IN THE COURT OF APPEALS OF IOWA

No. 0-641 / 90-337

FILED
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CLERK SUPREME COURT

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**ERNEST REX ELLIS, JR.,**

Appellant,

vs.

**STATE OF IOWA,**

Appellee.

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Appeal from the Iowa District Court for Scott County, L. D. Carstensen, Judge.

Defendant sought post-conviction relief to challenge his 1987 conviction for first-degree robbery. The district court denied relief and we affirm. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Mark Joel Zbieroski, Assistant Attorney General; William E. Davis, County Attorney; and James D. Hoffman, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

**HABHAB, J.**

In 1987, Ernest Ellis was convicted of robbery in the first degree. During his trial the district court had given the jury a "flight instruction," telling the jury that if it found Ellis had fled from the crime scene, it could consider such flight as a circumstance relevant to guilt.

Following the conviction, Ellis' trial attorney advised him that he had little chance of prevailing in an appeal. Ellis therefore took no direct appeal from his conviction.

However, Ellis later challenged the conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and Ellis has appealed.

Ellis contends his attorney in the 1987 criminal trial rendered ineffective assistance by failing to advise him (1) that the Iowa Supreme Court has disapproved the use of "flight instructions," and (2) that he should take a direct appeal to challenge the use of a "flight instruction".

In a postconviction action, the petitioner has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1981).

Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged."

Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by 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. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985).

In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1987). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

Our evaluation of the circumstances convinces us the postconviction court was correct regarding petitioner's claim. In Cleesen v. State, our supreme court analyzed a similar issue and stated: "Petitioner was fully advised of his appeal rights by both the trial court and his attorney. The attorney informed him he did not believe there were grounds for appeal but stated he would pursue

the matter if so directed. Thereafter the defendant neither directed nor requested Mr. Glenn to pursue an appeal to this court." Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977).

In this case, the defendant's attorney discussed with him the merits of an appeal, told him he did not believe this particular appeal would be successful, but advised him he would file the appeal if the defendant requested. These circumstances are in line with the analysis provided by our supreme court in Cleesen. In addition, the evidence is clear that the trial court advised the defendant of his right to appeal. The defendant himself testified he did not believe his attorney had done anything improper. It appears from the record the attorney fully advised the defendant of his right to appeal.

The defendant's basis for his ineffective assistance of counsel claim rests on the assertion that the "flight" instruction given was improper and his attorney should have appealed on that basis. We agree that flight instructions are "rarely advisable" because they amount to an unnecessary communication by the trial court on evidence. State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986). However, after reviewing the record, we find, as in State v. Bone, that the instruction is superfluous and that the State has proven that the error was without prejudice beyond a reasonable doubt. State v. Bone, 429 N.W.2d 123 (Iowa 1988).

Here the defendant was identified by the officer both at the scene of the crime and then later after he was apprehended by another officer. In United States v. White, 488 F.2d 660 (8th Cir. (1973), the court found it was error to give a flight instruction using the following analysis:

> If the inference is to have any validity as an indication of guilt, the trial court should assure itself that some evidence exists regarding an accusation of the specific crime charged before instructing the jury that flight may be considered in its determination of guilt. [Where] it is undisputed that the defendant was not advised of the crime he is now charged with at the time of his flight, . . . and there is no indication that defendant knew at the time of his flight that he was being sought for the crime charged, we do not think the jury could properly draw an inference of guilt from defendant's flight.

State v. Bone, 429 N.W.2d 123, 126 (Iowa 1988), citing, United States v. White, 488 F.2d at 662 (citations omitted).

In this case, the officer at the scene testified that the defendant asked "what the ---- this was all about". The officer responded that the defendant was a suspect in an armed robbery. The defendant then dropped a gun and a sack containing money and fled the scene. This scenario falls in line with the recommendation from the Eighth Circuit that the defendant be aware of what he is being charged with at the time of his flight.

While we recognize the authorities which point out the "fleeing" instruction is rarely advisable, we also note it has not been forbidden as a matter of law. After reviewing all of the facts presented to us, we cannot say that

counsel failed to perform an essential duty in not recommending to the defendant that he appeal based upon this instruction alone. Additionally, we cannot say that the result would have been different had the instruction not been given or that we would have found error on direct appeal. There is sufficient evidence to support defendant's guilt without the instruction. We therefore affirm the district court in all respects.

**AFFIRMED.**