IN THE COURT OF APPEALS OF IOWA

No. 3-006 / 91-1739

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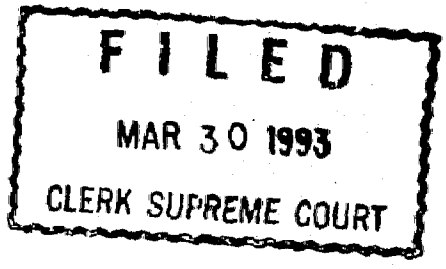
STATE OF IOWA,

Appellee,

vs.

FONSO LAMONT WIRES,

Appellant.



Appeal from the Iowa District Court for Des Moines County, R. David Fahey and D.G. Hendrickson, Judges.

The defendant appeals from his sentences and convictions for attempted murder, first-degree burglary, and possession of burglar tools. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bridget Chambers, Assistant Attorney General; Patrick C. Jackson, County Attorney; and John Jellineck, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

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HAYDEN, P.J.

Defendant Fonso Lamont Wires appeals from his convictions, following a jury trial, for attempted murder, first-degree burglary, and possession of burglar tools.

In the early morning hours of April 26, 1991, the silent alarm was triggered at a discount store in Burlington. The police responded immediately. One of the officers responding to the call was Thomas Walz.

A police radio broadcast informed Walz a possible suspect was running east away from the store. Walz drove his car to the vicinity and saw a man running in an easterly direction by the corner of a building. After Walz lost sight of the man, he drove closer to the building. Before he could turn on his spotlight, Walz heard his windshield break and he turned to see a man in dark clothing fire five shots at his car. One of the shots struck him in the head. Walz saw the man run behind a building and disappear.

Upon hearing shots being fired, Officer David Smith and two other officers proceeded to the area where Walz was located. Walz told Smith the direction the suspect had fled, and Smith went alone after the suspect. Smith then encountered an individual dressed in dark clothing in the area indicated by Walz.

Armed with a shotgun, Smith approached the man and ordered him to the ground. As the officer approached, the man raised his head and moved one arm. The officer again

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told the man not to move or he would shoot. The man was later identified as Fonso Lamont Wires. Officer Smith asked Wires where he had put his gun. Wires told Officer Smith he had thrown it down. Smith retrieved defendant's gun and put it in his back pocket.

Smith then handcuffed Wires and began to search Wires' person. Among other things, Smith found a folding lock-blade knife, two flashlights, and two screwdrivers. Another officer helped Smith remove an ankle holster from beneath Wires' pants leg. Wires allegedly made voluntary statements to the effect "you guys are good, you got me right away" and "you did not give me a chance to escape."

Smith then told Officers Thompson and Hawkinson to take Wires to the police station. Before doing so, they decided to search Wires for a second time. Officer Hawkinson then read Wires his Miranda right. During the search, Wires allegedly made a statement to the effect "I know you're excited because I shot at the guy." Before Wires got into the car, Smith told Wires if he made any wrong moves, he would shoot. Also, during transport, Wires spoke constantly and allegedly made statements like "I'm a pretty good shot" and "I would have got you guys if I wanted."

On May 3, 1991, the State filed a trial information charging Wires with attempted murder, first-degree burglary, possession of burglar tools, third-degree theft, and possession of a firearm by a felon. Later, the State amended the information to exclude the last two charges.

Due to pretrial publicity, Wires filed a motion for change of venue. The district court granted the motion and transferred venue from Des Moines County to Henry County.

Wires also filed a motion to suppress the statements he made after his encounter with Officer Smith. At a suppression hearing, Wires testified he was never given his Miranda warnings. The district court determined Wires' statements were voluntary and overruled the motion.

In addition, Wires filed a motion in limine seeking to prevent the State from introducing evidence concerning his prior convictions. Wires based his motion on Iowa Rule of Evidence 609 and the Fifth and Fourteenth Amendments. The district court granted the motion.

After closing arguments, the jury returned a verdict of guilty. Wires then filed a pro se motion for new trial alleging, inter alia, he was denied a fair and impartial trial due to pretrial publicity and the jury's knowledge of the plea bargain he entered into and later withdrew. The district court overruled the motion. The district court sentenced Wires to two consecutive twenty-five-year terms and one concurrent ten-year term. The court also imposed the five-year minimum for use of a firearm. Wires appeals.

I. Motion in Limine.

Wires contends the trial court erred in overruling his motion for mistrial based on an alleged violation of a pretrial motion in limine. The district court had granted defendant's motion in limine, which requested the State be

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prohibited from introducing testimony of defendant's prior convictions pursuant to Iowa Rule of Evidence 609.

We review this alleged error for an abuse of discretion by the trial court. A trial court has considerable discretion in ruling upon motions for mistrial. State v. Brown, 397 N.W.2d 689, 699 (Iowa 1987) (citations omitted). The trial court's ruling will not be set aside except upon a clear showing of abuse of discretion. State v. Staker, 220 N.W.2d 613, 617 (Iowa 1974).

At trial, the State introduced the testimony of Terry Liggett, a cellmate of Wires during April and May of 1991. Liggett testified Wires told him he burglarized the discount store and shot at a police car. In addition, Liggett testified Wires had told him he was scared because he was on parole and was afraid of going back to prison.

Defense objected to Liggett's statements and made a motion for new trial on the ground the testimony violated the motion in limine. The district court overruled the motion for new trial. We conclude the admission of testimony was not so egregious as to constitute an abuse of discretion. We affirm the district court on this issue.

II. **Motion to Suppress**. Wires contends the district court erred in overruling his motion to suppress. Wires sought to suppress statements he made after being taken into custody. Wires alleges he made such statements before receiving his Miranda rights. Defendant claims the officers' words and actions elicited incriminating

responses and created the "functional equivalent" of interrogation. Wires argued his statements were not voluntary.

Our scope of review of the district court's ruling on the motion to suppress is de novo. State v. Scott, 409 N.W.2d 465, 468 (Iowa 1987). We evaluate the totality of the circumstances. State v. Hilpipre, 242 N.W.2d 306, 309 (Iowa 1976). The State bears the burden of proving by a preponderance of evidence defendant's statements were voluntary. State v. Conger, 434 N.W.2d 406, 408 (Iowa App. 1988).

Defendant's statements must be suppressed if made before defendant has received Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Miranda safeguards are not triggered, however, unless an individual in custody is subjected to interrogation. Rhode Island v. Innis, 446 U.S. 291, 300-02, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297, 307-08 (1980); Davis, 446 N.W.2d at 788 (citations omitted). Custodial interrogation occurs after a person has been taken into custody or otherwise deprived of his freedom in any way, and consists of either express questioning or any words or actions initiated by the police that the police should know are reasonably likely to elicit an incriminating response. State v. Davis, 446 N.W.2d 785, 788 (Iowa 1989) (citations omitted). An incriminating statement is considered voluntary if it is not extracted by

threats, obtained by direct or implied promises, or obtained by any improper influence. Id. at 787 (citing State v. Chambers, 39 Iowa 179, 182 (1874)); see United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987).

The issue is whether the words and actions of the police officers constituted the functional equivalent of interrogation such that the officers were required to read defendant his Miranda rights. The following statements and actions were made with regard to the apprehension of defendant. Officer Smith initially spotted the suspect walking briskly away from the scene. Smith, who was alone, immediately told Wires to get to the ground. As defendant lay on the ground, Smith approached. When Wires moved his head and arm, Smith again had to tell him not to move and warned he would shoot if Wires moved another time.

The officer then asked defendant what he had done with his weapon. Smith retrieved defendant's gun and proceeded to handcuff him. The officer's question and defendant's response regarding the location of the gun are not subject to a Miranda analysis because the statements fall under the public emergency exception. This exception provides for the admission of such statements. New York v. Quarles, 467 U.S. 649, 655-56, 104 S. Ct. 2626, 2631, 81 L. Ed. 2d 550, 557 (1984).

Before taking defendant to the squad car, an officer warned defendant if he did anything wrong, he would shoot him. When defendant was asked his name, he swore at the

officer and failed to give his name. Officer Smith testified defendant made a statement like "You guys are good. You were on me right away. You didn't give me a chance." Smith testified he told Wires to shut up several times but Wires failed to follow his order.

Officer Hawkinson testified he read Wires his Miranda rights before a second search of defendant's person was conducted. The statements made by Wires prior to receiving Miranda rights are admissible because the officers' statements and conduct did not constitute interrogation or its functional equivalent. *In the absence of* interrogation, the safeguards of Miranda are not triggered. Innis, 446 U.S. at 300-02, 100 S. Ct. 1689-90, 64 L. Ed. 2d at 307-08. We find the statements or conduct of the police officers, which occurred prior to Miranda, did not go beyond measures of coercion normally associated with custody, especially custody of an armed felony suspect who had just shot an officer.

Even if Wires was in custody at the time he made the statements and had not yet been told of his Miranda rights, the statements are admissible because they were not the *result of custodial interrogation or its functional* equivalent. "Absent coercion, spontaneous statements volunteered by a defendant [outside the scope of any police interrogation] are admissible even when Miranda warnings are required but not given." Davis, 446 N.W.2d at 790 (citing State v. Youngbear, 229 N.W.2d 728, 736 (Iowa),

cert. denied, 423 U.S. 1018 (1975)). We determine Miranda safeguards were not triggered because Wires had not been subjected to interrogation or its functional equivalent. Wires' statements were not the product of coercion.

After being read his Miranda rights, Wires continued to "run off at the mouth" by making voluntary statements. We determine these statements were made voluntarily and were properly received into evidence. We affirm the district court on this issue.

III. ***Ineffective Assistance of Counsel.*** *Wires claims* his trial counsel rendered ineffective assistance by failing to object to improper statements made by the prosecutor in closing argument and in failing to develop an adequate record during voir dire.

During the State's closing argument, the prosecutor referred to Wires as an "animal" on several occasions. Defense counsel made no objection.

Wires also claims his trial counsel breached an essential duty by failing to record voir dire. Wires claims this prejudiced him because he is unable to substantiate his claim the jury knew of his plea bargain and its subsequent withdrawal. Wires also claims his trial counsel should have objected, on the record, to the composition of the jury and the method by which it was drawn. He claims he was prejudiced because he was an African-American tried by a jury without minority representation.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841 (1982). When the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the claim for postconviction proceedings so the facts may be developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984) (citing Mulder, 313 N.W.2d at 890). We decline to address Wires' ineffective assistance of counsel claim at this time because the record before us is inadequate for an informed decision. We preserve defendant's ineffective assistance of counsel claim for possible postconviction proceedings.

AFFIRMED.

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