counsel failed to perform an essential duty and prejudice resulted. Prejudice is established by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the results of the proceedings would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The Iowa standard for establishing an ineffective assistance of counsel claim follows the language of *Strickland*. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To prove the first prong, the defendant must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). To prove the second prong, the defendant must show counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable possibility exists that but for counsel's error the trial results would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). This test also applies to plea proceedings. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d (1985).

Washington's specific contention is that trial counsel was ineffective for discontinuing the plea proceedings, for not advising Washington about an *Alford*

plea, and for failing to pursue the possibility of the use of an *Alford* plea to satisfy the requirements for acceptance of the guilty plea to burglary in the second degree by the court. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Washington has not attempted to demonstrate on the record in these proceedings any ineffectiveness on the part of his trial counsel at the plea proceedings. He contends additional record is necessary for such purposes.

This court does not generally decide ineffective assistance of counsel claims on direct appeal because trial counsel has not had an opportunity to respond to the claim. The preference is to let the parties explore the matter in postconviction proceedings. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997).

The record in this direct appeal proceeding is inadequate for us to draw appropriate conclusions about the issues concerning ineffective assistance of counsel raised by Washington. It is also significant for counsel representing Washington in the plea proceedings to have the opportunity to respond to the claims made by Washington. *State v. Cole*, 264 N.W.2d 295, 296 (Iowa 1978).

The record supports the judgment and sentence of the trial court. Subsequent postconviction proceedings may consider issues raised concerning ineffective assistance of counsel.

AFFIRMED.