IN THE COURT OF APPEALS OF IOWA

No. 7-070 / 96-0150

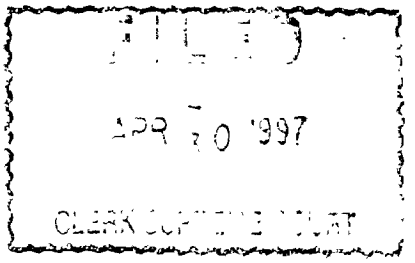
RAYMOND LEE SPEARS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for North Lee County, R. David Fahey, Judge.

Raymond Spears appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Susan A. Diehl of Tom Riley Law Firm, P.C., Burlington, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Michael Short, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Huitink and Streit, JJ.

HABHAB, C.J.

Following a bench trial, Raymond Spears was found guilty of second-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(2) (1991) and found to be an habitual offender in violation of Iowa Code section 902.8 (1991). Spears allegedly stole a 1984 Camero from John Calloway. His defense at trial was that he was given the Camero by Calloway as payment for fixing it. He was sentenced to a term of incarceration not to exceed fifteen years. On direct appeal, his conviction was affirmed, per curiam. *See State v. Spears*, No. 92-1458 (Iowa App. Nov. 1, 1993).

On February 3, 1994, Spears filed a pro se petition for postconviction relief. Counsel was later appointed and the court granted a request for the appointment of a private investigator.

At the hearing on November 8, 1995, Spears' trial counsel testified he did not think it was necessary to use a private investigator. He explained he contacted or attempted to contact each of the potential witnesses suggested by Spears. He subpoenaed Gregg Karr and first spoke with him the day of the trial. Trial counsel was not aware Spears was taking antipsychotic medication. Additionally, he did not have knowledge of Calloway's mental condition and prior inconsistent statements. Trial counsel explained Spears voluntarily signed an affidavit stating he was satisfied with his representation.

Spears testified his trial counsel was inaccessible and failed to contact witnesses. He also stated he was taking medication for depression and relied on his counsel's representations regarding waiver of his right to a jury trial.

Spears' mother, Marilyn, testified Spears' trial counsel (or someone from his office) told her that her testimony was not needed at trial. She testified she had advanced Spears $500 to fix the Camero and took him to work on the car three times. She also discussed a visit she had with Calloway after Spears' arrest and she described him as "kind of strange." Apparently, Calloway denied knowing Spears and reported to police that Marilyn threatened him.

Joshua Spears, Spears' son, testified about the work Spears had done on the car and that he was present when Calloway told Spears he could have the car as payment for "some debt." Joshua stated he did not recall speaking with Spears' trial counsel.

The postconviction court denied Spears' application. It determined Spears failed to prove he was prejudiced by his counsel's alleged failure to obtain an investigator and/or complete a thorough investigation because of the overwhelming evidence against him. It also determined the additional witnesses would have only provided cumulative testimony. Spears appeals.

When a defendant asserts a violation of a constitutional right, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A defendant bears the burden

of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel failed to perform an essential duty; and (2) he was prejudiced by counsel's omission. *Id.* at 561-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

We generally afford counsel a presumption his conduct fell within the broad range of professional competence. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result. *Wissing*, 528 N.W.2d at 563.

The record reveals that trail counsel met with Spears on four occasions before trial. He had at least four or five telephone conferences with him and kept in touch through frequent correspondence. He determined the use of a private investigator was not necessary. He also discussed potential witnesses with Spears. He subpoenaed Karr and interviewed him before he testified. He explained Spears' mother did not

seem interested in testifying and Spears made no request for the testimony of additional witnesses.

Although Spears maintains Calloway's credibility could have been impeached in several ways, trial counsel did not attempt to impeach Calloway at trial. Through trial counsel's examination, the extensive repairs to the Camero were set out and Calloway testified he only owed Spears $30 for all of the repairs. Trial counsel also alleged Calloway gave Spears the car and then reported it stolen in an attempt to defraud the insurance company to receive reimbursement for the value of the car.

We find defendant has not met his burden of showing ineffective assistance. Spears was not entitled to perfect representation, rather, only that which falls within the normal range of competency. *Rice*, 543 N.W.2d at 888. Counsel did not breach an essential duty to Spears by failing to call additional witnesses or by failing to more thoroughly impeach Calloway. Moreover, although it is true trial counsel did not know Spears was taking antipsychotic medication, Spears has not shown he was prejudiced by his counsel's failure to have this information.

The evidence against Spears was strong. He was found passed out in the backseat of the Camero by two Lee County deputy sheriffs. The car was in a ditch just outside Fort Madison, Iowa. He was clearly intoxicated when the officers found him. The car had expired temporary Kansas plates. When the officers asked Spears his name, he misleadingly informed them his name was Terry Joe Wiese. He also told

the officers he had just been in Gulfport, Illinois. He explained while in Gulfport he had run into a friend, Dan Thompson, who owned the Camero. He told the officers Thompson had offered to give him a ride to Burlington, Iowa, where Spears was allegedly residing with Richard Meyer.

Officers then contacted Meyer. Meyer's girlfriend informed officers she did not know a Terry Joe Wiese, but did know a Roy Bird. Officers questioned Spears and he informed them he had used that name. Subsequently, the officers located the actual Terry Joe Wiese, who informed them Spears was his brother and was probably attempting to use his identity. Only after being confronted with this information did Spears reveal his true identity to the officers.

At trial, the officers testified the car had been recently repainted brown. There was spray paint on the windshield and masking tape on the parking lights. The car was originally red and the doorjambs had not been repainted. The vehicle identification number had been removed from the lid of the console in the car's interior and also from the right front inner fender well.

Spears completely changed his story during his direct testimony at trial. He testified the $3200 Camero had been given to him for the payment of a $500 debt owed to him by Calloway. He explained Calloway told him he could not afford to put more money into the car and he could have it. He stated he painted the car brown to fix it up to give as a birthday gift to his son.

Spears claimed he and Greg Karr arranged for Dick White to tow the vehicle from Calloway's residence in Iowa City to Harper, Iowa. Calloway allegedly gave Spears the keys and told him to come back the following week to pick up the title. Spears explained that as he did not have a license, Thompson agreed to drive him home to Burlington. He stated he and Thompson were driving and the next thing he remembered was being awakened by the Lee County deputy sheriffs.

On cross-examination, Spears again changed his story. He stated the brown Camero was never in Gulfport, Illinois on April 16, 1992, and that he lied to the deputies. He also admitted he lied about Thompson's ownership of the Camero.

In our de novo review of the record, we find given the weight of the evidence against Spears and the numerous inaccuracies and varying accounts given by him, he has not met his burden of showing trial counsel rendered ineffective assistance. Spears has not shown trial counsel breached any essential duty or that he was prejudiced by trial counsel's representation to the extent our confidence in the outcome of the trial is undermined. There is no reasonable probability that but for these alleged errors, the result of the trial would have been different.

AFFIRMED.