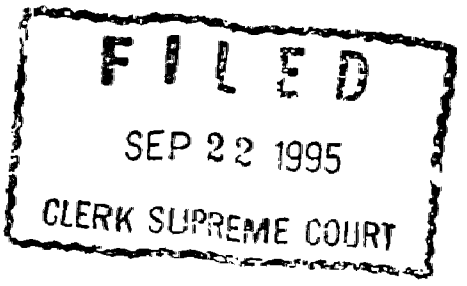
IN THE COURT OF APPEALS OF IOWA



No. 5-394 / 94-1379

STATE OF IOWA,

Appellee,

vs.

HOWARD DEAN CONGER,

Appellant.

Appeal from the Iowa District Court for Keokuk County, James P. Rielly, Judge.

Howard Conger appeals his conviction, following a jury trial, for possession of a firearm by a convicted felon in violation of Iowa Code section 724.26 (1993). **AFFIRMED**.

Robert E. Breckenridge and Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and John E. Schroeder, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

The defendant, Howard Conger, appeals from his conviction for possession of a firearm by a convicted felon. He contends the trial court erred in: 1) denying his request for a continuance; 2) refusing to grant his request to suppress statements he made to DNR[1] officials; and 3) overruling his objection to jury instruction number 12. He also contends his trial counsel was ineffective. We affirm on all issues.

I. MOTION FOR CONTINUANCE.

A trial information charging the defendant with being a convicted felon in possession of a firearm was filed on January 24, 1994. The defendant filed an application for court-appointed counsel, and an attorney was appointed to represent him on January 28, 1994. The defendant was represented by his court-appointed counsel when he filed his written arraignment and plea of not guilty on February 14, 1994. On that same date, trial was scheduled for April 26, 1994.

Just prior to the commencement of jury selection on April 26, 1994, the trial court was informed the defendant wished to be represented by different counsel and to continue the trial. The transcript reflects the following discussion was held in chambers:

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[1] The Iowa Department of Natural Resources.

> [THE COURT]: Let the record show that we are having a hearing in chambers out of the jury panel's hearing and just prior to jury selection in the case of State of Iowa versus Howard Dean Conger. This is criminal No. 9117-0194. The Defendant is present with his attorney Ed Conrad and the prosecuting attorney John Schroeder is also present. Any record you want to make?
> [DEFENSE COUNSEL]: Yes. I would briefly like to state that my client he has contacted another attorney, Tom Walter out of Ottumwa, and he would just like to formalize on the record that he would like to have -- He would make a motion for continuance so that he can have Mr. Walter representing him.
> [THE COURT]: Anything you want to say, Mr. Conger?
> [THE DEFENDANT]: Well, I would like to ask for a continuation because for several reasons, Eddy and I, that I thought was important to me that we haven't got to discuss and just lack of communication and let time run out I guess, and I think that it's important to me that we have a continuation of this.
> [THE COURT]: This case has been set for trial for some time, and to come in on Friday afternoon and try to get a continuance is not going to fly with me. You are represented by a competent lawyer, he has been court-appointed at state expense. You asked for that, we gave you a lawyer. You have a good lawyer, and I have full confidence in him. I don't know and I don't' want you to specifically discuss your problems because you might be revealing trial strategy and that sort of thing, but I'm going to deny the continuance an we will go ahead with the trial today. Anything else?

Motions for the continuance of a trial date are discouraged. Iowa R. Crim. .P. 8.1(2). A motion for continuance shall not be granted except upon a showing of good and compelling cause. *Id.* We review the denial of a request for a continuance for an abuse of discretion. *State v. Simmons*, 454 N.W.2d 866, 868 (Iowa 1990). The defendant waited until the day of trial to inform the court of his desire to obtain new counsel and continue the trial. He made no record demonstrating a good and

compelling cause for continuing the trial, and the trial court did not abuse its discretion in denying his motion.

II. MOTION TO SUPPRESS.

The defendant argues the trial court erred in failing to suppress statements he made to DNR officers. He contends the officers engaged him in a custodial stop which required the administration of his *Miranda*[2] rights. The State claims the defendant has not preserved error on this issue, and we agree.

A motion to suppress evidence on the ground it was illegally obtained must be raised prior to trial. Iowa R. Crim. P. 10.(2)(c). The defendant was required to file a motion to suppress his inculpatory statements within forty days of his arraignment. Iowa R. Crim. P. 10(4). He failed to do so and attempted at trial to exclude the admission of the statements. The belated filing of a motion to suppress is a sufficient basis upon which to uphold the trial court's ruling admitting the statements, even though the State did not argue waiver, and the trial court did not base its ruling on the late filing of the motion. *State v Rhiner*, 352 N.W.2d 258, 261 (Iowa 1984); *State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980). The defendant's request to exclude the evidence was untimely and he has not preserved the merits of this matter for appellate review.

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[2]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

III. JURY INSTRUCTION 12.

The following instruction was given to the jury:

INSTRUCTION NO. 12

> The State must prove all of the following elements of Dominion and Control of a Firearm by a Felon:
>
> 1. On or about the 13th day of November, 1993, defendant knowingly had under his dominion and control a firearm.
> 2. The defendant was previously convicted of the crime of possession with intent to deliver marijuana.
>
> If the State has proved both of the elements, the defendant is guilty of Dominion and Control of a Firearm by a Felon. If the State has failed to prove either of the elements, the defendant is not guilty.

The defendant requested the court change this instruction to exclude the reference to the specific type of felony of which he had been convicted. He wanted it "to read merely that the Defendant was previously convicted of a felony." The State requested the instruction remain as it was so it would be consistent with the uniform Iowa Criminal Jury Instructions. The defendant argues he was unfairly prejudiced by this instruction because there was a risk the jury would be influenced by the nature of the prior felony, and he believed it would negatively affect the jury's assessment of his credibility.

We review a trial court ruling on a party's request for the modification of a uniform jury instruction for an abuse of discretion. *State v. Johnson*, 481 N.W.2d 541, 542-43 (Iowa App. 1991). Instruction 12 does nothing more than identify the felony of which the defendant had been previously convicted. This same information

had already been presented to the jury through the admission of State's exhibits 1 and 2 without objection by the defendant. Instruction 12 does not elaborate on the circumstances surrounding the conviction and was not prejudicial. It was not an abuse of discretion to deny the defendant's request to modify the instruction.

IV. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The defendant claims his trial counsel was ineffective. The defendant bears the burden of proving by a preponderance of the evidence that he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

The benchmark for judging any claim of ineffectiveness must be 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.* Our review is

based upon an evaluation of the totality of the circumstances. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994).

The defendant claims his counsel was ineffective in failing to stipulate regarding his prior felony conviction and in not objecting to the admission of exhibits which established the existence of that conviction. In a case where it is not disputed that a defendant has a prior felony conviction, time and judicial resources could be saved if defense counsel would stipulate as to a defendant's status as a prior convicted felon. Depending upon the nature of the prior offense, it could be in a defendant's best interests to do so and not inform the jury of his specific felony record. However, in a case such as this, where the prior offense is not particularly egregious or heinous, the decision not to stipulate and to require the State to prove all of the elements of the offense charged is not a breach of an essential duty.

We have reviewed the exhibits admitted at trial and agree with the State that the defendant's pre-sentence investigation report was not admitted into evidence. The nature of the evidence actually introduced in this case to establish the defendant's prior felony conviction was not inherently prejudicial in nature, and defense counsel breached no essential duty in not objecting to its admission.

The defendant also claims his defense counsel was ineffective in allowing DNR officer Schutey to testify without objection as to why he believed the defendant had been the individual he saw shooting raccoons. The defendant claims the officer's

testimony invaded the province of the jury and consisted of testimony concerning the ultimate question of his guilt or innocence. We have reviewed the testimony in question and find it was not objectionable. The officer testified as to his observations on the night in question and what circumstances led him to believe the defendant had done the shooting. Counsel breached no duty in not objecting to this testimony.

AFFIRMED.