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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MAURICE REDD,)

Petitioner-Appellant,) Filed January 26, 1983 00125

vs.)

THE STATE OF IOWA,) 2-419
2-67930

Respondent-Appellee.)

Appeal from Polk District Court - C. Edwin Moore, Senior Judge.

Petitioner appeals from the lower court's denial of postconviction relief contending the attorney who represented him in his 1979 criminal trial rendered ineffective assistance by failing to investigate the possibility of a defense of entrapment and by failing to discover the identity of a confidential informant who allegedly participated in the entrapment. AFFIRMED.

James Cleary, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner, Maurice Redd, appeals from the lower court's denial of postconviction relief. He contends the attorney who represented him in his 1979 criminal trial rendered ineffective assistance by failing to investigate the possibility of a defense of entrapment and by failing to discover the identity of a confidential informant who allegedly participated in the entrapment. We affirm.

In 1979, after a jury trial, Maurice Redd was convicted of delivering a controlled substance for profit. He appealed the conviction. On January 30, 1981, this court affirmed his conviction and sentence but reserved his right to seek postconviction relief on the ground he had received ineffective assistance of counsel. The lower court denied the requested relief and this appeal followed. On appeal, petitioner reiterates his complaints about the performance of his attorney in the 1979 trial.

I. Scope of Review. In general, our review of postconviction rulings under Iowa Code § 663A.9 is on error and not de novo. The court, however, has said:

> that where, as here, there is an asserted violation of a basic constitutional safeguard we make our own evaluation of the totality of circumstances under which the ruling was made. E.g., Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). Whether we call such a review de novo or a review under the totality of circumstances our function is the same. We consider anew all the matters presented to, and which should have been considered by, the trial court and reach our own conclusion on whether the constitutional safeguard was violated. It makes no practical difference whether such a review is called de novo or one under the totality of circumstances. State v. Boren, 224 N.W.2d 14, 15 (Iowa 1974), cert. denied, 422 U.S. 1008, 95 S. Ct. 2630, 45 L. Ed. 2d 671 (1975).

Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

II. Ineffective Assistance of Counsel. The general principles and standards governing our consideration of petitioner's claims that trial counsel rendered ineffective assistance were detailed by the court in State v. Aldape, 307 N.W.2d 32, 41-42 (Iowa 1981).

> General principles. The right to assistance of counsel, under the sixth amendment to the Federal Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. Powell v. Alabama, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 2d 158, 171-72 (1932); State v. Gambell, 262 N.W.2d 792, 795 (Iowa 1978). Effective assistance of counsel "means conscientious, meaningful representation." Scalf v. Bennett, 260 Iowa 393, 399, 147 N.W.2d 860, 864 (1967). The test for determining whether a defendant has been denied effective assistance of counsel is whether, considering all of the circumstances, the attorney's performance was within the normal range of competency. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).
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> A presumption exists that counsel is competent. Sims v. State, 295 N.W. 420, 423 (Iowa 1980). Defendant has the burden of proof to establish by a preponderance of the evidence that counsel rendered ineffective assistance. Id. "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). To warrant a finding of ineffective assistance of counsel, the "circumstances must include 'an affirmative factual basis demonstrating counsel's inadequacy of representation.' " State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973), (quoting In re Parker, 423 F. 2d 1021, 1025 (8th Cir.), cert.denied, 398 U.S. 966, 90 S. Ct. 2182, 26 L. Ed. 2d 551 (1970)).

To sustain his allegation of ineffective assistance, petitioner also must establish that he was prejudiced by his counsel's representation. State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978).

The lower court, in denying postconviction relief, concluded "that calling or not calling a witness is a matter normally within the judgment of counsel or trial strategy which the courts are reluctant to second guess." Petitioner argues on appeal that this was not just any witness but rather was a confidential informant whose knowledge was vital to a defense of entrapment.

The record reveals that the alleged confidential informant was known to the defendant as Mr. Neeva a/k/a A.J. The record also reflects that petitioner informed his counsel about A.J. during one of their first meetings. It appears that A.J. was introduced to petitioner by a mutual friend and the two became acquainted. During the acquaintance A.J. and petitioner were involved in the sale

of drugs to undercover state agents. Of primary evidentiary importance was a phone conversation between A.J. and petitioner which was recorded by the State. A.J. was also present during the sale of the drugs to the agents.

Prior to trial, defense counsel filed notices of defendant's intent to rely on the defenses of entrapment and delivery for accommodation. At the postconviction hearing, defense counsel testified that entrapment was a "feigned" defense for the purpose of distracting the prosecutor in his preparation of the case. For trial preparation, defense counsel deposed several of the State's witnesses. He also took minimal steps to find A.J. Defense counsel testified that he never deposed A.J. or intended to use A.J. as a defense witness. This decision was predicated on counsel's experience that paid informants are typically hostile and well prepared by the prosecution. Knowing that A.J. was not on the State's minutes of testimony, defense counsel testified that he chose to attempt to attack the State's case by emphasizing the State's failure to call A.J. He attempted to discredit A.J. by arguing that A.J.'s identity was no secret and by asking why A.J. was not brought forth to testify if petitioner was lying. He argued that A.J.'s absence was evidence that petitioner was telling the truth.

First, we note that A.J. may not properly be characterized as a confidential informant. Petitioner testified as to the informant's identity and informed counsel of A.J.'s movements from Sioux City. Even granting that the names of A.J. and Mr. Neeva may have been fictitious, we find little evidence of this in the record. More important is the fact that petitioner and counsel knew the whereabouts of A.J. at all times material to the prosecution. In fact, counsel testified that he could have located A.J. as easily as sending an investigator to Sioux City. We thus conclude that, for all intents and purposes, A.J.'s identity and whereabouts were known to the defense and counsel elected not to call A.J. as a witness. It would have served little purpose for counsel to request the identity of

the witness when he possessed such knowledge and when it would have frustrated counsel's efforts not to unduly emphasize A.J. in preparation for the State's case.

We concur with the trial court's conclusion that generally the decision regarding which witnesses are to be called at trial is within the province of counsel. See Crimson v. United States, 510 F.2d 356 (8th Cir. 1975); United States v. Hoger, 505 F.2d 737 (8th Cir. 1974); Robinson v. United States, 448 F.2d 1255 (8th Cir. 1971). We are unpersuaded by petitioner's argument that the calling of a known informant affords less latitude to counsel. Given these facts, we are not required to decide the issue of whether a lawyer's failure to investigate and to require the production of an unknown informant's identity when there is a defense of entrapment renders counsel's assistance ineffective. Accordingly, we affirm the trial court.

AFFIRMED.