IN THE COURT OF APPEALS OF IOWA

No. 0-21 / 89-293

STATE OF IOWA,

Appellee,

vs.

BENJAMIN JOSEPH LANGFORD,

Appellant.

FILED
MAR 27 1990
CLERK SUPREME COURT
327

Appeal from the Iowa District Court for Johnson County, Paul J. Kilburg, Judge.

The defendant appeals his conviction and sentencing of robbery in the first degree, theft in the second degree as a habitual offender, and possession of a controlled substance. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; J. Patrick White, County Attorney; Maggie Poepsel, Assistant County Attorney; for appellee.

Raymond E. Rogers, State Appellate Defender; Linda Del Gallo, Assistant Appellate Defender; for appellant.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The defendant appeals his conviction and sentencing of robbery in the first degree, theft in the second degree as a habitual offender, and possession of a controlled substance. We affirm in part, reverse in part, and remand for resentencing.

On October 7, 1988, two men robbed a pharmacy in Iowa City. One of the men, carrying a gun, indicated that he wanted dilaudid and morphine from the safe. The other man took an undisclosed amount of money from the cash register. They took drugs valued at $1,141.39.

When the police arrested defendant, they found him and his live-in girlfriend at defendant's apartment. The police did not have a search warrant at the time. While defendant was being taken to the police station, one of the officers remained at the apartment overnight until the others could arrive the next day with a warrant. Defendant's girlfriend and her son voluntarily left the apartment while the officer stayed overnight.

The officer who had been assigned to secure the apartment indicated that the defendant's girlfriend returned to the apartment to obtain some toiletries. He accompanied her until she secured the necessary items. He stated that the defendant's girlfriend appeared nervous at this time. The police officer then became suspicious that perhaps someone else was hiding in the apartment. He

proceeded to search more hidden areas of the apartment. Upon opening a closet he observed a Colt pistol, partially covered, lying on the floor.

When the other two police officers returned to the apartment subsequent to this discovery, and after having secured a search warrant, they were told by the police officer at the scene that there was a handgun in the hall closet. The officers seized the weapon pursuant to the warrant.

Before trial, the defendant filed a motion to suppress evidence seized from his apartment, specifically the handgun. He argued that his girlfriend declined to give consent to search of the apartment.

The trial court refused to suppress the evidence holding that the search warrant had been obtained and was executed independently of any prior search conducted of the apartment. Both officers testified that the pistol was immediately visible as soon as the closet door was open. Additionally, the police officers knew they were investigating an armed robbery in which a handgun had been involved. The apartment of the defendant's accomplice had already been searched, and the weapon had not been found.

On appeal, the defendant contends that the trial court erred in refusing to suppress evidence of the weapon. He argues that no exigent circumstances existed which justified the search of the defendant's apartment prior to the arrival of a search warrant.

Secondly, the defendant argues that he was denied effective assistance of counsel when his attorney failed to object to the application of the habitual offender provisions of the Iowa Code to him and to the imposition of a habitual offender sentence upon him. He argues, and the State concedes, that the habitual offender provision was not applicable to him because his second offense, robbery with aggravation, was not committed subsequent to his first conviction, attempted breaking and entering. On November 25, 1974, he committed the attempted breaking and entering. On January 6, 1975, he committed robbery with aggravation. On July 3, 1975, he was convicted of the attempted breaking and entering charge; and on September 24, 1975, he was convicted of robbery with aggravation.

The defendant maintains he is entitled to a vacation of his sentence as a habitual offender in connection with the second-degree theft charge and to a remand for resentencing.

The State agrees that he is entitled to this remedy provided the claim was properly raised on direct appeal. Additionally, the State asserts that the discovery of the pistol was inevitable and would have been discovered, regardless of the prior search, as a result of information derived from an independent source. The district court held that the search warrant was validly issued independent

of any possible police misconduct, and that a routine search pursuant to that warrant would have revealed the evidence which the defendant sought to suppress.

Defendant is claiming that certain evidence was obtained as a result of an illegal search, and that he was denied effective assistance of counsel at the sentencing hearing. When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Defendant's complaint centers around the seizure of a pistol found in the apartment. The State argues that, regardless of whether the officer stationed in the apartment had good cause to search the apartment, the gun is still admissible under both the inevitable discovery and independent source exceptions to the exclusionary rule. The exclusionary rule prohibits the introduction of evidence seized during an unlawful search, and also of derivative evidence acquired as an indirect result of such a search. Murray v. United States, 487 U.S. ___, ___, 108 S. Ct. 2529, 2532-33, 101 L. Ed. 2d 472, 480 (1988). The "inevitable discovery rule" is an exception to the fourth amendment exclusionary rule. If the prosecution can establish by a preponderance of the evidence that

332

unlawfully-obtained evidence ultimately or inevitably would have been discovered by lawful means, the evidence is admissible. Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387. In addition, evidence which is initially discovered during or as a consequence of an unlawful search is nevertheless admissible if it is later obtained by way of an independent source untainted by the initial illegality. Murray, 487 U.S. at ____, 108 S. Ct. at 2533, 101 L. Ed. 2d at 480.

This situation clearly falls within these two exceptions to the exclusionary rule. The police were to return in the morning with a search warrant. They did return with a valid warrant. However, before they could begin to search the apartment, the stationed officer stated that a gun was in the closet. This statement did not taint the evidence because the search warrant was obtained prior to the discovery of the gun by the stationed police officer. The facts relied upon to establish probable cause did not include those known by the officer in the apartment. All of the facts necessary to obtain the warrant were obtained independently of the allegedly illegal search. In addition, when the officer informed the searching officers of the location of the gun, they already had a valid warrant and would inevitably have discovered the gun. The officers were looking for a gun and other small objects. This means that the scope of their search

would not be limited to large areas, but could extend to very small containers. Even if they were not looking for small objects, the evidence shows that the gun was in partial view in a closet and immediately noticed by the officer staying in the apartment after his search for hidden suspects, and by the officers searching with the warrant. The officer did not move the gun or the clothes partially covering it. The officers with the warrant were certainly authorized to move a pile of clothes and would have found the gun even had it been completely covered. The trial court was correct in refusing to suppress the pistol.

Defendant also claims he was denied effective assistance of counsel when his attorney failed to object to the application of the habitual offender provisions of Iowa Code section 902.8 to him. The State agrees that the habitual offender provisions should not have applied to the defendant. The State's only challenge is whether the ineffective assistance claim is properly raised on direct appeal. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). However, in State v. Clark, 351 N.W.2d 532 (Iowa 1984), the claim of ineffective assistance of counsel was heard on direct appeal. The facts in Clark were substantially similar to our case.

Counsel had failed to object to the imposition of a habitual offender statute. In Clark, there was some question as to the meaning of a particular word in the statute. The supreme court held that counsel should have raised this discrepancy before the trial court. In our case there is no discrepancy. The habitual offender provision is simply not applicable to the defendant. If an objection had been raised, the sentence would have been less and no prejudice would have resulted to the defendant. The defendant has established by a preponderance of the evidence that counsel failed to perform an essential duty, and that prejudice resulted. We return the case to the district court for resentencing.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.