FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 24, 1981
vs.	)	
WILLIAM J. FLEMING,	)	0-439 2-64421
Defendant-Appellant.	)	

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

Defendant appeals his conviction for OMVUI in violation of section 321.281, The Code 1979, contending that he was denied effective assistance of counsel and that it was error when neither the trial court nor defense counsel informed him of his right to move for a new trial. AFFIRMED.

William H. Michelson and Robert J. Kromminga, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Shirley Ann Steffe, Assistant Attorney General, Steven M. Fortiano, Legal Intern, and Dan Johnston, Polk County Attorney, for plaintiff-appellee.

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

DONIELSON, J.

Defendant William Fleming appeals from his conviction for operating a motor vehicle while under the influence of alcohol (OMVUI) in violation of section 321.281, The Code 1979. He contends that he was denied effective assistance of counsel and that it was error when neither the trial court nor defense counsel informed him of his right to move for a new trial. We affirm the conviction.

I.

The defendant was arrested for OMVUI in September of 1979 and convicted by jury. At trial, a police officer testified that the defendant told him that he had consumed 128 ounces of beer the night of his arrest. The defendant's attorney, who is not the same counsel on appeal, did not object to the officer's statement. The defendant testified on his own behalf and on direct examination gave rambling, unresponsive, and sometimes damaging answers to several of the questions put to him by his counsel. His attorney did not object on cross-examination when the prosecutor asked the defendant if his mental condition affected his ability to drive and if he was an honest man. When he appeared before the court for sentencing, the defendant said that he intended to appeal his case and that one of his grounds for appeal would be ineffective assistance of counsel. Neither the trial court nor the defense counsel informed the defendant at this time that he had the right to move for a new trial.

II.

Defendant first contends that his conviction should be reversed because various omissions of his trial court counsel deprived him of effective assistance of counsel. Specifically, he contends that he was denied effective assistance of counsel because his attorney failed to object to or move to strike certain testimony and failed to adequately prepare defendant to testify at trial. We find no support for defendant's contention on this record.

Because defendant alleges violation of a basic constitutional safeguard, see Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L. Ed. 2d 799, 804 (1963), we will evaluate the totality of relevant circumstances shown by the entire record. Webster County Board of Supervisors v. Flattery, 268 N.W.2d 869, 872 (Iowa 1978); Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); Long v. Brewer, 253 N.W.2d 549, 552 (Iowa 1977). Iowa has adopted the "range of normal competency" standard in reviewing allegations of this nature. Hinkle v. State, 290 N.W.2d 28, 30 (1980); State v.

Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978) (quoting State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978)). We must be shown that there is an affirmative factual basis demonstrating counsel's inadequacy, Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977) and that the defendant was prejudiced by the alleged inadequacy. State v. Rand, 268 N.W.2d 642, 649 (Iowa 1978); Long, 253 N.W.2d at 558. The burden of proof is on the party alleging ineffective assistance of counsel. Hinkle, 290 N.W.2d at 30; Veverka, 271 N.W.2d at 750. Not every mistake in strategy or trial tactics qualifies as ineffective assistance of counsel, Long, 253 N.W.2d at 588, and we bear in mind in reviewing professional performance that trial preparation frequently involves extensive time pressures. Kellogg v. State, 288 N.W.2d 561, 566 (Iowa 1980). Applying these criteria to the instant case, we conclude that the defendant has failed to sustain his burden to show ineffective assistance.

We deal first with defendant's contention that he was denied effective assistance of counsel because his attorney failed to object to certain testimony. In particular, defendant maintains that his attorney should have objected to or moved to strike the following: the police officer's testimony regarding post-arrest statements made by the defendant; the prosecutor's questions about whether the defendant was an honest man and whether his mental illness affects his ability to drive; and the prosecutor's question about whether the fact that defendant was nervous and agitated could have affected his performance on field sobriety tests. We begin our discussion of these points by re-emphasizing that the defendant must show an affirmative factual basis to justify his contention that failure to object in these circumstances is beyond the normal range of competency. Hinkle, 290 N.W.2d at 30; Cleesen, 258 N.W.2d at 332. Moreover, he must also show that he was prejudiced by counsel's alleged inadequacy. Rand, 268 N.W.2d at 649. Although defendant has alleged that his counsel should have objected to specific testimony, he has not demonstrated either that failure to object is beyond the range of competency normally found in the profession or that he was prejudiced by his counsel's failure to object. Defendant has shown no likelihood that the objections would have been sustained had they been made, and in fact defense counsel may have refrained from objecting on these points because he thought it unlikely that such objections would be sustained. Furthermore, counsel's failure to object raises questions of judgment and trial strategy and, while the defendant may argue that counsel poorly judged the

situation, we acknowledge that improvident trial strategy, mistakes in judgment, or miscalculated tactics do not necessarily amount to ineffective assistance of counsel. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980); Hinkle, 290 N.W.2d at 34; Killpack, 276 N.W.2d at 372. Although it is difficult to determine trial counsel's strategy from this record, we hesitate to try to second-guess him after the fact in matters of judgment and strategy.

Nor do we find convincing the defendant's contention that he was denied effective assistance of counsel because his attorney failed to adequately prepare him to testify at trial. Defendant maintains that counsel failed to protect him from giving testimony that was damaging to his own cause, that counsel did not make clear to him the need to keep silent on damaging or irrelevant points, and that he did not explain to defendant the necessity of giving narrow, specific answers to counsel's questions. We have little sympathy with the defendant on these points; the record reveals that his answers were often so totally unresponsive to the questions he was asked that counsel would not be able to anticipate such responses or prevent the defendant from making them. At any rate, we conclude that defendant has failed to show an affirmative factual basis for his claim. We hold that counsel's performance was within the normal range of competency.

III.

Defendant further contends that the trial court erred and defense counsel provided ineffective assistance when neither the court nor counsel informed defendant of his right to move for a new trial, although both knew that the defendant intended to raise an ineffective assistance of counsel claim on appeal. We first note that defense counsel's failure to inform defendant of his right to move for a new trial does not constitute ineffective assistance of counsel under these circumstances. Counsel was unaware that grounds for new trial existed until the defendant told the court at the time of sentencing that he thought he had been denied effective assistance of counsel. It would have done no good at that point to inform defendant of his right to move for a new trial, since Iowa R. Crim. P. 23(2)(a) requires that a motion for new trial be made not later than five days before the date set for pronouncing judgment. Additionally, we decline to hold, as defendant would have us do, that the trial courts of this state have a duty to inform defendants of the right to move for new trial. We think that the appropriate body to impose such an obligation is the legislature, which, although it has provided by statute that trial courts must inform defendants of the statutory right to

appeal, Iowa R. Crim. P. 22(3)(e), has not yet seen fit to require courts to notify defendants of the right to move for new trial. We decline to intrude in what we consider to be the legislative domain.

Defendant's conviction is hereby affirmed.

AFFIRMED.