FILED
OCT 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

232

OBERT RAY MILLS,)
Petitioner-Appellant,) Filed October 29, 1985
)
TATE OF IOWA,) 5-314
Respondent-Appellee.) 83-1656

Appeal from the Iowa District Court for Polk County - C. Edwin Moore, enior Judge.

Petitioner appeals from a denial of postconviction relief. **REVERSED.**

Charles Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela G. Dahl, Assistant Attorney General, for respondent-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

AYDEN, J.

Petitioner appeals from a denial of postconviction relief. He asserts that trial counsel was ineffective in: 1) failing to move for a judgment of acquittal; 2) allegedly violating Iowa Rule of Criminal Procedure 9(5); and 3) failing to object to the trial court's questioning of the defendant. We reverse.

Following a bench trial, Robert Mills was convicted on two counts of false use of a financial instrument and one count of theft in the fifth degree. Prior to the commencement of the trial, defense counsel agreed to stipulate to the minutes of testimony. The only other evidence presented at trial was Mills' testimony on his own behalf.

Mills subsequently appealed his conviction making several allegations relating to ineffective assistance of trial counsel. The court of appeals affirmed the conviction but remanded for postconviction proceedings to "adjudicate all of defendant's allegations of ineffective assistance." State v. Mills, No. 67662 (Iowa Ct. App. June 28, 1983).

In September 1983, Mills filed an application for postconviction relief alleging seven instances of ineffective assistance, some of which were not raised in the direct appeal. The denial of petitioner's application forms the basis for this appeal.

Preliminarily, we note that the first two allegations of ineffective assistance now before this court were not raised on direct appeal. The State asserts that since the claims were not raised in the prior proceeding postconviction relief is not available. We agree.

Iowa Code section 663A.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant

> has taken to secure relief, may not be the basis for a *subsequent application, unless the court finds a ground* for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

In accordance with this section, it is necessary for the petitioner to show a "sufficient reason" for not raising the issues on appeal and actual prejudice. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). Since Mills has failed to do so, he is barred from postconviction relief. Contrary to petitioner's contention, our court did not intend to allow these claims in remanding the case for postconviction proceedings on "all of defendant's allegations of ineffective assistance of counsel." Read in context, it is apparent that the statement only refers to those claims which were before the court on direct appeal. Accordingly, we decline to consider Mills' first two assignments of error.

Mills' final claim is that counsel was ineffective in failing to object to the trial court's questioning of petitioner during his testimony. Since this issue was raised on direct appeal, and thus properly preserved, we consider the merits.

At trial, while Mills was relating the events which preceded his arrest, the following colloquy occurred:

> By Mr. Rigg:
>
> Q. After he did that then what happened?
>
> A. He asked me how much I would like to make it out for and I first said $500 and then he said, "How about two hundred?" and I said, "That's fine." And he said, "Would you like to have cash?" And I said, "No, I would like to have it converted into traveler's checks," and he said "That's fine."
>
> And then he followed me up to the counter and he informed the teller that — when banks okay a check, if a check needs to be okayed by a bank officer, they'll put their initials — they'll put their initials at one corner of the check and most usually all bank officers — all of the tellers in the bank usually know each person's individual signature and they proceeded — this Mr. Rasley informed

Allison Edwards that he had countersigned a check, that the check was okay to be cashed, and that I would like to have ten $20 traveler's checks.

THE COURT: Let me make sure I understand Mr. Mills' answer.

Q The checks — did you just cash one check with Mr. Rasley?

A Yes.

Q That was in an amount of $200?

A Yes.

Q Was the check — I guess I'm trying to figure out who finished completing the check. Did you fill in the name John McDermott? In other words, paid to the order of John McDermott or was that already filled in?

A That was blank at the time. When I was sitting in front of Mr. Rasley while he got on the phone to his bank in California, I filled in my name — the alias name I was using and the amount $200.

Q I hadn't heard any information if you had done that. So while Mr. Rasley was verifying the fact that the check was good and was okay to cash it from the California bank you filled out the check made payable to the order of John McDermott which was the alias name or fictitious name you were using?

A Yes.

Q And then if I understand what happened, Mr. Rasley went up to the teller to get this check cashed but instead of giving you $200 cash you instead asked for ten $20 traveler's checks?

A Yes.

Q And that was given to you by the teller, is that correct?

A Yes.

THE COURT: Proceed, Mr. Rigg.

Petitioner claims that through this questioning the trial court elicited answers which established missing elements of the State's case. Because of

this, it is argued that defense counsel should have lodged an objection and rendered ineffective assistance in failing to do so.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Applying these principles in the present case, we conclude that trial counsel's failure to object constitutes ineffective assistance.

The only evidence presented by the State was that contained in the minutes of testimony. The minutes indicate that the defendant presented a check in the amount of $200, made out to cash, with a notation on the bottom "John McDermott," and signed with the signature "Lee Gregory." The minutes further indicate that the defendant represented himself to be John McDermott.

Even viewed in a light most favorable to the State, these facts are insufficient to support a conviction for false use of a financial instrument. There is no evidence that the defendant altered the check in any way. In fact, the minutes indicate that the instrument was made out to cash and, as such, was a bearer instrument. Our court has specifically stated that negotiation of a genuine bearer instrument is not within the class of conduct condemned by Iowa Code section 615.6. State v. Sanders, 309 N.W.2d 144, 146 (Iowa 1981). The fact that Mills misrepresented himself would be of no consequence since anyone could negotiate a check made out to cash.

In questioning Mills, however, the trial court elicited testimony which would indicate that the check was not a genuine bearer instrument. One could infer from Mills' testimony that he made the check payable to John McDermott rather than cash. The record is devoid of any other evidence which would support a finding that the check was altered in this fashion.

A trial court may take reasonable measures to clarify evidence through the questioning of witnesses "when in the exercise of sound discretion it is reasonable deemed necessary." State v. Cuevas, 288 N.W.2d 523, 533 (Iowa 1980). Yet in the present case, the trial court went beyond merely clarifying evidence in the record and established the existence of an element of the crime charged. In such a situation we believe counsel had a duty to object. The court had ceased to be an impartial tribunal and assumed the role of an advocate, thereby denying petitioner a fair trial.

In State v. Willet, 305 N.W.2d 454, 457 (Iowa 1981), the supreme court cautioned against the questioning of witnesses by the trial court. In Willet, the defendant was charged with third degree sexual abuse in violation of Iowa Code section 709.4(5). Id. The defendant's age, a necessary element of the crime, appeared in the record only once--in response to a question posed by the trial court. Id. Although unnecessary to the disposition of the case, the supreme court expressed disapproval with the manner in which the evidence was introduced:

> We have recognized that a trial court may question witnesses. State v. Cuevas, 288 N.W.2d 525, 532-33 (Iowa 1980). By examining witnesses, however, "the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice or advocacy are some of those." Id. This case is an example of the dangers inherent in trial court examination of witnesses. Here the court, in the absence of counsel, elicited from defendant an essential element of third-degree sexual abuse under section 709.4(5)--defendnat's age. While it is unnecessary for us to decide the

> consequences of this exchange, it illustrates why this court does "not encourage judges to enter the fray with their own interrogation of witnesses." Id.

Id

Today, guided by the cautionary language in Willet, we hold that it is an abuse of discretion for a trial court to elicit the elements necessary to establish the State's case. We do not suggest that the trial court intended to aid the prosecution in this manner. As in Willet, it is likely that the court was merely attempting to clarify evidence and supplement its notes. The fact remains, however, that the court went beyond this intended purpose and elicited testimony that was not only damaging, but essential to the conviction. We simply cannot endorse this practice. In fact, this court is seldom confronted with a fact situation where the prejudice is so evident. Absent the colloquy between the court and Mills, Mills could not have been convicted of false use of a financial instrument. Thus, had trial counsel lodged an objection, we can only conclude that a reasonable probability exists that the result of the proceeding would have been different.

Since trial counsel had a duty to object and the failure to do so resulted in prejudice, we reverse the conviction.

REVERSED.

Schlegel, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I dissent.

I do not believe that counsel failed to perform an "essential duty" and that prejudice resulted to the defendant.

The majority maintains the judge went beyond clarifying evidence in questioning the defendant which necessitated a duty in counsel to object. If counsel was ineffective because he did not object, what was the appropriate objection counsel should have made to avoid providing this ineffective assistance? I assume that the objection the majority is referring to is where counsel would object to the judge asking a clarifying question. According to the law that I read specifically in Cuevas and other authorities generally, such questioning is perfectly permissible and any objection would therefore be overruled. The trial judge made it very clear what he was doing: "Let me make sure I understand Mr. Mills' answer."

It is well settled that judges can question witnesses. Iowa R. Evid. 614(b); see McCormick's Handbook on the Law of Evidence § 8, at 12-13 (2d ed. E. Cleary 1972). ("The judge in his discretion may examine any witness to bring out needed facts which have not been elicited by the parties.") In a bench trial, as in this case, the risk of prejudice from such questions is undoubtedly less than in a jury trial. After defendant took the stand, the court had the authority to question him. See State v. Cuevas, 288 N.W.2d at 533.

> [The trial judge] has not only the right, but he has the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel. ... "A trial judge, who is after all 'the only disinterested lawyer connected with the proceeding', has the duty to help make clear to the jury the facts and circumstances pertinent to the case. 'He should not hesitate to ask questions for the purpose of developing the facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other.'" (citations omitted)

United States v. Ostendorf, 371 F.2d 729, 732 (4th Cir. 1967), cert. denied 386 U S. 982, 87 S. Ct. 1286, 18 L. Ed. 2d 229 (1967).

While judges are to remain impartial during the course of a trial, I do not believe the judge's questioning was so impermissible as to render him, in effect, an advocate for the State. The testimony originally elicited from defendant was less than clear and the judge correctly sought a clarification as to certain statements the defendant made. The judge did not unduly interrogate the witness. See United States v. Harris, 488 F.2d 867, 868-69 (8th Cir. 1973) ("It is one of the chief duties of a trial judge to clarify the testimony of witnesses. His attempt to do so should not be a basis of error unless done in a biased manner . . . stated differently, a federal judge may ask questions and has the prerogative of commenting directly on witnesses and their testimony . . . it is only when a judge becomes an advocate for one party that he oversteps the bounds of propriety in directing and governing the conduct of the trial." (citations omitted)).

Since it is clear the trial judge has the authority to ask questions in a trial, the majority is in effect stating the principle that while the judge can ask a question, clarifying or not, it cannot be a question which establishes one of the elements of the charged crime. This is neither reasonable nor a part of established law. To hold that a trial court can ask a clarifying question but cannot ask such a question if it involves the principal issue of the case (i.e. an element of the crime charged) is preposterous. Obviously, the trial court cannot be an advocate, but if the judge cannot ask a clarifying question on an element of the crime while the defendant is on the stand, it logically follows the judge cannot ask a clarifying question exonerating the defendant if it relates to an element either. Surely a judge has a greater role in the administration

of justice than the majority's opinion indicates. I fail to see how the trial court abused its discretion under these facts.

Even assuming, arguendo, that impermissible questioning did occur, the minutes of testimony provide sufficient grounds to support this conviction under section 715.6. The judge could infer that the defendant stole blank payroll checks of Citadel Systems Inc., filled in the amount of the check and made it payable to cash, and represented himself as John McDermott. Defendant knew the instrument was not what it purported to be and that he could not rightfully use such an instrument. The fact elicited during the judge's questioning that Mills signed John McDermott's name on the check was not crucial to establishing a section 715.6 conviction. In light of these facts, the conviction should be affirmed.