



IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 4, 1986
vs.	)	<u>6-111</u>
EARL LEE NIMMERS,	)	85-727
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County (No. 117123), Linda K. Neuman, Judge.

Defendant appeals his conviction and sentence following a jury trial in which defendant was found guilty of two counts of delivering a controlled substance in violation of Iowa Code section 204.401(1). **AFFIRMED.**

Glenn F. Rudd and Dorothea O'Dean of Rudd & Scovill, Rock Island, Illinois, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca H. Claypool, Assistant Attorney General; and Martin S. Wozniak, Assistant Scott County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

OXBERGER, C.J.

Defendant, Earl Lee Nimmers, appeals his conviction on two counts of delivering a controlled substance in violation of Iowa Code section 204.401(1). Defendant asserts that he was denied the opportunity for a fair trial because of the ineffectiveness of his trial counsel. We affirm.

A police undercover employee named Odell Anderson was working with Detective Scott Sievert to apprehend individuals selling narcotics. On April 26, 1984, Anderson met with Detective Sievert, who strip-searched Anderson and gave him \$50 to go to the Penthouse Tavern in Davenport to buy cocaine or heroin from any dealer in the bar. Anderson went to the Penthouse Tavern, recognized the defendant as a dealer, and purchased two tinfoil packets from him. Anderson turned over these packets to the police.

Anderson further testified that he made a second purchase from the defendant on August 23, 1984, upon instructions from Detective Sievert. Once again the packet received was turned over to the police. The prosecution later established that the content of all packets purchased from the defendant contained heroin.

During the course of the trial, the defendant contends that his counsel failed to: (1) cross-examine properly the State's witnesses; (2) produce alibi witnesses; and (3) object and move for a mistrial when a State's witness's answer included an allegation that defendant was a dealer. As a result, defendant claims that he was deprived of his right to effective counsel as guaranteed by the sixth amendment to the U.S. Constitution and article I § 10 of the Iowa Constitution, and was therefore denied a fair trial.

Because we are confronted with an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of

the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa Ct. App. 1985); State v. Losee, 353 N.W.2d 876, 878 (Iowa Ct. App. 1984). Our scope of review is de novo. State v. Hilleshiem, 291 N.W.2d 314, 316 (Iowa 1980).

To establish his claim of ineffective assistance of counsel, defendant must show:

(1) that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and

(2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984)(citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

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At trial the State's witness, Anderson, and the prosecution entered into the following colloquy:

Q. What were those instructions [given to you by Detective Sievert]? A. To go to Sixth and Vine, . . . and get—make a purchase of cocaine or heroin from any dealer that was in there.

The first alleged error the defendant raises in regard to this testimony was that it was hearsay. However, assuming without deciding whether the witness's statement was hearsay or not, we find that the statements made by Anderson did not have a prejudicial effect because Detective Sievert had previously testified to the instructions given to Mr. Anderson. Therefore, since this information was already in the record, Anderson's testimony would have little prejudicial effect.

Defendant also claims that his trial counsel should have objected to and moved for a mistrial when a State's witness's answer included a reference to the fact that the defendant was a "dealer," because it violated the motion in limine. The motion in limine ordered that the State shall not make any reference in its case to the defendant's prior felony conviction for delivery or possession

of drugs. Even though Anderson's testimony mentioned that defendant was a dealer, he made no references to any crime for which the defendant had been convicted, and at worst, only indicated his opinion that defendant is a dealer. Therefore, we cannot find that this testimony unduly prejudiced the jury nor that defendant's counsel violated an essential duty owed to the defendant by not objecting to this evidence.

II.

Secondly, the defendant characterizes his trial counsel's cross-examination of Anderson, the State's leading witness, and Sievert, the Davenport police officer in charge of the investigation, as being "brief, erroneous, and dispirited," thereby resulting in an unfair and unjust trial. We do not concur with this view.

In regard to the cross-examination of Anderson, the trial counsel's questions, though few in number, were reasonably calculated to raise doubts in the jurors' minds about the credibility of the State's paid informant. Counsel's questions revealed the witness's failure to complete his education, that he had been a prior drug user and that he had a financial interest in the proceeding. Such a strategy of impeaching the credibility of Mr. Anderson was logical because the State was relying heavily upon his testimony. The defendant's counsel's cross-examination of Sievert was designed to raise further doubts about the credibility of the police informant's testimony as well as stressing that there were no other witnesses to the drug purchases besides Odell Anderson and that Mr. Anderson had a financial interest in the proceedings. This also was a logical strategy for defendant's counsel to follow.

There is a presumption that counsel's conduct falls within a wide range of reasonable professional assistance. Thus, the defendant has the burden of proof to show by a preponderance of the evidence that his counsel rendered

ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981). In regard to trial counsel's cross-examination of these two witnesses, this high burden was not met. Therefore, the conduct of the defendant's counsel was in compliance with the sixth amendment's requirement for counsel to render "reasonably effective assistance given the totality of the circumstances." Strickland, 446 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 674, 693.

III.

Defendants final claim of ineffective assistance of counsel rests on his counsel's failure to compel the attendance of alibi witnesses who refused voluntarily to testify. It is well established that in all criminal prosecutions, the accused shall enjoy the right to compulsory process for obtaining witnesses in his favor. Sixth amendment to the United States Constitution, Constitution of the State of Iowa, article I, section 10.

The defendant contends that the testimony of alibi witnesses was crucial to his case in order to enhance the credibility of the defendant's testimony. However, the defendant's counsel never filed the subpoenas for the witnesses.

We decide that the defendant's counsel did make a reasonable attempt to procure alibi witnesses. Counsel filed a notice of alibi defense on February 8, 1985. However, defendant's counsel had difficulty discovering the identity of these witnesses because the defendant failed to supply their names to his counsel. Also, defendant did make numerous attempts to procure the attendance of the witnesses, though they did not comply with his request for them to testify. Therefore, the defendant's counsel did not fail to perform an essential duty because he made a reasonable effort to supply the named alibi witnesses.

It is also important to note that the trial court ruled that the defendant's counsel's failure to subpoena alibi witnesses was reasonable, due to the fact that the named alibi witnesses were so uncooperative. The trial counsel's strategy may have been that if his own witnesses were not going to cooperate voluntarily, then they would not be much benefit at trial if they were forced to testify. Thus, the decision not to subpoena those witnesses may have been a part of the trial counsel's strategy, and "when counsel makes a reasonable decision concerning strategy, we will not interfere simply because the chosen strategy was unsuccessful." State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984). Rather, "the benchmark for judging any claim of ineffectiveness must be whether the counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result," which was not the case here. Strickland, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692, 693.

Provided, however, that the defendant's counsel's failure to subpoena the alibi witnesses did constitute a failure to perform an essential duty, we still are of the opinion that this failure did not show such prejudice as to deny the defendant the right to a fair and impartial trial. This is due to the fact that the central issue was not how many alibi witnesses the defendant could have testify, but rather the credibility of the State's witness, Mr. Anderson.

Upon viewing the entire record as a whole, the defendant's attorney raised an adequate defense using reasonably acceptable strategies and methods. Therefore, we find that the defendant did not meet the burden of proving that his counsel was so deficient that he did not function as "counsel" guaranteed by the sixth amendment to the U.S. Constitution or the Iowa Constitution, article I, section 10. Also, the counsel's performance was not so deficient as to prejudice the defense so as to deprive the defendant of a fair trial.

For the reasons stated, we affirm.

AFFIRMED.