

IN THE COURT OF APPEALS OF IOWA

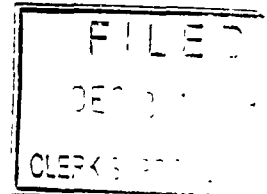
No. 1999-325 (9-578) / 98-1386

Filed December 27, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID WILLIS ALBERTSON, II,
Defendant-Appellant.



Appeal from the Iowa District Court for Tama County, L. Vern Robinson,
Judge.

David Willis Albertson II appeals from the judgment and sentence following his conviction by jury on one count of burglary in the third degree and one count of conspiracy in violation of Iowa Code sections 713.1, 713.6A and 902.8, 902.9 (1997), respectively. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender and Stephen J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen, Assistant Attorney General, Brent D. Heeren, Tama County Attorney, and Richard Vander Mey, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

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MAHAN, J.

David Willis Albertson II appeals from the judgment and sentence following his conviction by jury on one count of burglary in the third degree and one count of conspiracy in violation of Iowa Code sections 713.1, 713.6A and 902.8, 902.9 (1997), respectively. Albertson contends his trial counsel was ineffective in failing to move for suppression of evidence based on a violation of his Fourth Amendment rights. We affirm.

Albertson, Keith Lester, Rodney Cormeny, and Brian Shepard were stopped by police officers as the vehicle in which they were riding was leaving a car dealership in the Tama/Toledo area during early morning hours. Lester told the officers they were looking at cars and consented to a search of his vehicle. The officers found a pry bar with "fresh marks" on it in the trunk. Lester explained he used the pry bar as a member of a pit crew at a local racetrack to bend and straighten bent metal on race cars. Albertson and the other occupants of Lester's vehicle were allowed to leave.

Later that morning, burglaries were reported at the King Tower Cafe in Tama and a Subway in Toledo. Albertson and his companions became suspects in the burglaries. Lester appeared nervous when questioned about the burglaries and was unable to produce the pry bar that had been in his trunk during the investigative stop. Shortly thereafter, Shepard gave a statement implicating Albertson, Lester, and Cormeny in the burglaries. Shepard testified at trial it was his own idea to commit the

burglaries, and the four men had talked about committing burglaries while they had been "riding around" earlier the same evening.

Albertson was convicted of one count of burglary third degree for the burglary of the Subway and one count of conspiracy to commit burglary. Albertson was acquitted of the charge of the burglary of the King's Tower Cafe. He was sentenced to a five-year indeterminate term. The sentence was suspended, and Albertson was placed on intensive probation for a period of three years.

Albertson appeals.

I. INEFFECTIVE ASSISTANCE OF COUNSEL. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Albertson's conviction based on his

failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Toil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective-assistance-of-counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). However, only in "rare circumstances will the trial record alone be sufficient to resolve the claim." *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987).

Albertson claims he was deprived of his right to effective assistance of counsel when his trial attorney failed to file a motion to suppress all evidence gathered as a result of an illegal stop. The record in this case is insufficient for us to address

Albertson's claim in this direct appeal. We therefore affirm his convictions and sentence and preserve the ineffective-assistance-of-counsel claim for possible postconviction relief action. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

AFFIRMED.