IN THE COURT OF APPEALS OF IOWA

No. 2-008 / 90-1838

FILED
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CLERK SUPREME COURT

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DONALD KEITH BRITT,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Judge.

Defendant appeals a judgment of the district court dismissing his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; and Richard Crowl, Assistant County Attorney, for appellee.

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

HABHAB, J.

On June 22, 1989, the State filed a trial information charging the defendant, Donald Britt, with operating a motor vehicle without the owner's consent in violation of Iowa Code section 714.7 (1989). On June 3, 1989, the State filed a second trial information charging Britt with theft in the second degree pursuant to Iowa Code section 714.2(2) (1989). On July 10, 1989, Britt plead guilty to theft in the second degree, and on that same day the district court entered judgment and sentenced Britt to serve a term of imprisonment not to exceed five years. On October 10, 1989, Britt filed an application for postconviction relief. Britt amended the application on June 14, 1990, and the district court denied the application on November 1, 1990. Britt subsequently filed a notice of appeal.

Britt maintains his plea was involuntary since counsel failed to inform him concerning the potential challenge to the allegedly-amended trial information. Britt maintains the State did not have the authority to amend the trial information since the charge constituted a wholly new and different charge. The theft charge is a felony, Britt points out, but the charge of operating a vehicle without the owner's consent is an aggravated misdemeanor. Britt also contends trial counsel was ineffective in failing to file a notice of appeal.

The State, however, maintains that Britt was charged on June 15, 1989, in a criminal complaint with theft in the second degree. The State points out that in his initial appearance, Britt told his counsel he would be willing to waive extradidtion to Michigan if Iowa would dismiss the present charge. Counsel approached the the prosecutor, who stated he would be willing to file a charge of operating a motor vehicle without the owner's consent, to which he could plead guilty, and also waive extradition. The defendant rejected the offer, but defense counsel failed to inform the prosecutor of that decision immediately. The next day, the prosecutor filed its first trial information charging the defendant with operating a motor vehicle without the owner's consent.

During the arraignment, however, the public defender stated for the record the prosecutor had agreed to file the first trial information on the condition the defendant plead guilty and waive extradition. Counsel then stated the defendant had rejected the plea agreement. The State subsequently argued that in light of the defendant's rejection of the plea offer, it would either amend its trial information to charge second-degree theft, or file a new trial information. The State points out the defendant was present at this hearing. On July 3, 1989, the State filed a new trial information which charged second-degree theft. In return for this plea the State agreed not to pursue an habitual offender charge.

The State maintains this resulted in their filing a new trial information, not an amended one. The State argues that even if the public defender provided ineffective assistance, there was no prejudice since the defendant was present at the hearing and knew the State was going to charge him with second-degree theft. The State argues that the defendant did not change his trial strategy, but simply pleaded guilty to the crime for which he was originally charged. The State also maintains there is no merit to the defendant's arguments that trial counsel was ineffective for failing to file an appeal, since the testimony at the postconviction hearing revealed counsel could find no basis on which a successful appeal could be had. Even assuming counsel did breach a duty, the State argues there was no prejudice since the only issue that could have been presented on appeal would have been the propriety of the second trial information.

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

that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

Our review of the record indicates a new trial information, rather than just an amendment, was filed. We determine Britt has failed to carry his burden on either of the two prongs of the test for ineffective assistance. We find all Britt's assignments of error to be without merit.

We affirm the trial court on all issues.

AFFIRMED.