IN THE COURT OF APPEALS OF IOWA

No. 1-446 / 91-104

FILED
DEC 31 1991
CLERK SUPREME COURT

HENRY WALTER BUTLER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Franklin County, Jon Stuart Scoles, Judge.

Butler appeals the district court denial of postconviction relief. **AFFIRMED.**

Randall E. Nielsen of Pappajohn, Shriver, Eide & Nicholas, P.C., Mason City, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, and James M. Drew, County Attorney, for appellee.

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

OXBERGER, C.J.

In 1986 Henry Butler was convicted of second-degree burglary and possession of burglary tools. On each count he was sentenced as a habitual offender to a term of up to fifteen years. The district court imposed these two terms consecutively to each other.

Upon direct appeal, the Iowa Supreme Court affirmed Butler's convictions in 1987. State v. Butler, 415 N.W.2d 634 (Iowa 1987).

Butler later sought postconviction relief to challenge his convictions. The district court denied postconviction relief, and Butler has appealed.

SCOPE OF REVIEW: Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id. Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1987). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

SPEEDY TRIAL: We first consider whether the court was correct in finding that Butler had not received ineffective assistance of counsel, where his appellate counsel did not raise the issue of a speedy trial on appeal. Butler contends his appellate counsel in his 1987 direct appeal, rendered ineffective assistance by failing to raise such an issue. It is not in dispute that Butler's trial occurred on the ninety first day after the filing of the trial information against him.

The State responds that a one-day delay in Butler's criminal trial was for good cause resulting from Butler's pretrial motions, the factual complexity of the case, and by Butler's acquiescence in the trial date. The issue of a speedy trial was presented to the trial court. The trial court found that the original continuance was granted as a result of a notice of alibi defense and motion in limine filed by the defendant. Iowa Rule of Criminal Procedure 27(2)(b) provides:

> 2. Speedy trial. It is the public policy of the State of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for dismissals under this subsection may be made by the prosecuting attorney or the defendant or by the court on its own motion.
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> b. If a defendant indicted for a public offense has not waived his right to a speedy trial he must be brought to trial within ninety days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary is shown or the defendant waives his right thereto. (emphasis added)

A defendant must be brought to trial within ninety days after the indictment unless good cause for the delay is shown, or the delay is attributable to the defendant. State v. Bond, 340 N.W.2d 276, 279 (Iowa 1983). The State argues that appellate counsel had no duty to raise an issue concerning denial of speedy trial because such an issue would have been frivolous. We agree.

In addition to the necessity of several pretrial motions arising out of the complexity of the case, Butler

did not resist the continuance motion filed by the prosecution. The continuance was granted in order to allow the prosecution time to investigate an untimely notice given by Butler that an alibi defense would be asserted at trial. Butler agreed to continue the trial. We find the delay in the trial was for good cause in allowing the prosecution time to investigate the alibi defense. In addition, we find the delay was related to the defendant's conduct by the filing of an untimely notice of the alibi defense. Accordingly, we affirm the district court.

ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL: We next consider whether the court was correct in finding that Butler did not receive ineffective assistance of counsel, where his counsel on appeal did not raise any issue regarding ineffective assistance at the trial level. In reviewing this issue, we are faced with the dilemma of considering appellate counsel conduct, without any record of his explanation for not raising ineffective assistance on appeal.

At the postconviction hearing, Butler did not call his appellate counsel as a witness to explain his professional efforts. In the face of being charged with ineffective assistance of counsel an attorney has a right to explain his professional efforts. See Kellogg v. State, 288 N.W.2d 561, 566 (Iowa 1980). Absent an explanation of appellate counsel's reasons, we consider whether Butler's trial

counsel's conduct was reasonable under prevailing professional norms to determine whether a failure on the part of appellate counsel to raise the issue of ineffective assistance of counsel was in itself a violation of Butler's constitutional right to effective assistance of counsel.

Butler asserts that his attorney in the 1986 criminal trial rendered ineffective assistance in two respects. Butler complains that the trial attorney failed to call as witnesses his two alleged companions on the night of the burglary.

The district court took judicial notice of the affidavits of Gary Lundgren and Michael O'Connors. The affidavits indicated both were prepared to testify that they committed the burglary alone, that Butler was not involved, and that they had encountered Butler only after they committed the burglary. They were not called as witnesses or approached by Butler's counsel. Butler's trial counsel however chose to distance Butler from both Lundgren and O'Connors. An alibi witness was available to Butler's defense. O'Connors in particular was not believed to be a good witness. He was considered by counsel to be belligerent. At his initial appearance he was confrontational to the magistrate and knocked over chairs in the room. O'Connors had an extensive criminal record and there was concern by counsel that his criminal history would be presented at the trial. O'Connors had, at the

time of trial, admitted to committing the particular burglary for which Butler was being tried. Butler's trial counsel was concerned that further association with O'Connors would link Butler to the commission of the offense.

Mr. Lundgren had not, at the time of trial, entered a plea of guilty to the burglary. Butler's trial counsel did not believe Lundgren would admit to the crime. In addition, shortly after Butler was arrested, he denied knowing Lundgren. Evidence was produced at trial that indicated in fact they did know one another. Butler's trial counsel believed that Lundgren's testimony he did not know Butler would have been damaging to his client's case. Like O'Connor, Mr. Lundgren also had a long criminal history, including a felony conviction. Even if Lundgren were to testify, counsel indicated a clear concern that his client, Mr. Butler, would be linked unnecessarily by association, to the commission of the burglary. We find in light of the Mr. Butler's trial counsel's concerns, the decision not to call O'Connors and Lundgren as witnesses was well within professional standards of effective counsel.

FAILURE TO OBJECT TO PHYSICAL EVIDENCE: Butler also complains that the trial attorney failed to object to the admission of cocaine and other exhibits seized from the car of a codefendant. We consider the merits of Butler's trial

counsel's strategy in failing to object. Counsel indicated his theory of defense for Mr. Butler was that Butler did not have anything to do with the crime. The burglary of the pharmacy in this case involved theft of drugs. Butler's trial counsel was aware that there was no real connection with his client and a vile of cocaine found in another person's car. He testified that it was his belief that objecting would have amplified the presence of the cocaine and inferred that his client was a user of the drug. By not objecting, counsel sought to have the inference placed upon O'Connors and Lundgren as the users. In light of Butler's counsel's attempt to strategically distance his client from O'Connors and Lundgren, we find his decision not to object was reasonably within professional standards for effective counsel. We affirm the postconviction court denial of postconviction relief on the grounds of ineffective assistance of counsel as it pertains to both his trial counsel and appellate counsel.

AFFIRMED.