IN THE COURT OF APPEALS OF IOWA

No. 4-285 / 93-1203

FILED
DEC 14 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

TODD MICHAEL HULFISH,

Appellant.

Appeal from the Iowa District Court for Linn County, William M. Thomas, Judge.

Defendant appeals judgment and sentence, following jury trial, entered upon his conviction of possession of an offensive weapon. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher Jr., Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Donielson, C.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the second judicial district serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The defendant, Todd Michael Hulfish, appeals from a judgment and sentence imposed upon him for violation of Iowa Code section 724.3, possession of an offensive weapon.

The defendant raises several issues on his appeal. He asserts that his trial counsel provided ineffective assistance, that the trial court erred in authorizing a search of his apartment, and finally, that the record does not contain sufficient evidence to support his conviction after trial by jury.

We affirm on the latter two issues and hold the question of ineffective assistance of counsel in abeyance.

On February 8, 1993, Cedar Rapids police officers were sent to an address on Third Avenue Southeast in that city to investigate a stabbing of one Raines.

The officers were advised the defendant was a suspect in the stabbing and found him in the building at that location. The victim had identified the defendant as his assailant.

These activities occurred in the early morning hours of February 8, 1993.

Based on the foregoing information, the officers obtained a search warrant for the apartment of the defendant. Almost immediately Raines then changed his story and said that one Vernon was the assailant. Raines said that he "did not want to get Hulfish in trouble."

The officers, however, exercised the search warrant in the apartment of the defendant and found the offensive weapon, a sawed-off shotgun, enclosed in a container in a closet. They also found shotgun shells that fit the shotgun.

It is the contention of the defendant that the information received by the officers that Raines now identified Vernon as the assailant, took away the probable cause asserted by the officers in obtaining the warrant and that it should not have been exercised in view of this later information from the victim.

However, at this juncture, the officers were advised of two potential assailants, and the statement made by the victim, couched in the language that it was, that the victim did not want to get Hulfish into trouble, was not necessarily a retraction.

Under these circumstances, we believe the officers, as well as the issuing magistrate, acted with reasonable prudence in believing that evidence of the assault could be located at the apartment of the defendant. State v. Luter, 346 N.W.2d 802 (Iowa 1984).

The search was very closely related to the time of the issuance of the warrant and of the stabbing and justifies a finding of probable cause. The information was not "stale." State v. Berkstrad, 239 N.W.2d 352 (Iowa 1976). The trial court held that "the defendant must argue that the ambiguous recantation by a mortally-wounded victim

destroys probable cause previously existing. (The trial court) conclude(s) that the later information does not affect the quality of the probable cause earlier established and that the execution of the warrant . . . was valid." We agree.

Turning to the contention of the defendant that there was insufficient evidence to support his conviction, the defendant relies upon his statements at trial that he did not knowingly possess a weapon. Possession of an offensive weapon under the provisions of section 724.1 must be a knowing possession. State v. Leisinger, 364 N.W.2d 200 (Iowa 1985). There is no argument but that the shotgun was an "offensive weapon" under the requisite code section.

His landlord testified that the lock worked and a note written by the defendant that he unlocked his apartment only when it could be watched, controvert the testimony of the defendant. The shot-gun was in a box in the closet and shells were found in another part of the apartment. This evidence was before the jury on the claim of Hulfish that he was unaware of the gun. His credibility was for the jury to determine and the jury decided it adversely to the defendant.

We find that the evidence was sufficient to support the conviction.

The defendant further claims, that his counsel was ineffective in assisting him in his defense.

The first issue is whether trial counsel was

ineffective in failing to (a) object to testimony about a murder investigation, and (b) ensure witnesses' presence at the suppression hearing.

Established principles govern our review of defendant's Sixth Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining conduct of counsel we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). We are mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

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. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

However, where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the claim of the defendant for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the trial attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate this claim of the defendant.

We therefore preserve the ineffective assistance of counsel claim for a later proceeding but we affirm on all other issues.

AFFIRMED.