

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Filed April 21, 1981

Plaintiff-Appellee,)

vs.)

0-433
64263

FRANK JAY STEELE,)

a/k/a JAY FRANK CORBETT,)

Defendant-Appellant.)

Appeal from Black Hawk District Court.

Peter Van Metre, Judge.

Defendant appeals his conviction of three counts of false use of a financial instrument in violation of section 715.6, The Code 1979. **AFFIRMED.**

James F. Whalen, of Dunbar & Dunbar, Waterloo, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

OXBERGER, C.J.

Defendant, Frank Jay Steele, appeals his conviction and sentence imposed for violation of section 715.6, The Code 1979. We affirm.

Steele was charged with three counts of false use of a financial instrument. An assistant public defender was appointed to represent him. Trial to the court was commenced; whereupon he was found guilty. Steele was sentenced to three concurrent terms of imprisonment, each not to exceed ten years. He appeals the conviction and sentencing. He raises on appeal the following as error: ineffective assistance of counsel and abuse of discretion of sentencing court.

I. Ineffective Assistance of Counsel.

Steele's appeal of this issue raises a violation of a basic constitutional safeguard which requires our review of the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39 (Iowa 1977).

Steele asserts that defense attorney's failure to make a closing argument was a denial of effective assistance of counsel. At the close of the state's case, defense attorney moved for directed verdict on two counts, which was denied. The defense presented no evidence. The state then offered a brief closing argument. In response to the court's invitation to argue, defense attorney stated, "We have no closing argument, your Honor. The facts speak for themselves."

Steele argues the denial, without waiver, of his right to closing argument guaranteed under the sixth amendment's right to counsel is sufficient grounds for reversal. Certainly, this right is fundamental to an accused. Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L.Ed.2d 593 (1975). Not all such fundamental rights, however, are to be held inviolate by an accused, subject only to his knowing and intelligent waiver. For example, the rights to call and to confront witnesses, though constitutionally guaranteed, are matters in which an attorney's actions are but decisions in trial tactics or strategy not requiring approval by the accused. See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, The Defense Function §5.2 (Approved Draft 1971). We find the closing argument function falls within the strategical realm of an attorney's responsibility and is not dependant upon the accused's ultimate decision or waiver.

Be that as it may, inadequate closing arguments may effect reversal of convictions when that inadequacy amounts to ineffective assistance of counsel. See, e.g. Matthews v. United States, 145 App. C.C. 323, 449 F.2d 985 (1971); People v. Carter, 41 Ill. App. 2d 425, 354 N.E.2d 482 (1976). But see State v. Green, Ill. Ariz. 444, 532 P.2d 506 (1975). Our task is to determine whether failure to make a closing argument under the circumstances is performance within the range of normal competency of the attorney. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980).

The state argues this matter should be reserved for post-conviction relief. We are in agreement. The record before us does not reveal enough of the factors and circumstances necessary to determine if the defense attorney failed to perform a duty to his client. We could only guess whether there was consultation with Steele regarding closing argument or why the attorney chose to forego this final opportunity to address the fact finder. While we find under the record no basis on which to hold Steele had ineffective counsel, this holding is without prejudice to a post-conviction relief action where a full evidentiary hearing may be had on this matter. See State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); See also State v. O'Connell, 275 N.W.2d 197 (Iowa 1979).

II. Sentencing.

Steele asserts error in 1) trial court's denial of self representation at sentencing, 2) denial of effective assistance of counsel at sentencing; 3) trial court's abuse of discretion in denying defendant's access and challenge to pre-sentence report, 4) trial court's abuse of discretion by imposition of sentence based on a sole factor.

The sentencing hearing held on September 13, 1979, was brief and the record is set forth as follows:

THE COURT: This is the time set for sentencing. I've received the report of the pre-sentence investigator, and recommendation, and have examined those and would ask on the record the position of the State in this case.

MR. CORRELL: Your Honor, the position of the State is in accord with the recommendation of the Department of Court Services, and that is that Mr. Corbett be given three 10-year sentences. This is based on the fact that the pre-sentence investigator has received no cooperation from Mr. Corbett and none of the information he has given the Department has checked out as correct. It does not appear that he is any kind of a candidate for probation, and there's no alternative but to sentence him to the Iowa Department of Correctional Services.

MS. MCGIVERN: Your Honor, Mr. Corbett has advised

me that he wishes a continuance on this sentencing. He wishes to represent himself. He wants the public defender's office to withdraw as his attorney, and he would like Mr. Whalen to be appointed as his advisor connected with his representation of himself.

THE COURT: I'm not going to grant a continuance. We're going to proceed with the sentencing today. I'm not sure whether you're Mr. Corbett or Mr. Steele or just who you are, but would you stand, please. Under Iowa Law you do have the right to speak for yourself rather than through an attorney before sentence is passed. Is there anything you wish to say at this time?

THE DEFENDANT: No, sir.

THE COURT: Well, I'm accepting the recommendation of the Department of Correctional Services. The information you have given about your background is obviously false, so I'm going to impose a sentence of imprisonment not to exceed ten years on each of the three counts. I will make those run concurrently rather than consecutively, and I would advise you that you do have a right to appeal to the Supreme Court of Iowa from this verdict and sentence; and if you are taking an appeal, there are certain legal steps that you must take very promptly. Obviously, you're going to have to have the advice of a lawyer to do that, and I will appoint Mr. Whalen to represent you in all proceedings henceforth.

THE DEFENDANT: Thank you.

MS. MCGIVERN: Thank you, your Honor.

MR. CORRELL: Thank you, Judge.

THE COURT: Bond on appeal is \$20,000.

The judgment filed on September 13, 1979, indicates Steele's appointed counsel, Ted Stone, was present at the hearing.

In addition to the transcript of the proceedings, Steele addressed the sentencing court by letters on August 2, 1979, and August 21, 1979. (The letter of August 2nd and response by Judge Van Metre are not in the court record. Defendant includes the contents, however, in the appendix.)

A. Self-representation.

Steele alleges he was denied his right to self-representation. He requested this right in his letter of August 21st and through a request at hearing. The court acknowledged that request when it stated Steele's right to speak for himself and extended the opportunity to do so. The defendant declined. We find no denial of this right.

B. Effective Assistance of Counsel at Sentencing.

Steele's argument on this issue is difficult to address because of his request for

the right of self-representation stated above. He argues he was denied effective assistance of counsel because attorney Whalen was not appointed as he had requested. At the hearing, he requested Whalen to assist in his self-representation. However, his earlier appointed attorney, Ted Stone, was present at the hearing. Steele's preference for Whalen does not constitute ineffective assistance of the appointed counsel without a factual basis showing counsel's performance falling below the normal range of competency. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). See also State v. Williams, 285 N.W.2d 248 (Iowa 1979).

In any event, Steele, requested to represent himself, waiving his right to counsel. No argument is raised as to the knowing, intelligent nature of the waiver or the inability of Steele to represent himself, other than access to records. See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1975). Neither was the denial of a continuance raised as error. We find no abuse of discretion in this matter as presented.

C. Access and Challenge to Pre-sentence Report.

Steele alleges trial court's abuse of discretion in denying access to pre-sentence reports and the opportunity to challenge the same. Steele, in his letters, requested all relevant documents be provided to him. He made no request or challenge at the hearing. In his letter of August 2nd, he challenged the report as "incomputant (sic), incomplete and derogatory". He alleged the investigator was influenced by his prior arrest record and not the actual convictions. Judge Van Metre responded by letter (included in the appendix, but not of record) that certain information was inaccurate and further time was needed to complete the investigation. A supplemental report was given the court on August 30, 1979, reporting that verification attempts of Steele's military service, education achievement, and employment as offered by Steele were futile as no records of that information could be found. It is unclear whether the supplemental report was furnished to Steele or his attorney before hearing. In any event, a defendant has no absolute right to inspect pre-sentence reports. State v. Waterman, 217 N.W.2d 621, 624 (Iowa 1974); § 901.4, The Code 1979. It is discretionary with the court.

It appears from all sources available to our review, that Steele was apprised of the initial report and made a general challenge before the hearing, which challenge was answered by the judge. No further challenge was presented by Steele at the hearing

when he was given the opportunity to address the court. We find no abuse of discretion concerning the pre-sentence report.

D. Imposition of Sentence.

Steele asserts the trial court's abuse of discretion when it imposed the sentences based on a sole factor, that Steele had obviously lied to pre-sentence investigators. A sentence within statutory maximums, as is the case here, will be upheld unless an abuse of discretion is shown. State v. Inger, 292 N.W.2d 119 (Iowa 1980). Steele argues the sole factor basis is unacceptable according to State v. Hildebrand, 280 N.W.2d 393 (Iowa 1979). Our interpretation of Hildebrand reveals that it is not the sole factor which is denounced, but the personal, inflexible sentencing policy based on a sole factor. Id. at 396. Such policy precludes the exercise of discretion which is required of a sentencing judge. Id.

The adherence to a personal, inflexible sentencing policy is not present in the instant case. Rather, the court acknowledged Steele had been uncooperative and untruthful in complying with a service designed to benefit all parties involved. The court reviewed the report containing pertinent information and agreed with the recommendation therein. Such use of a pre-sentence report is not an abuse of discretion. State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975).

Finding no error, we affirm the conviction and sentence.

AFFIRMED.