



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 4, 1986
vs.	)	
DENNIS LEE WRIGHT,	)	<u>6-53</u>
Defendant-Appellant.	)	84-1310

417

Appeal from the Iowa District Court for Story County (No. 9246) - Carl D. Baker, Judge.

Defendant appeals from his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5. **AFFIRMED.**

Timothy J. Finn of Curtis, Finn & Pattinson, Ames, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Sandra L. Tedlock, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Defendant, Dennis L. Wright, appeals from his conviction for burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5, asserting: (1) that he was denied effective assistance by trial counsel's failure to seek a sanction or remedy for the State's failure to produce a tape recording relating to witnesses' initial identification and that the issue should be preserved for postconviction purposes; and (2) that he was denied due process when, at the time he waived jury trial, he was not informed that conviction would probably result because the case was submitted upon the basis of the minutes of testimony and the defense presented no evidence.

Three persons observed a person flee from the scene of a burglary and two of them subsequently identified defendant as that person. Prior to trial defense counsel sought discovery of, inter alia, police dispatch tapes regarding the burglary which were presumed to contain matters involving the witnesses' descriptions and/or identification of the suspect. After a hearing, the court entered a ruling which specifically discussed certain defense requests and stated that other requests were of a dragnet nature. The ruling noted the State's continuing duty to disclose exculpatory evidence but made no specific finding regarding the existence of the tapes sought. Defense counsel did not subsequently seek a sanction or remedy for the State's failure to produce the tapes.

Defendant was convicted following trial to the court at which the minutes of testimony were stipulated and neither party introduced any other evidence. At the time that he waived jury trial on the record, defendant was not informed that a conviction would be the probable result of submitting the case upon the minutes without offering explanatory evidence.

I.

Defendant contends he was provided with ineffective assistance of counsel when such counsel did not pursue the issue of obtaining a tape recording relating to the identification by the witnesses of the defendant. To prevail on an ineffective assistance of counsel claim, defendant must establish: (1) that counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). It is not necessary that "a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the petitioner makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069-70; 80 L. Ed. 2d at 699; accord Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Strickland enables us to address the prejudice component first, which enables us to assume, without deciding, that defense counsel failed to perform an essential duty. This is particularly advantageous because no postconviction proceeding testimony from defense counsel is available at this point in the proceedings.

The record indicates overwhelming evidence that the witnesses unmistakably identified the defendant. Two witnesses identified defendant from police photographs as the person they saw running from the burglarized home. Another witness, who was unable to positively identify defendant from the police photographs, was able to provide a description which matched those given by the other two witnesses.

Two witnesses who clearly identified the defendant also reported seeing a person get into a new silver car after the burglary. One of these witnesses specifically identified the car as a Ford Fairmont. The witness who could not identify the defendant did identify the car that was driven off in as a new silver-gray Ford Fairmont. Evidence established defendant rented a 1983 silver Ford Fairmont from Dollar Rental in Des Moines, Iowa, on the day before the burglary.

Moreover, the three witnesses told authorities that the person they observed wore a hat, dark glasses, and had curly hair. One witness told authorities that the hat he observed was gray in color. The descriptions provided by the three witnesses is buttressed when viewed in connection with the seizure of a gray hat, sunglasses, and two wigs from defendant's home approximately six weeks after the burglary. Defendant's truck was seized containing burglary tools.

Given this testimony, we cannot conclude defendant was prejudiced by not having access to the police's tape recordings.

II.

Defendant also maintains that the trial court should have informed him a stipulated trial would result in his conviction when no defense was offered to rebut the minutes of testimony. This argument misses the mark.

Iowa has recently adopted the approach which "rejects any due process requirement to undertake a guilty plea colloquy prior to accepting a stipulated factual record." State v. Everett, 372 N.W.2d 235, 237 (Iowa 1985). In Everett, it was recently held that a guilty plea type of colloquy was not required before a criminal case may be submitted under a stipulated factual record. In the present case, unlike Everett, defendant's argument is not based on Iowa Rule of Criminal Procedure 8(2)(b), but rather is based on Rule 5(4). While acknowledging Everett could be dispositive of this case, defendant distinguishes the case on two grounds: (1) he offered no evidence of his own while it is unclear whether

the defendant in Everett offered such evidence, and (2) he requests that we narrowly hold that trial courts should inform defendants they will be found guilty in the absence of any exculpatory evidence.

We find defendant's first distinction to be without merit. Cases of this sort do not turn on a defendant's offering of evidence, and a fair reading of Everett indicates that factor was not determinative of the issue.

Defendant's second distinction is equally lacking in merit. Iowa Rule of Criminal Procedure 5(4) provides:

Prior to the filing of the information, it must be approved by a district judge, or a district associate judge or judicial magistrate having jurisdiction of the offense. If the judge or magistrate finds that the evidence contained in the information and the minutes of evidence, if unexplained, would warrant a conviction by the trial jury, the judge or magistrate shall approve the information which shall be promptly filed. If not approved, the charge may be presented to the grand jury for consideration. At any time after judicial approval of an information, and prior to the commencement of trial, the court, on its own motion, may order the information set aside and the case submitted to the grand jury.

Defendant reads this as requiring a trial court to find defendant guilty if no testimony is produced by the defendant.

Rule 5(4) indicates that in order for an information to be filed, it must contain sufficient allegations to support the charge. It in no way requires a trial court to find the defendant guilty upon a stipulated trial when defendant offers no testimony. See State v. Epps, 322 N.W.2d 288, 291 (Iowa 1982) (a showing higher than probable cause is not required to satisfy Rule 5(4)); State v. Leto, 305 N.W.2d 482, 485 (Iowa 1981) (proof of guilt requires a much higher evidentiary showing than proof of probable cause). Given the spirit of Everett and the purpose of Rule 5(4), we believe defendant's claims must fail because trial courts are not bound to find defendants guilty under these circumstances.

Therefore, the trial court in this case was not required to inform defendants of the consequences of a stipulated trial.

AFFIRMED.