IN THE COURT OF APPEALS OF IOWA

No. 9-117 / 98-724

STATE OF IOWA,

Appellee,

vs.

HERBERT OBERBROECKLING,

Appellant.

FILED
MAR 31 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, Judge.

On appeal from his conviction for fourth-degree theft, the defendant argues his trial counsel was ineffective. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, William E. Davis, County Attorney, and Marc Gellerman, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Zimmer, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PETERSON, S.J.

Herbert Oberbroeckling appeals his conviction for theft in the fourth degree, in violation of Iowa Code sections 714.1(1) and 714.2(4). He claims he received ineffective assistance of counsel. We reverse his conviction.

On September 4, 1997, Oberbroeckling entered into an agreement with Irene Alyea to cut down a dead tree on her property for $650. Alyea gave Oberbroeckling a check for $250 at the time of the agreement, with the remainder to be paid when the work was completed. Oberbroeckling kept in contact with Alyea and gave her several excuses, but did not cut down the tree.

On October 17, 1997, Alyea's daughter contacted the sheriff's department and filed a complaint against Oberbroeckling. The State charged him with theft in the fourth degree, as defined in section 714.1(1), alleging Oberbroeckling took possession or control over the property of another with the intent to deprive the owner thereof.

A jury found defendant guilty of the crime charged. He was sentenced to one year in the county jail. Oberbroeckling appeals his conviction, claiming he received ineffective assistance of counsel at his criminal trial.

Our scope of review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

Oberbroeckling contends he was improperly charged with theft by taking under section 714.1(1). He asserts there are no facts to show he took property from Alyea against her will. Defendant claims that, if anything, he should have been charged with theft by deception under section 714.1(3). Defendant asserts he received ineffective assistance due to his counsel's failure to challenge the charge of theft by taking under section 714.1(1).

Section 714.1(1) provides a person commits theft when the person:

> Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

This definition of "theft" is derived from the former crime of larceny. *See State v. Berger*, 438 N.W.2d 29, 31 (Iowa App. 1989). "Larceny" is defined as the wrongful taking and carrying away by a person of personal property of another from any place, with a felonious intent to convert it to the taker's own use without the consent of the owner. *State v. Jackson*, 251 Iowa 537, 543, 101 N.W.2d 731, 735 (1960).

In the present case, there is no evidence defendant took possession of Alyea's property without her consent. Alyea voluntarily gave defendant a check for $250. The alleged criminal conduct arose because defendant did not perform services in exchange for the payment. We determine this is not the type of factual situation section 714.1(1) was intended to prohibit.

Somewhat similar factual circumstances were found in *State v. Galbreath*, 525 N.W.2d 424 (Iowa 1994). There the defendant accepted a down payment to replace a roof, but did not commence work. *Id.* at 425. He was charged with theft by

misappropriation, in violation of section 714.1(2). *Id.* The supreme court determined failure of a contractor to adequately perform may give rise to a suit for breach of contract, but will not support a conviction for criminal conversion. *Id.* at 426. The court noted that if the homeowner's transfer of funds was prompted by the contractor's fraudulent misrepresentations, a case could be made for theft by deception. *Id.* Because defendant was charged with the wrong offense, the court reversed his conviction. *Id.* at 427.

We conclude Oberbroeckling was also charged with the wrong offense. Under *Galbreath,* where a contractor accepts a down payment in exchange for promised services, but does not perform, the proper charge, if any, is theft by deception under section 714.1(3). *Id.* at 426.

The supreme court has held defense counsel can be ineffective for failing to challenge whether a defendant was properly charged. *State v. Allison,* 576 N.W.2d 371, 374 (Iowa 1998); *State v. Schoelerman,* 315 N.W.2d 67, 71 (Iowa 1982). The State concedes defense counsel may have breached an essential duty in this case, but argues the breach was not necessarily prejudicial.

We find counsel's breach of an essential duty in this case was prejudicial to defendant. Fraud is not a material element of theft by taking under section 714.1(1). *State v. Wilson,* 573 N.W.2d 248, 252 (Iowa 1998). However, fraud is an element of theft by deception under section 714.1(3). *Id.* "Deception" is defined in section 702.9(5) as follows:

> Promising payment, the delivery of goods, or other performance which the actor does not intend to perform or knows the actor will not be able to perform. Failure to perform, standing alone, is not evidence that the actor did not intend to perform.

Thus, if the defendant had been properly charged, the State would be required to prove defendant knowingly deceived his victim. *See State v. Delaney,* 526 N.W.2d 170, 176 (Iowa App. 1994). Theft by deception requires a thorough inquiry of all the facts and circumstances surrounding the defendant's promise or other form of deception. *State v. Hogrefe,* 557 N.W.2d 871, 878 (Iowa 1996). Defendant was prejudiced because the State was not required to prove these elements in order to obtain a conviction under section 714.1(1).

Under *Galbreath,* the proper remedy in this case is to remand to the district court for dismissal of the charge without prejudice to the State's right to re-indict defendant under a code section supportable by the available evidence. *Galbreath,* 525 N.W.2d at 427. We therefore reverse Oberbroeckling's conviction and remand for dismissal.

REVERSED AND REMANDED.