FILED
FEB 26 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed February 26, 1986
vs.	)	347
ROBERT WINFIELD SCOTT, JR.,	)	5-599 85-373
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Des Moines County (CRF3401-1084) - John C. Miller, Judge.

Defendant appeals his conviction of second-degree burglary and possession of a controlled substance. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General; William Dowell, Des Moines County Attorney, and William G. Brewer, Assistant Des Moines County Attorney, for plaintiff-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

Defendant appeals his conviction of second-degree burglary and possession of a controlled substance. He contends that 1) the trial court erred in ruling defendant could not present witnesses to establish diminished responsibility, and 2) counsel was ineffective in failing to file a timely motion concerning his defense. We affirm.

In October 1984, Robert Scott was charged with burglary in the second degree and possession of a controlled substance. He was arraigned on October 22, 1984.

On January 3, 1985, Scott filed an untimely notice of a diminished responsibility defense. The following day, trial counsel informed the court that Scott no longer wished to plead guilty and wanted to proceed to trial. He therefore filed a notice of defense witnesses in support of his diminished responsibility defense. The State resisted, arguing, inter alia, that it would be prejudiced by the late motion.

Following a hearing on the matter, the trial court ruled that because Scott's notice was untimely he would not be allowed to present witnesses concerning diminished responsibility. Defendant reasserted his motion at trial and the motion was overruled.

At trial, defendant testified as to the medical and psychiatric problems he suffered after an automobile accident. He subsequently made an offer of proof of the testimony of his mother, the substance of which went to his brain-damaged condition.

The jury returned a verdict finding defendant guilty as charged. He was sentenced to serve a term of imprisonment not to exceed ten years on the burglary conviction and to a six-month term on the possession conviction, sentences to run concurrently. Defendant appealed.

Scott argues that the trial court erred in failing to allow him to present witnesses concerning his diminished responsibility defense.

Pursuant to the Iowa Rules of Criminal Procedure, defendant was required to file notice of his intent to rely upon diminished responsibility within 40 days of arraignment. Iowa R. Crim. P. 10(4), 10(11)(b)(1). If notice is untimely, evidence cannot be offered on the issue without "leave of court for good cause shown." Iowa R. Crim. P. 10(11)(d). However, defendant is not precluded from presenting his own testimony in support of the defense. Iowa R. Crim. P. 10(11)(d).

A determination of good cause is within the trial court's discretion. State v. Taylor, 336 N.W.2d 721, 724 (Iowa 1983). We will not find an abuse of discretion unless it is shown that "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)). In the present case, this standard has not been satisfied.

Scott claims good cause exists because defense counsel was not notified of the defense until January 1985 and because the State suffered no prejudice. We disagree.

Although defense counsel claimed to have known about the defense only a few days before trial, Scott should have known of it long before the deadline to file had expired. See State v. Christiansen, 323 N.W.2d 219, 223-24 (Iowa 1982). Furthermore, it was within the trial court's discretion to determine that the delay would prejudice the State's ability to rebut the defense.

Defendant has failed to demonstrate an abuse of discretion by the trial court in denying his untimely request to present witnesses on his diminished responsibility defense. Accordingly, we affirm.

Scott also argues that trial counsel was ineffective in failing to file a timely notice and obtain expert testimony in support of his defense.

When examining a claim of ineffective assistance of counsel, we must consider the totality of the circumstances and determine whether counsel's performance was within the normal range of competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). The record before this court is not adequate for making this determination. We are hesitant to make what would amount to an ex parte decision. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); see also State v. Whitsel, 339 N.W.2d 149, 157 (Iowa 1983).

We conclude that the issue of ineffective assistance should be reserved for postconviction proceedings.

AFFIRMED.