

IN THE COURT OF APPEALS OF IOWA

No. 5-355 / 94-1564

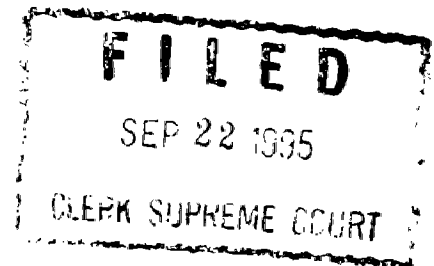
STATE OF IOWA,

Plaintiff-Appellee.

vs.

TERRY MONROE DELP,

Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Terry Delp appeals from his conviction, following a jury trial, of second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant County Attorney for appellee.

Considered by Sackett, P.J., and Hubbs and Cady, JJ.

CADY, J.

Terry Delp appeals from his conviction for second-degree robbery. We must determine whether inculpatory statements by Delp were voluntarily made to police or induced by a promise of leniency. The district court denied Delp's motion in limine and admitted the statements at trial. Upon our review, we affirm.

Victoria LaBayre was working at a Kwik Shop in Davenport on the night of March 27, 1994. A white male entered wearing dirty work gloves, red sweat pants, and a blue stocking cap pulled down to his eyebrows. The man laid a pack of cigarettes on the counter and handed LaBayre a five-dollar bill. When LaBayre opened the register, the man grabbed for the cash. LaBayre tried to close the drawer on his hand, but the man pushed her away. The man then grabbed the cigarettes and ran.

A surveillance camera captured the incident. The police made still photographs of the suspect from the tape. They then constructed "wanted posters" from the still photographs and displayed them in Kwik Shops.

As a result of the "wanted posters," police received an anonymous tip implicating Delp. Detective Thomas compared a photo of Delp with the Kwik Shop photos and obtained a warrant to search Delp's residence. The search resulted in the seizure of a pair of red sweatpants, marijuana, and some drug paraphernalia. Police arrested Delp on April 27, 1994. Thomas attempted to interview Delp regarding the Kwik Shop robbery, but Delp invoked his right to counsel. Later that day, LaBayre

identified Delp from a photo array, and the State charged Delp with second-degree robbery and possession of a schedule I controlled substance.

On May 5 Thomas brought Delp to the police department to provide an alibi statement as part of an investigation of an unrelated robbery involving Rudy's Tacos. According to Thomas, Delp offered to provide information on the commission of a robbery at the Super 8 Motel in exchange for a reduced charge in the Kwik Shop robbery, and then confessed to the Kwik Shop robbery.

On August 4, 1994, the State filed additional minutes of testimony which alluded to the confession. In response, Delp filed a motion in limine seeking to suppress the alleged confession. This motion was filed August 11, only five days prior to the scheduled trial date. After hearing arguments from counsel, the court ultimately held an Iowa Rule of Criminal Procedure 104 hearing.

At the hearing, Thomas testified that Delp was also considered, at the time of his arrest, to be a suspect in the robberies of Rudy's Tacos and the Super 8 Motel. When officers later obtained information clearing Delp in the Rudy's Tacos robbery, Thomas asked Delp to provide an alibi statement for use in the trial against the perpetrators.

At some point in the conversation, Thomas claims Delp offered to provide information on who committed the Super 8 robbery in exchange for a reduced charge in the Kwik Shop case. Thomas indicated Delp was advised he would have to give a truthful statement on his involvement in the Kwik Shop case. Thomas testified county

attorney, **Realff** Ottesen, agreed to allow Delp to plead guilty to fifth-degree theft and assault in exchange for truthful information on the Super 8 robbery. Thomas stated they could not reach Delp's attorney, but Delp wanted to go forward with the statements so he could be released. Delp then allegedly gave statements implicating others in the Super 8 robbery and confessed to the Kwik Shop robbery.

Thomas claimed the "deal" fell through when it became apparent Delp lied about his own involvement in the Super 8 robbery. Thomas believed he had videotaped the interview with Delp but the tape was lost. Thomas also thought Delp executed a waiver of counsel form, but the form could not be found. Thomas did not have Delp sign a statement on the Kwik Shop robbery because he believed he had videotaped it.

Delp testified that the only deal was for decreased charges on the Kwik Shop robbery in exchange for information leading to arrests in the Super 8 robbery. He denied confessing to the Kwik Shop robbery and claimed he asserted his right to counsel.

The district court found Delp's statements were voluntary and denied Delp's motion in limine. A jury found Delp guilty of second-degree robbery, assault, and possession of a schedule I controlled substance.

Delp appeals. He claims the district court erred in refusing to suppress his confession because it was involuntary and given in response to a promise of leniency. He also maintains his trial counsel rendered ineffective assistance by failing to file a

motion to dismiss due to the State's failure to comply with the cooperative agreement.

I. Preservation of the Issue

Before reaching the merits of Delp's challenge to the admission of the alleged confession, we must determine if the issue was preserved for appeal. Delp did not file his motion in limine within the time limit established in Iowa Rules of Criminal Procedure 10(3) and 10(4). Thus, the State maintains Delp waived his challenge.

The belated filing of a motion to suppress is ordinarily a sufficient basis for us to uphold the trial court's ruling admitting the statements, even though the State did not argue waiver and the trial court did not base its ruling on late filing. *State v. Rhiner*, 352 N.W.2d 258, 261 (Iowa 1984) (citing *State v. Beeman*, 315 N.W.2d 770, 778-79 (Iowa 1982)). Here, however, Delp's late filing was in response to the State's belated addition to the trial information. Under these circumstances, the trial court may have found good cause for the late filing. We conclude the issue was preserved for review.

II. Voluntariness of Statement

In reviewing Delp's claim that his statements were involuntary, we make an independent, de novo review of the totality of the circumstances. *State v. Whitsel*, 339 N.W.2d 149, 153 (Iowa 1983). Statements are deemed voluntary if they were "the product of an essentially free and unconstrained choice, made by the defendant at a time when his will was not overborne nor his capacity for self-determination critically impaired." *State v. Foell*, 512 N.W.2d 809, 812 (Iowa App. 1993) (quoting

State v. Snethen, 245 N.W.2d 308, 315 (Iowa 1976)). Statements are involuntary if they are induced by threats or promises of leniency by a person in authority. *State v. Davis*, 446 N.W.2d 785, 788 (Iowa 1989); *State v. Hodges*, 326 N.W.2d 345, 348 (Iowa 1982).

An officer may encourage a suspect to tell the truth. *Hodges*, 326 N.W.2d at 349. However, the line between admissibility and exclusion is crossed if the officer also tells the suspect what advantage is to be gained or is likely from making a confession. *Id.*

In this case, whether the line between admissibility and exclusion has been crossed turns on the credibility of Thomas' and Delp's testimony. Thomas testified that Delp initiated the conversation regarding leniency on the Kwik Shop robbery in exchange for information about the Super 8 robbery. While Delp admitted that during the conversation with Thomas he asked about the possibility of dismissing the second degree robbery charge in the Kwik Shop case, he contends that his question was prompted by Thomas' statement that had Delp been "straight" from the beginning only a theft charge would have been filed.

Following the evidentiary hearing, the trial court explicitly found Thomas' testimony, concerning the circumstances under which the confession arose, more credible. When resolution of factual issues depends on the credibility of witnesses, we give particular weight to the fact findings of the trial court. *State v. Parkey*, 471

N.W.2d 896, 897 (Iowa 1991). Considering all the circumstances present here, we conclude Delp's statements were voluntary.

III. Ineffective Assistance of Counsel

Delp also claims he was denied effective representation by counsel. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result was challenged." *Foell*, 512 N.W.2d at 813. In examining counsel's conduct, we review de novo the totality of the relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The defendant bears the burden of proving by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Id.* at 131-32.

Delp asserts his trial counsel was ineffective because he failed to file a motion to dismiss the trial information after the State allegedly violated the cooperative agreement between itself and Delp. We need not reach the issue of counsel's performance, as we conclude no prejudice occurred. *See Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). A trial court is given discretion in ruling on a motion to dismiss as a remedy for the repudiation of a plea agreement. *State v. Hovind*, 431 N.W.2d 366, 368 (Iowa 1988). Its decision is controlling in the face of conflicting evidence. *Id.* We do not review de novo. *Id.* In this case, the trial court rejected Delp's claim of repudiation in response to his pretrial motion in limine. Thus, any request to dismiss based on the same claim

would also have been denied, and no prejudice could have resulted from the failure to file a motion to dismiss. **AFFIRMED.**

Habhab and Cady, JJ., concur; Sackett, P.J., specially concurs.

SACKETT, J. (concurring specially)

I concur specially. I reluctantly concur with the majority on the issue of admission of defendant's alleged confession. Thomas, a police officer, testified defendant orally confessed to the robbery. Defendant denied he confessed. Defendant, prior to the alleged confession, had invoked his right to an attorney. The officer testified he believed defendant signed a waiver of counsel prior to giving the oral confession. The officer testified he did not get a written confession because the confession was videotaped. The officer could not produce either the waiver of counsel or the videotape. The trial court found the officer's version of the facts more credible. I have a problem with the fact the two pieces of evidence which would corroborate the officer's version of the facts cannot be found. The preservation of the integrity of our system of justice demands such evidence be carefully preserved because the failure to do so creates a suspicion that evidence was manufactured by the officer. The trial court made a credibility assessment, and I rely heavily on that assessment and the other overwhelming evidence of guilt in voting to affirm.

I concur with the majority in denying defendant's claim of ineffective assistance of counsel.