FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-465 / 90-60

451

STATE OF IOWA,

Appellant,

vs.

MARK ALLEN PARKEY,

Appellee.

Appeal from the Iowa District Court for Polk County, Theodore Miller, Judge.

The State has appealed a court order granting Parkey a new trial. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, James Smith, County Attorney, Catherine Thune and Nan Horvat, Assistant County Attorneys, for appellant.

Jon B. Schuster, Des Moines, for appellee.

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

HAYDEN, J.

Mark Parkey was accused of robbing a hotel desk clerk. According to the State's theory, Parkey left his place of employment during his working hours, drove to the robbery site, committed the robbery, and then returned to his job.

The State's primary evidence against Parkey was the eyewitness identification by the hotel desk clerk who was robbed. The desk clerk had known Parkey before the robbery because Parkey's girlfriend had formerly worked at the hotel. The desk clerk made a positive identification of Parkey.

Parkey presented an alibi defense, alleging he had never left his place of employment on the day in question. He explained his supervisor's failure to see him during part of the crucial time period by asserting he had taken a cigarette break in the employees' locker room.

A jury found Parkey guilty of first-degree robbery.

Following the jury's verdict, Parkey appeared with new counsel and filed a motion for new trial. He alleged his original trial attorney had rendered ineffective assistance by failing to call several of his co-workers as witnesses. Parkey asserted these co-workers would have supported his alibi defense by testifying they had seen him on the job during the time period when the robbery occurred.

The district court agreed with Parkey's ineffective assistance claim and granted his motion for new trial.

The State has appealed the order granting Parkey a new trial. The State contends Parkey failed to establish his original trial attorney rendered ineffective assistance. The State asserts the testimony of Parkey's co-workers would not have helped him much because it was immaterial to the primary factual issue: the positive and highly reliable identification of Parkey by the robbery victim. The State argues counsel's failure to call the co-workers as witnesses did not breach an essential duty and did not prejudice Parkey.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987), quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted.

The defendant in this case was using an alibi defense. The State attempted to show there was a thirty-five minute time gap during which Parkey could not be accounted for. Thus, it was critical for Parkey to show where he was during that thirty-five minute time frame.

Some of the alibi witnesses Parkey wished to rely on had been subpoenaed by the State, but failed to appear for trial. The defense counsel apparently waived their failure to appear and did not seek to obtain their presence at trial. Nor does it appear defense counsel adequately investigated these other witnesses' leads.

Three of the four new alibi witnesses were co-employees with Parkey. Their time punch cards could help establish a solid time frame in which reliable witnesses can identify Parkey as being at his place of employment at the time of the crime.

These new witnesses' testimony directly contradicts that of the State's main witness, the victim of the robbery. The weighing of the reliability of conflicting testimony is a jury question.

The trial court found the defense trial counsel to be ineffective in failing to adequately investigate and present these possibly crucial witnesses' testimony. Not only did trial counsel fail to cause these witnesses to appear at trial, but also failed to insist on their appearance after they initially failed to appear for depositions.

The trial court found this testimony was new evidence justifying a new trial. However, this appears to be a derivative of the ineffective assistance of counsel claim. We believe with adequate investigation by defense counsel and the public defender's investigator this testimony could

have been discovered before trial and the witnesses made to appear at trial.

The trial judge was present throughout these proceedings. He observed the various witnesses at trial and heard their testimony. He observed defense counsel. The trial judge also conducted the post-trial hearing on the ineffective assistance of counsel issue. He was in an ideal place to weigh the credibility of the various witnesses and assess the potential impact of this new testimony on Parkey's alibi defense. He made his decision granting a new trial on the basis of the circumstances before him viewed in the light of his professional and judicial experience.

We determine defense counsel failed to perform an essential duty in not investigating and presenting potentially crucial witnesses. We further determine Parkey has shown 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." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

"The [appellate] court is slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 14(f)(4). The trial court in the present case granted a new trial. We will not interfere with its decision. We affirm the trial court's grant of a new trial on the ground of ineffective assistance of counsel.

AFFIRMED.