IN THE COURT OF APPEALS OF IOWA

No 5-246 / 94-1790

FILED
JUN 27 1995
CLERK SUPREME COURT

IN THE INTEREST OF C.D., A Minor Child,

C.D., Minor Child,

Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gary K. Anderson, Judge.

C.D., a juvenile, appeals from the adjudicatory order finding him delinquent of assault without intent to inflict serious injury but causing bodily injury and criminal mischief in violation of Iowa Code sections 708.1, 708.2(2), 716.1 and 716.6 (1993).

AFFIRMED IN PART, AND REVERSED IN PART.

John P. Heithoff, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee-State.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

CADY, J.

C.D., a juvenile, appeals from the adjudicatory order finding him delinquent of assault without intent to inflict serious injury but causing bodily injury and criminal mischief in violation of Iowa Code sections 708.1, 708.2(2), 716.1 and 716.6 (1993).

At 2 p.m. on July 8, 1994, fifteen-year-old Chad Hackford and other detasselers were dropped off by bus at Katelman's Pool parking lot. After Chad called his mother to pick him up, he was surrounded by a group of teenage boys and assaulted. He was pushed to the ground, hit and kicked. Chad's shirt was torn, and his glasses and baseball hat were taken from him, thrown in a trash can, and set afire.

Jeff Shafer was driving by the pool parking lot as the assault took place. Chad was pushed into the street and Shafer braked to avoid hitting him. Shafer stopped his car and got out to help. He observed the assailants walking away from the parking lot towards a nearby restaurant.

Officer Gorman was dispatched to the scene of the assault. Chad named fifteen-year-old C.D. as one of his assailants, but he did not know the names of the other boys. Gorman went to C.D.'s house and found C.D. there with his father and sister. C.D. was dressed as Chad had described, in black jeans and a black T-shirt C.D. denied any involvement in the assault and stated that he had gone straight home with Troy Gutheil after the bus had dropped them off from detasseling. C.D. and his father stated that C.D. had arrived home around 2:05 p.m.

A delinquency petition was subsequently filed alleging C.D. had committed the offenses of assault without intent to inflict serious injury but causing bodily harm and criminal mischief.

At the adjudicatory hearing Chad identified C.D. as one of his attackers. He stated that he did not see whether C.D. hit him but did see C.D. push him. Shafer also identified C.D. and stated that he had seen C.D. holding Chad by his shirt as he drove by the group of boys. Officer Gorman testified that he had talked with several other witnesses to the assault and was given the first names of two boys involved and C.D.'s full name.

C.D. denied he assaulted Chad. C.D. explained that after Officer Gorman left his house on July 8 some of his friends came over and told him they had beat up Chad. C.D.'s father testified that C.D. arrived home on July 8 around 2:05 or 2:10 with Troy Gutheil.

The court found C.D. had committed the offenses and adjudicated him delinquent.

At the dispositional hearing, juvenile court officer Colleen Recher testified that she thought C.D. should ideally be placed in a group foster home; however, after checking with nineteen group homes she found none that would take him. Recher recommended that C.D. be placed in the state training school. She explained that C.D. had not complied with the rules of probation. In addition to committing the assault on

Chad. C.D. had not done assigned school work, he missed appointments with her, he had not done community service work, and he had been staying out past curfew. Although C.D.'s parents admitted that they have problems controlling C.D., they thought he should remain at home on probation. The court ordered C.D. to be placed at the state training school.

C.D. filed a motion for new trial alleging newly discovered evidence. Attached to the motion were statements made by several boys who were present during the assault. Although the boys named different culprits, each averred that C.D. was not among the assailants. The court denied C.D.'s motion.

C.D. appeals. He argues the court erred in (1) finding he committed the delinquent acts, (2) denying his motion for new trial, and (3) in placing him in the state training school. C.D. further argues his counsel was ineffective and lists fourteen specific examples of deficiencies in her performance.

I. Scope of Review

Juvenile delinquency proceedings are special proceedings which serve as ameliorative alternatives to criminal prosecutions against children. *In re J.D.S.*, 436 N.W.2d 342, 344 (Iowa 1989). We review them de novo considering both questions of law and fact. *In re D.L.C.*, 464 N.W.2d 881, 882 (Iowa 1991); *In re Thompson*, 241 N.W.2d 2, 4 (Iowa 1976). We give weight to the fact-findings of the trial court.

especially when considering credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Sufficiency of the Evidence

C.D. argues the evidence adduced by the State was insufficient to show beyond a reasonable doubt he committed the delinquent acts of assault and criminal mischief. After reviewing all of the evidence we conclude there was evidence beyond a reasonable doubt that C.D. committed the assault, but there was not evidence beyond a reasonable doubt that C.D. committed the act of criminal mischief.

With regard to the assault, both the victim, Chad, and the passerby, Schafer, identified C.D. as one of several boys who assaulted Chad. Chad testified that C.D. was standing in front of him when the assault began and that C.D. pushed him. Shafer corroborated this testimony stating he saw C.D. grab Chad's left arm during the assault. Furthermore, C.D.'s clothing and hair color matched the description given to Officer Gorman by witnesses to the assault.

The court also found C.D. committed criminal mischief by taking Chad's glasses and hat and setting them on fire in a nearby trash can. We cannot conclude beyond a reasonable doubt that C.D. participated in these acts. Chad did not know who removed his glasses and knocked his hat off his head. He was also unable to identify the individuals who started the fire and placed his glasses and hat in the fire. His only testimony on this issue was that he believed the same group who assaulted him started

the fire and he saw C.D. walking by the trash can after the assault. Moreover, Shafer's testimony was contrary to Chad's. He stated that following the assault, C.D. walked toward a nearby restaurant in the opposite direction of the trash can.

While it may be logical to speculate from C.D.'s participation in the assault that he also participated in the criminal mischief, mere speculation does not equate to proof beyond a reasonable doubt. *See State v. Geier*, 484 N.W.2d 167, 171 (Iowa 1992). We reverse the juvenile court's finding that C.D. committed criminal mischief in the fourth degree.

III. New Trial Motion

Following the adjudication hearing, C.D. filed a motion for new trial based on newly discovered evidence. Attached to the motion were statements made by Jeremy McDonough, Josh Escritt, and Rick Koehrsen, three boys C.D. named as participants in the assault. The juvenile court denied C.D.'s motion and he appeals.

The trial court has wide discretion in ruling on motions for new trial. *State v. More*, 382 N.W.2d 718, 723 (Iowa App. 1985). The trial court's ruling will be upheld unless clearly erroneous. In order to prevail on a motion for new trial C.D. must prove: (1) the evidence was discovered after the verdict; (2) the evidence could not with reasonable diligence have been discovered earlier; (3) the evidence is material to the issues of the case, not merely cumulative or impeaching; and (4) the evidence probably would change the result of the trial. *Id.*; Iowa R. Crim. P. 23(2)(b)(8).

C.D. has failed to prove elements two and four. C.D. testified at trial that McDonough, Escritt, and Koehrsen came by his house after the assault and admitted to committing it. He, however, chose not to disclose this information to the police because he did not want to be a "snitch." Clearly, C.D. had the ability to obtain this information before trial if he had chosen to.

Even if C.D. had been unable to locate the other boys prior to trial, their statements would not alter the outcome of the adjudication. Although, each of the boys stated C.D. had not participated in the assault, their statements were inconsistent with each other's and C.D.'s testimony. Each statement placed C.D. in a different location during the assault and named different participants in the assault. McDonough even claimed C.D. was not detasseling on the day of the assault. The statements lacked credibility and the juvenile court properly concluded they did not constitute evidence sufficient to require a new trial.

IV. Placement in State Training School

C.D. claims the juvenile court erred by placing him the state training school in Eldora, Iowa. C.D. contends this is not the least restrictive dispositional order in view of his actions and he should be allowed to remain at home with his parents on probation.

Under Iowa Code section 232.52(2)(e) (1993) the court may place a juvenile in the state training school if the court finds any three of the following conditions:

> (1) The child is at least fifteen years of age and the court finds the placement to be in the best interests of the child or necessary to the protection of the public.
>
> (2) The child has committed an act which is a crime against a person and which would be an aggravated misdemeanor or a felony if the act were committed by an adult.
>
> (3) The child has previously been found to have committed a delinquent act.
>
> (4) The child has previously been placed in a treatment facility outside the child's home.

We conclude placing C.D. in the state training school was an appropriate disposition. Three of the four elements required by section 232.52 were met, the Juvenile Court Services Office made reasonable efforts to prevent out of home placement, and state training school was the least restrictive alternative.

C.D. has been on probation to the Juvenile Court Services Office since October 1992 when he was adjudicated to have committed the delinquent acts of possession of explosive or incendiary material, a class "C" felony, and reckless use of fire. Since then, he has continued to commit delinquent acts and has repeatedly violated the terms of his probation. In April 1994 C.D. was adjudicated to have committed the delinquent acts of assault causing bodily injury, and in August 1994 the juvenile court determined C.D. committed the assault at issue in this appeal.

The juvenile court officer recommended C.D. be placed at the Eldora State Training School. According to her testimony and report, C.D. refused to follow rules

in the home and was late for curfew. He missed appointments with his juvenile services officer. He did not complete his restitution and community service work obligations. He also refused to complete his school work and slept during class.

C.D. received individual and family therapy with little effect. He was also discharged unsuccessfully from the Mercy Hospital Alliance Program. The juvenile court officer sought to place him in nineteen group homes, however, none of them would accept him.

Despite his parents desire to have him return home C.D. is obviously in need of a more structured environment. We conclude his placement in the state training school was the least restrictive disposition and in his best interest.

V. Ineffective Assistance of Counsel

C.D. contends he was deprived of his right to a fair trial by ineffective assistance of counsel. He asserts counsel failed to properly investigate and prepare for the case, failed to call his alibi witness after the witness personally appeared to testify, failed to properly cross-examine Gorman and Shafer, failed to object to a hearsay statement by Gorman, and failed to impeach Chad with his prior inconsistent statement.

We approach ineffective assistance of counsel claims with the presumption that counsel's conduct falls within the range of reasonable professional competency. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). Improvident trial strategy or a mistake in judgment does not necessarily amount to ineffective assistance of counsel. *Thompson*

v. *State*, 492 N.W.2d 410, 413 (Iowa 1992). We evaluate counsel's overall representation, rather than isolated complaints about what counsel might have done. *State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982). The burden of proving ineffectiveness is on the claimant. *In re J.P.B.*, 419 N.W.2d 387, 392 (Iowa 1988). To establish ineffectiveness the claimant must show: (1) counsel's performance was deficient, and (2) actual prejudice resulted. *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992).

Counsel's failure to interview C.D.'s alleged alibi witness, Troy Gutheil, prior to trial and subsequent decision not to have him testify, was not ineffective assistance. Gutheil was present during the adjudicatory hearing and counsel took a break during the hearing to speak with him and consider whether he should be called to testify. After speaking with Gutheil she made a tactical decision that his testimony would not assist C.D. We will not second guess counsel's strategy. *See Cooley v. Nix*, 738 F.2d 345, 347 (8th Cir. 1984); *Odem v. State*, 483 N.W.2d 17, 19 (Iowa 1992).

Likewise, counsel's failure to locate and speak with the three boys whom C.D. identified at the adjudicatory hearing as participants in the assault is not deficient. C.D. himself withheld the information until the hearing. Moreover, the statements the juveniles gave in support of the new trial motion would not have assisted C.D.'s defense. The statements were contradictory and did not corroborate C.D.'s testimony.

Finally, we find no merit in C.D.'s complaints about counsel's cross-examination of Gorman, Chad, and Shafer, or counsel's failure to object to Gorman's hearsay statement. After reviewing the totality of the circumstances and considering counsel's overall representation, rather than isolated complaints about what counsel might have done, we find trial counsel's performance was within the range of normal competence. *See Newman*, 326 N.W.2d at 795.

AFFIRMED IN PART, AND REVERSED IN PART.