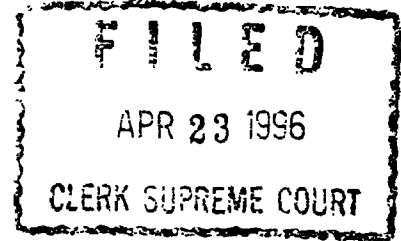


IN THE COURT OF APPEALS OF IOWA

000345

No. 6-099 / 95-745



STATE OF IOWA,

Appellee,

vs.

KENNETH WAYNE FISHER,

Appellant.

Appeal from the Iowa District Court for Wapello County, Richard Meadows,
Jr., Judge.

Kenneth Fisher appeals from his convictions, following a jury trial, for serious
assault and interference with official acts in violation of Iowa Code sections 708.1,
708.2, and 719.1. **AFFIRMED.**

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for
appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, and Victoria Siegel, County Attorney, for appellee.

Heard by Cady, P.J., and Streit, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of
the Iowa Supreme Court.

CADY, J.

Kenneth Fisher appeals the trial court's denial of his motion for a new trial based on ineffective assistance of counsel. We affirm Fisher's convictions and preserve his ineffective assistance claim for postconviction relief.

The State charged Fisher with serious assault and interference with official acts stemming from an altercation Fisher had with police officers. At the initial appearance, the court appointed attorney R.T. Starken to represent Fisher in his court proceedings.

Shortly before trial, Starken filed a motion to merge the two counts and requested a continuance in order for a hearing to be held. At the close of jury selection, Starken orally argued his motion to the court, and further requested an opportunity to conduct discovery depositions concerning whether the officers unlawfully entered Fisher's home without his consent. He again requested a continuance of the trial. The trial court denied all motions. The jury found Fisher guilty of both charges.

At the sentencing hearing, Fisher requested replacement counsel since he felt Starken had not properly represented him. Starken was allowed to withdraw and a new attorney was appointed to represent Fisher. Fisher later testified at the sentencing hearing he repeatedly attempted to contact Starken, but received little to no opportunity to discuss his case with Starken. He stated Starken did not notify him of the trial until four days prior to the trial date, at which time he inquired about

pretrial preparation. He further testified he felt he was prejudiced by the inaction of his court-appointed attorney. He also admitted to refusing a plea agreement presented at a pretrial conference which Starken had recommended.

Fisher's new attorney filed a motion for a new trial due to ineffective assistance. The trial court denied the motion for a new trial, and sentenced Fisher to a term of six months imprisonment, suspending all but two days. He was further ordered to pay a fine of \$825, and was placed on two years probation.

Fisher appeals contending his trial counsel rendered ineffective assistance by not returning phone calls, denying him an opportunity to discuss his case with him, and failing to timely file discovery motions and a motion to suppress based on illegal entry into his house.

When a defendant is alleging error involving a constitutional right, such as ineffective assistance of counsel, 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). Claims of ineffective assistance of counsel are resolved on direct appeal only when the record adequately presents the issues. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

In order to establish ineffectiveness of trial counsel, the defendant bears the burden of proving by a preponderance of the evidence (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Gay*, 526 N.W.2d 294, 298

(Iowa 1995); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Generally, improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Here, the issue of ineffective assistance was never fully litigated at the trial court level. Starken was never given the opportunity to explain why he did not consult Fisher sooner than four days prior to trial, file more timely pretrial motions, or conduct more pretrial discovery. Evidence indicated Fisher rejected a plea bargain Starken encouraged him to accept close in time to the trial. The close proximity of the trial at the time Fisher rejected the plea could indicate a strategic move by Starken or ineffective assistance.

We conclude there is an inadequate record for us to adjudicate defendant's claim without Starken's explanation for his conduct. We therefore preserve Fisher's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.