IN THE COURT OF APPEALS OF IOWA

No. 0-330 / 99-1131
Filed July 26, 2000

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CLERK SUPREME COURT

DANIEL R. MEYER,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman and Gary E. Wenell Judges.

Appellant appeals the district court order denying his application for postconviction relief. **AFFIRMED.**

L. Jay Irwin III of L. Jay Irwin III P.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County attorney, and Lisa Krigsten, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Daniel R. Meyer appeals the district court order denying his application for postconviction relief. Because we find the appellant was not prejudiced by the alleged ineffective assistance rendered by his trial and appellate counsel, we affirm.

Background facts. Meyer was convicted of second-degree burglary following a trial by jury and, because of his stipulated habitual offender status, sentenced to a term of incarceration not to exceed fifteen years. Meyer filed a direct appeal of this conviction on the basis of insufficient evidence of the intent element of the crime. The conviction was affirmed. *State v. Meyer,* No. 96-848 (Iowa Apr. 7, 1997). Meyer then filed an application for postconviction relief, alleging ineffective assistance of both his trial and appellate counsel. The State moved for summary judgment, which was granted as to one claim. Following a hearing on the remaining claims, the district court denied relief. Meyer appeals.

Meyer's conviction stems from an incident that occurred on December 18, 1995. Meyer was caught in the basement of Tina King's residence. Tina lived there with her adult sons, Barry King, Nathan King and with Nathan's girlfriend Molly Hanshaw, and her daughter. Meyer had lived across the street from the Kings for many years and had also lived with the Kings periodically. He was most recently asked to leave the King home in June of 1995 after a brief stay and was told not to return. The basement of the King home was undergoing renovations, with one wall enclosed only with a tarp. Meyer was discovered in the basement, with Barry's toolbox in hand. The Kings noticed many of their

belongings, which had been stored in the basement, had been moved. Meyer claimed he was there with Nathan's permission because they were going to meet there to "do drugs." Nathan denied any such meeting or giving permission for Meyer to enter the premises. Meyer was found guilty by a jury and sentenced accordingly.

Scope of review. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In alleging ineffective assistance of counsel, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Ineffective assistance of trial counsel. Meyer claims his trial counsel was ineffective on three main grounds. The State contends Meyer failed to preserve error as to these issues by failing to raise them on direct appeal. Meyer

then claimed his appellate counsel was ineffective for failing to raise on direct appeal the issues of ineffective assistance of trial counsel. It is well established, that a claim of ineffective assistance of appellate counsel "is sufficient reason for failing to raise an issue on direct appeal." *Washington v. Scurr,* 304 N.W.2d 231, 235 (Iowa 1981). Therefore, we will address the claimed deficiencies of trial counsel to determine if appellate counsel was ineffective.

A) Habitual offender stipulation. Meyer claims his trial counsel was ineffective for failing to file a motion in arrest of judgment against Meyer's habitual offender sentence. Prior to sentencing, Meyer stipulated to his previous felony convictions, which invoked the habitual offender status and lengthened the term of his incarceration. It has been recognized that a habitual offender stipulation so closely resembles a guilty plea, it invokes the protections of the mandatory colloquy between the trial court and the defendant at the time of sentencing to apprise defendant of his rights, the nature of the charges, and verify the plea is made voluntarily and intelligently. *State v. Brady,* 442 N.W.2d 57, 58 (Iowa 1989); Iowa R. Cr. P. 8(2)(b). Clearly, the court did not perform this mandatory safeguard in Meyer's sentencing hearing. However, in order for Meyer to prevail, he must prove that prejudice resulted from his stipulation without the colloquy. *State v. Vesey,* 482 N.W.2d 165, 168 (Iowa App. 1991). Since the State was ready and able to present the facts necessary to establish Meyer's status as a habitual offender, Meyer has not demonstrated any prejudice as a result of the trial court's failure to engage in the guilty plea colloquy. *Id.* The trial court, in fact, utilized evidence of Meyer's past convictions, in conjunction

with Meyer's admissions to his prior felonies in the sentencing. Because the State had the necessary evidence and was able and willing to present it to the trial court to prove Meyer fell within the habitual offender classification, Meyer suffered no prejudice from his admission, even without the added benefit of the trial court's colloquy.

B) Trial counsel's threatened withdrawal if Meyer testified at trial. Next, Meyer alleges his trial counsel was ineffective for failing to allow him to testify on his own behalf at trial in violation of his Sixth Amendment right.

> Initially, we examine appellant's right to testify claim. While we would not base a criminal defendant's right to testify solely on the Sixth Amendment, such a right is recognized. While this right is not specifically expressed in the Constitution or Bill of Rights, the "centuries-old right granted an accused to be present and to be heard in person at a federal criminal trial may not be denied without violating the accused's Fifth and Sixth Amendment rights." The due process clause of the Fourteenth Amendment would secure that right to an accused in a state prosecution.

Schertz v. State, 380 N.W.2d 404, 413 (Iowa 1985) (citations omitted). Meyer has contended all along that he was on the King property with permission from Nathan King. He claims he was supposed to meet Nathan in the basement and they were going to engage in illegal drug use together. Nathan denied Meyer's assertions. Meyer claims he wanted to testify at trial that he had permission to be on the premises, which would negate an essential element of burglary. He claims he told his attorney of his desire to testify on four separate occasions. His attorney, according to Meyer, told him it was not a good idea and twice threatened to withdraw as his counsel if Meyer testified to such at trial.

Meyer's trial attorney, Gregory Jones, testified at the post conviction hearing that he did not recall Meyer telling him he wanted to testify. He was, however, certain they discussed the risks and benefits of testifying, as was his practice in all of his cases. It was Jones' opinion that allowing Meyer to take the stand would open Meyer up on cross-examination to impeachment from his prior felonies. Jones stated that he did not threaten to withdraw and would have allowed Meyer to testify if he had expressed his wish to do so. He further testified he entered into a stipulation with the state, in the presence of Meyer, to a motion in limine that any testimony regarding drug use would be specifically excluded from the trial. Jones reasoned that it was to Meyer's advantage to preclude the State from mentioning impeachable offenses and any drug use. The post conviction court found Jones' testimony to be more credible than Meyer's and found no breach of an essential duty. We agree.

Even if this action by attorney Jones breached an essential duty, Meyer must establish resulting prejudice. The evidence at trial was overwhelmingly in favor of the State, including Meyer being caught in the King basement with a toolbox in his hand, several items moved to a different area, Nathan King's testimony that he did not give Meyer permission to enter the premises, Tina King's testimony that Meyer asked her to lie about giving him permission to enter the basement, and the lack of any corroboration of Meyer's version of the facts. Given the strong evidence presented at trial against Meyer, his failure to testify in his own defense does not provide a reasonable probability "sufficient to undermine confidence in the outcome." *Tracy*, 482 N.W.2d at 680.

C) Instruction on circumstantial evidence. Meyer next asserts trial counsel was ineffective by failing to request an instruction on circumstantial evidence. Meyer failed to provide any argument or authority in his brief in support of this argument. In an appellate brief, when a party fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived. *See* Iowa R. App. P. 14(a)(3). Because the deficiency in the appellant's brief has hindered this court from its review and consideration of the issue, we find the issue has been waived. *Hollingsworth v. Schminkey,* 553 N.W.2d 591, 596 (Iowa 1996).

We find the arguments regarding ineffective assistance of Meyer's trial counsel to be without merit and further find Meyer has suffered no resulting prejudice. Accordingly, we find Meyer's appellate counsel was not ineffective for failing to raise ineffective assistance of trial counsel claims on direct appeal. Therefore, we affirm.

AFFIRMED.