IN THE COURT OF APPEALS OF IOWA

FILED
JUN 25 1985
CLERK SUPREME COURT

CHARLES B. KNAPP,)

Petitioner-Appellant,) Filed June 25, 1985

vs.)

247

STATE OF IOWA,) 5-180
84-1338

Respondent-Appellee.)

Appeal from the Iowa District Court for Warren County - M. C. Herrick, Judge.

The petitioner appeals from the trial court's denial of postconviction relief. AFFIRMED.

Kristine Fasano, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

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

PER CURIAM

In 1981, Charles Knapp entered simultaneous pleas of guilty to charges of burglary in the second degree and possession of burglar's tools. Both charges arose from the same incident. He was sentenced to a prison term of up to ten years on each charge, with the two prison terms to run consecutively.

In 1984, Knapp challenged his convictions by applying for postconviction relief. The trial court denied postconviction relief, and Knapp has appealed. On appeal, Knapp contends: he received ineffective assistance of counsel before and during his guilty plea proceeding; the court which accepted his guilty plea erred by failing to determine whether he was physically and mentally capable of entering a plea at that time; he was subject to double jeopardy because he was charged and convicted both for burglary and for possession of burglar's tools; the sentencing court erroneously failed to tell him its reasons for imposing consecutive rather than concurrent sentences; and the statute defining the crime of possessing burglar's tools (currently Iowa Code section 713.7; formerly section 713.4, Iowa Code 1981) is unconstitutionally vague.

I. Ineffective Assistance. Petitioner raises an ineffective assistance claim on several grounds. When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test for ineffective assistance was most recently set forth in Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In that case, the Court stated: "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." Id. at ____, 104 S. Ct. at 2068, 80 L. Ed. 2d at 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.

Petitioner first claims that trial counsel was ineffective in that he failed to conduct adequate discovery. Petitioner contends that discovery in this case would have disclosed "potential suppression or limine issues to evidence offered by the State." However, petitioner fails to set out what specific evidence should have been suppressed or that such evidence would have been suppressed. In short, petitioner has failed to establish that trial counsel failed to conduct proper pretrial discovery, and more importantly he has failed to present any evidence that but for counsel's errors, the result of the proceeding would have been different.

We also reject petitioner's claim that he was prejudiced by the failure of trial counsel to file a motion to sever his case from that of the co-defendant. We find no error on the part of trial counsel because at the time such a motion should have been filed there was nothing in the record to indicate that the two would be tried together. Rather, the co-defendant had escaped at that time and it appears they would have been tried separately.

Petitioner also claims that he was prejudiced by counsel's failure to raise a claim of double jeopardy. Petitioner was charged with both possession of burglar's tools and burglary. He claims that possession of burglar's tools is a lesser included offense of burglary. Because of our finding that possession of burglar's tools is not a lesser included offense, we find that there would have been no merit to the double jeopardy objection, and thus there was no ineffective assistance. The double jeopardy issue shall be discussed separately below.

Petitioner contends that counsel was ineffective in not requesting a competency hearing prior to the time he entered his guilty plea. Petitioner had been shot in the lower back during the burglary. He was severely injured and was

required to undergo surgery twice. Following the surgery, he was placed on pain medication. Petitioner contends that because of the pain he was suffering and the medication he was taking he was not competent to enter a plea at that time.

The record does not support his claim that counsel committed an unprofessional error by failing to request a competency hearing. The plea proceedings were over a month from the time of the surgery. There was no indication that the petitioner was acting in an abnormal manner or that the drugs were having any adverse effect which would result in an inability to function normally.

We also reject petitioner's claim that the court had a duty to suspend the sentencing under Iowa Code section 812.3 which states:

> If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.

For the reasons stated above, we cannot say that it was reasonably apparent the petitioner was suffering from a mental disorder preventing him from understanding the charge.

Finally, petitioner claims that his guilty plea was the result of trial counsel's alleged misadvice that he had no defense in this case. Considering the fact that petitioner was found, at night, inside the building where the burglary took place, and in possession of guns, gloves, screwdrivers, flashlights, and walkie-talkie, we cannot say say that counsel's advice was improper.

II. Double Jeopardy. Petitioner claims that possession of burglar tools is a lesser included offense of burglary and that he was subject to double jeopardy by being charged with possession of burglary tools and burglary. To be classified as a lesser included offense, the possession of burglary tools must be both "factually" and "legally" included in burglary. State v. Goff, 342 N.W.2d 830, 835 (Iowa 1983). The factual test requires that there be enough evidence introduced at trial to

justify submission of an instruction on the lesser included offense to the jury. Id. The legal test is stated as follows:

> To pass the legal or element prong of our test for lesser included offenses, the lesser offense must be composed solely of some but not all elements of the greater crime. State v. Wales, 325 N.W.2d 87, 88 (Iowa 1982). The lesser offense necessarily is included in the greater offense if it is impossible to commit the greater offense without also committing the lesser.

Id. Iowa Code section 713.1 defines burglary as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Section 713.7 defines burglar's tools:

> Any person who possesses any key, tool, instrument, device or any explosive, with the intent to use it in the perpetration of a burglary, shall be guilty possessing burglar's tools. Possessing burglar's tools is a class "C" felony.

It is apparent from these two definitions that a person could commit burglary without committing the crime of possession of burglar's tools. We therefore reject petitioner's double jeopardy claim.

III. Sentencing. Petitioner claims that the trial court failed to inform the petitioner of the reasons for imposing consecutive sentences instead of concurrent sentences and that this violated Iowa Rule of Criminal Procedure 22(3)(d) which requires the court to state on the record reasons for imposing a particular sentence.

The sentence here was entered according to a plea agreement and the court acknowledged that the sentence was in keeping with the agreement. In addition, the court stated that the reasons for the sentence included the petitioner's history of criminal involvement and prior incarcerations. We find that the court stated adequate reasons for the sentence.

IV. Constitutionality of Section 713.4(7). Petitioner's final claim is that Iowa Code section 713.4(7) which defines possession of burglar's tools, is unconstituionally vague. Specifically, petitioner claims that burglar's tools as defined in this section is broad and lacking specificity.

This claim is raised for the first time on appeal. Even with constitutional questions, error must be properly preserved. State v. Hamilton, 309 N.W.2d 471, 476 (Iowa 1981). While ineffective assistance of counsel can excuse failure to preserve error, State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983), petitioner does not claim counsel was ineffective in failing to raise this claim nor do we believe that counsel was ineffective. Therefore, error was not preserved on this issue.

The findings of the trial court are affirmed.

AFFIRMED.