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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEE KENNETH SHEETS,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

Filed June 26, 1984

4-100
83-806

Appeal from the Iowa District Court for Union County - Thomas S. Bown, Judge.

Petitioner appeals from the district court's denial of postconviction relief, asserting that he received ineffective assistance of counsel during the 1979 trial that led to his conviction for first-degree burglary and during the subsequent direct appeal. AFFIRMED.

James P. Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SNELL, J.

Petitioner Lee Kenneth Sheets was convicted in 1979 of burglary in the first degree, a violation of Iowa Code section 713.2 (1979). The conviction and sentence were affirmed on appeal. See State v. Sheets, 291 N.W.2d 35 (Iowa 1980). He applied for postconviction relief in 1983, asserting ineffective assistance of counsel. The district court denied his application; he appeals.

On January 16, 1979, shortly after 11:00 p.m., a silent alarm was set off at the Creston Medical Clinic. When police arrived, they observed two men inside the clinic. One man, later identified as Sheets, was seen carrying a handgun. When police entered through the main door of the clinic, they observed a green canvas army bag full of tools lying by the door. Sheets was apprehended outside the clinic soon afterwards. He was unarmed when arrested, but a gun was found hidden in the snow "within arm's reach" of where he was arrested.

Sheets asserts on appeal that evidence of either entry or lack of consent to be on the premises was insufficient to sustain a charge of first-degree burglary. He also contends he was denied a fair trial and due process of law because of the trial court's failure to instruct the jury regarding the lesser included offense of trespass.

Our scope of review for postconviction proceedings is as an action at law, except when there are issues raised as to a constitutional violation. Then we must independently evaluate the totality of the relevant circumstances shown by the record under which rulings on those constitutional rights were made. Evidence relevant to the issue is received de novo. Bledsoe v. State, 257 N.W.2d 32, 33 (Iowa 1977).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising

it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981); Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973); Iowa Code § 663A.8.

Neither of the issues Sheets now brings to our attention were raised at trial or on direct appeal. Thus, these issues may not be litigated in a postconviction proceeding unless Sheets presents sufficient reason for not raising them previously. Washington v. Scurr, 304 N.W.2d at 234; Horn v. Haugh, 209 N.W.2d at 120.

The reason Sheets gives for not raising these issues previously is that he received ineffective assistance of counsel. The ineffective assistance of trial counsel claim was raised for the first time in the postconviction proceedings. Because Sheets failed to raise the issue of ineffective assistance of counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. See Washington v. Scurr, 304 N.W.2d at 235. Sheets' appellate counsel was the same as his trial counsel. Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. Id.; Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). Therefore, we must decide whether Sheets' counsel was ineffective.

Ineffective assistance of counsel would be a violation of a basic constitutional safeguard. Consequently, we make our own evaluation of the claim under the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977). In reviewing an attorney's performance, the defendant has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. We presume counsel was competent. When the claim is premised on the failure of counsel to take some action, the defendant must show that counsel failed to perform an essential duty and that prejudice resulted. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The question is whether the attorney's challenged performance was within the range of normal competency. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). The right to effective

assistance of counsel also applies to counsel on appeal and effectiveness is judged by the same standards. Hinkle v. State, 290 N.W.2d at 31; cf. Anders v. California, 386 U.S. 738, 744-45, 87 S. Ct. 1396, 1400, 18 L. Ed. 2d 493, 498-99 (1967).

Sheets first argues that counsel failed to raise the claim of insufficient evidence at either the trial or on direct appeal. Sheets' trial counsel admitted at the postconviction proceeding that the absence of testimony regarding lack of consent would be a ground for a motion to dismiss and that if the evidence at trial did not include evidence regarding lack of consent, it would be a derilict ion of an attorney's duty not to move to dismiss. Unfortunately, Sheets' counsel does not remember the trial very well and does not remember why he didn't raise the sufficiency of the evidence claim. If we assume, without deciding, that Sheets' counsel failed to perform an essential duty, we next must determine whether prejudice resulted.

In reviewing sufficiency of the evidence:

> the evidence and all reasonable inferences therefrom are considered in the light most favorable to the State. If there is substantial evidence reasonably tending to support the charge the issue should be submitted to the jury. It is necessary to consider only the evidence which tends to support the verdict. However, the State must prove all the essential elements of the charge and any evidence, circumstantial or direct, must be sufficient to raise a fair inference of guilt. It must do more than raise a suspicion, speculation or conjecture. The finding of guilt by the trier of fact is binding on us unless we are satisfied it is without substantial support in the evidence or is clearly against the weight thereof.

State v. Bone, 201 N.W.2d 80, 81 (1972).

Sheets claims there was no evidence, either direct or circumstantial, of either lack of consent or entry from either the law enforcement officers or the occupants of the medical clinic. Although normally it would be better to have either the owner or occupant testify, "[w]ant of consent by the owner or occupant to enter into his premises may be proved by circumstantial evidence." State v. Bone, 201 N.W.2d at 82.

The testimony in this case came from two policemen, one county sheriff, and one member of the Union County Sheriff's Posse. They testified that they responded to a silent alarm set off at the medical clinic. When they arrived at the clinic, they saw two people inside, one of whom was later identified as Sheets. The officers testified that they normally check the clinic several times each night because drugs were kept inside and that the main door of the clinic is normally never open. The main door was unlocked on the night they saw Sheets inside after 11:00 p.m. They also testified that the clinic was not open for business that night. They entered the clinic through the unlocked main door and found a sack of tools in a green canvas army bag left by the main door.

We find this testimony presents circumstantial evidence sufficient to raise a fair inference of guilt and sufficient to allow a jury to find that the elements of lack of consent and entry had been proven by the State without resorting to suspicion, speculation or conjecture. The finding of guilt by the jury is binding on us because we are satisfied it is supported by substantial evidence.

Sheets' second contention in this appeal is that the trial court failed to instruct the jury regarding the lesser included offense of trespass. Our review of this issue is de novo because he contends trial court's error denied him a fair trial and due process of law. See Bledsoe v. State, 257 N.W.2d at 33.

Sheets was convicted of burglary in the first degree, a violation of Iowa Code section 713.2 (1979). In 1978, the Iowa Supreme Court had held that criminal trespass was not a lesser included offense of the 1975 Iowa Code definition of the crime of breaking and entering. See State v. Furnald, 263 N.W.2d 751, 754 (Iowa 1978). Sheets' trial occurred after the Furnald decision, but under the revised 1979 Iowa Code. After Sheets' trial, in 1980, the Iowa Supreme Court held that criminal trespass is an included offense of burglary under the 1979 Iowa Code. See State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). Sheets argues that his trial counsel provided ineffective assistance of counsel by failing to object to and appeal the

trial court's failure to instruct the jury of the lesser included offense of criminal trespass. We do not find Sheets' counsel incompetent for failing to predict the supreme court's interpretation of the new code. See Snethen v. State, 308 N.W.2d 11, 16 (1981). Furthermore, we do not find trial court erred in failing to instruct the jury sua sponte.

Sheets argues that the change in the law should be applied retroactively to his case to avoid denying him due process of law. The Iowa Supreme Court gave no indication that its holding in State v. Sangster would apply retroactively. See 299 N.W.2d at 664. In determining the extent to which a change of law will be made retroactive, we must consider the purpose of the new standards, the reliance which may have been placed on prior decisions on the subject, and the effect on the administration of justice of a retroactive application. "Underlying all of the considerations above is the basic inquiry as to how seriously the invalid prior rule affected the very integrity of the fact-finding process or produced the clear danger of convicting the innocent." State v. Monroe, 236 N.W.2d 24, 38 (Iowa 1975).

We must make "an ad hoc determination whether there is a factual basis in the record for submitting the included offense to the jury." State v. Sangster, 299 N.W.2d at 663 (quoting State v. Furnald, 263 N.W.2d 751, 752 (Iowa 1978)). Sheets claims a criminal trespass instruction would have been warranted on an elemental and factual analysis, but does not give us any guidance on how the facts support a finding of criminal trespass. The State, on the other hand, argues that there was evidence from which the jury could have found that Sheets intended to commit a felony or theft, as burglary is defined, but that there was no evidence to support a finding that Sheets intended to "commit a public offense or to use, remove therefrom, alter, damage, harass, or place thereon or therein anything animate or inanimate." Iowa Code § 716.7(2)(a) (1979).

We do not find that the exclusion of the lesser included offense from the

instructions to the jury "affected the very integrity of the fact-finding process or produced the clear danger of convicting the innocent." State v. Monroe, 236 N.W.2d at 38. The normally-locked main door to the medical clinic, wherein drugs were stored, was unlocked on the night police officers saw Sheets inside the clinic after business hours. No evidence was presented by Sheets to support a theory that Sheets' intent was to do anything or to commit any public offense other than burglary. Thus, there is no evidence under which a rational jury could find that Sheets committed any offense less than burglary. "There is no evidence that the break-in was for purposes other than theft. Under State v. Morgan, 322 N.W.2d 68 (Iowa 1982), defendant was guilty of burglary or he was guilty of nothing." State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). See also State v. Morgan, 322 N.W.2d 68, 71 (Iowa 1982) ("The present record does not contain substantial evidence controverting any of the elements which elevate this crime from assault to robbery. The trial court was correct in refusing to submit the crime of assault . . . .")

AFFIRMED.