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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM GILLETTE,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

Filed November 20, 1984

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4-362
83-1384

Appeal from the Iowa District Court for Black Hawk County—William G. Klotzbach, Judge.

Petitioner appeals from denial of his application for postconviction relief from his conviction for robbery in the first degree, asserting that he was denied effective assistance of counsel by trial counsel's failure to attack identification evidence gained by a showup procedure. The State contends in part that the showup was not impermissibly suggestive and that petitioner was not prejudiced. AFFIRMED.

W. H. Gilliam, Waterloo, for petitioner-appellant.

Thomas J. Miller, Attorney General and Rebecca L. Claypool, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

Nature Of The Case

Appellant, William Gillette, appeals from a trial court ruling which denied appellant's petition for postconviction relief pursuant to Code of Iowa chapter 663A (1983). The appellant alleged, among other things, that he was denied effective assistance of counsel. The State answered the petition and denied the allegation of ineffective assistance, and the case went to trial. Judgment was entered, after briefs and argument, on September 16, 1983.

Statement Of Facts

Petitioner was charged and convicted in the underlying criminal action with the crime of robbery in the first degree. The conviction was subsequently upheld by this court. The facts underlying the conviction were that the appellant entered a Seven-Eleven convenience store in Waterloo, Iowa at 3:30 a.m., on June 10, 1979. One of the clerks who was on duty that night was a gentleman by the name of Kris Ray Cobb. The appellant, Mr. Gillette, on entering the store and allegedly stated, "This is a robbery . . . open the cash register." Kris Cobb noted that the robber had a pocket-knife in hand. Mr. Cobb opened the register, removed the paper currency and handed the money to the robber. The cash included two halves of a one-dollar bill which had been taped together, and a two-dollar bill.

A police officer testified that while on patrol with his partner they observed a man fitting the description of the robber. This man was running toward a light-colored station wagon driving in the vicinity. The car stopped at a red light and the suspect got in. The police officers stopped the car shortly thereafter and the suspect got out of the car. The driver of the station wagon was the appellant's brother. In a statement given to an assistant county attorney, the brother Chester Gillette, stated that William Gillette got into his car and shortly thereafter stated that Chester should hide a brown paper sack because it contained money from a store that he had just robbed. The police officers brought the appellant back to

the Seven-Eleven store and conducted what is known as a showup identification procedure. At the time of the robbery, the robber had a brown shirt tied around his face, making a conclusive identification based solely on facial characteristics difficult. Mr. Cobb, the witness-victim, based his identification at the showup procedure on voice characteristics, physical stature and a description of the robber's clothing. Trial counsel for the appellant failed to file a motion to suppress the evidence obtained pursuant to this showup identification procedure. Following a jury trial, the appellant was found guilty of first degree robbery. In the subsequent appeal to the Iowa Supreme Court, transferred to the Iowa Court of Appeals, trial counsel did not assign this issue as error.

Issue: Whether appellant was denied effective assistance of counsel, where defense counsel failed to attack a showup identification as unnecessarily suggestive, and failed to raise such an issue on direct appeal.

This is an issue of constitutional dimensions as appellant has made claim that he was denied his fundamental right to due process under the Fourteenth Amendment. The amendment operates, in part, to assure a state criminal defendant of effective representation by counsel whether the attorney is one of the accused's own choosing or appointed to serve him by the court. In reviewing a claim of ineffective assistance of counsel, where the defendant is asserting that his constitutional rignt to a fair trial has been violated, we make an independent evaluation based on the totality of the circumstances - the equivalent of a de novo review. State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984).

In this appeal, the appellant bases his claim of ineffective assistance of counsel on the fact that his court appointed attorney failed to file a motion to suppress the results of a showup identification procedure conducted by police officers shortly after the robbery took place. Appellant avers that the showup procedure was unnecessarily suggestive. In addition, the appeal is based on

counsel's failure to raise this issue on direct appeal. When a defendant relies on a specific act or omission of counsel, such as the failure to attack the results of a showup identification by filing a motion to suppress or to raise the issue on direct appeal, the defendant must show that: 1) counsel failed to perform an essential duty, and 2) prejudice to the defendant resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Miles, the Iowa Supreme Court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152 170, 102 S. Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982). Essentially, the Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (emphasis in original). Id. The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982).

On review of the fifth circuit's decision in Strickland, the United States Supreme Court enunciated this test for prejudice which is more stringent than the standard employed in the lower court decision: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). The court further stated that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at ___, 104 S. Ct. at 2069, 80 L.Ed.2d at 698. Prejudice cannot be found unless error constitutes a denial of the accused's fundamental right to a fair trial, a fundamental miscarriage of justice or some equivalent constitutional deprivation. Miles at 234. The test for prejudice suggests the proper allocation of the burden of proof on the issue of prejudice. In order to sustain that burden, the petitioner must

show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt. Thus, even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel. Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982), cert granted, U.S. 103 S. Ct. 2451, 77 L.Ed. 1332 2d (1983)(emphasis in original). The Iowa Supreme Court has stated that "[t]he required examination should proceed while resisting, in the light of hindsight, the temptation to Monday morning quarterback the lawyer in the arena nor should the inquiry degenerate into a postmortem, microscopic dissection of each desperate effort of counsel to save a terminal case." Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

Finally, we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Taylor v. State, No. 83-223, slip op. at 4 (D. Iowa July 18, 1984). We need not "approach the inquiry in the same order or even address both components of the analysis if the defendant makes an insufficient showing on one. . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed. Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2069-70, 80 L.Ed.2d 674, 699 (1984).

In the case before us, the would-be robber was brought before the victim by police for a showup identification. As the victim testified, the identification occurred about one hour after the conclusion of the robbery. The police handed the victim a brown shirt and two knives and asked if he could identify them. The victim recognized the shirt as being the same color and same material as one used by the robber to cover his face. One of the knives was identified as the weapon used in the commission of the robbery. It was identified by the distinguishing brown marks appearing on the blade. The victim testified that he estimated that five (5) minutes elapsed from the time the robber entered the Seven-Eleven store and until he left with the money from the cash register in his possession. As stated earlier, the cash was distinguishable by the presence of a two-dollar bill, and by a one-dollar bill which had previously been torn apart but taped together by the victim. The store clerk-victim, Kris Cobb, described the individual that robbed him as follows: ". . . about 5' 6", weighing approximately 140 to 150 pounds, right around in there, had black hair, was sort of a small build, not a husky guy or anything, just sort of skinny. . . [H]e had on a blue pair of pants, dark blue, and a white T-shirt, and he also had a brown shirt wrapped around his face."

Mr. Cobb, in his testimony, described how he turned around and faced the robber at the start of the robbery. He noticed the knife that the robber held in his hand. Cobb conversed with the robber. The lighting conditions in the store were favorable to obtaining an accurate description of the robber.

The police officers asked Mr. Cobb to view the suspect as he sat in the back of the patrol car. Cobb made an unwaivering positive identification. He based this identification on the suspect's "size, his face, his hair and just his general facial features." He also recognized the suspect's voice as being that of the robber's when the suspect stated, "I will get you, punk."

The main concern of courts regarding the identification of suspects by witnesses is whether the identification can be deemed to be reliable. See State v.

McManus, 263 N.W.2d 556, 558 (Iowa 1977). The "guiding factor in the admissibility of both pretrial and in-court identifications . . . "is reliability. Id. (quoting from Manson v. Brathwaithe, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 140 (1977)). The admission of evidence of a showup without more does not violate due process. Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, ___, 34 L.Ed. 401, 411 (1973).

In admitting evidence of the results of this type of identification, the "primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" Id. (quoting from Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, ___, 19 L.Ed.2d 1247, 1253 (1968)(within the context of in-court identification)). The Supreme Court went on to explain its interpretation of this quoted phrase when it stated:

> While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. [394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as Stoval [388 U.S. 293, 87 S.Ct 1967, 18 L.Ed.2d 1199 (1967)] makes clear, the admission of evidence of a showup without more does not violate due process.

Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, ___, 34 L.Ed.2d 401, 410-11 (1972). We cannot say that as a matter of law there existed a very substantial likelihood of misidentification as to the manner that the showup procedure was conducted. This being the case, we do not need to decide whether the out-of-court identification involved an impermissably suggestive procedure. Under the totality of the circumstances test the identification was reliable. The factors to be considered in determining whether an identification was sufficiently reliable include the opportunity of the witness to view the criminal at the time of the crime, the

witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979)(quoting Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, ___, 34 L.Ed.2d 401, 411 (1972)); see State v. Hicks, 277 N.W.2d 889, 891-93 (Iowa 1979); see also McManus, 263 N.W.2d at 557-59.

Applying this five-factor analysis to the facts of the case before us we find this identification to be reliable. The victim, Kris Cobb, was not a casual observer or mere bystander at the time the robbery occurred. He was a face-to-face victim of a crime which was estimated to have taken five minutes to complete. He conversed with the robber. There was consistency between the victim's description of the suspect robber to police and the appellant's appearance at the showup identification procedure. The victim never waivered from his conviction that the appellant was the perpetrator of the robbery. Finally, there was little elapse of time between the robbery and the showup procedure. The victim-witness estimated that approximately one hour had passed when police arrived with the suspect in the patrol car. See Biggers, 409 U.S. at 201, 93 S. Ct. at ___, 34 L.Ed.2d at 412 (lapse of seven (7) months between crime and identification did not defeat the identification by the victim).

The appellant has made claim that he was denied effective assistance of counsel based on the fact that his defense attorney failed to file a motion to supress the results of a showup identification or raise the issue on direct appeal. The appellant has the burden of proving his claim. State v. Seltzer, 288 N.W.2d 557, 560 (Iowa 1980). Our discussion has come full circle and we now will decide if a reasonably competent attorney under similar circumstances would have filed a motion or raise the issue on appeal. See State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978).

We find guidance on this issue from the opinion in Zaenringer v. Brewer, 635 F.2d 734 (8th Cir. 1980)(applying Iowa common law). "We do not think an attorney necessarily fails to render effective legal service if he fails to discuss with his client a procedural alternative which a reasonable attorney in similar circumstances would consider having little or no likelihood of success." Id. at 737.

Our discussion, supra, of the admissibility of showup identifications reveals that a motion to suppress in this case would have stood little likelihood of being granted by the trial judge. Further, the record suggests that appellant's defense attorney gave thoughtful consideration to the filing of a motion to suppress. He drew on past experience in making a determination that he would decline to file such a motion. Although a motion to suppress in this situation would not be frivolous, under the circumstances, counsel's action in failing to file same cannot be found to be below the range of normal competency. It follows that a failure to pursue the issue on appeal does not fall below the range of normal competency for the same reasons.

AFFIRMED.