IN THE COURT OF APPEALS OF IOWA

No. 4-455 / 94-114

DAVID W. IRVING,

Appellee,

vs.

STATE OF IOWA,

Appellant.

FILED
JAN 23 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marion County, J. W. Jordan, Judge.

The State appeals seeking a reversal of an order granting applicant, David Irving, postconviction relief. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Terry Rachels, County Attorney, for appellant.

Linda Del Gallo, State Appellate Defender and Kevin Cmelik, Assistant State Appellate Defender, for appellee.

Considered by Hayden, P.J., Sackett, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

MCCARTNEY, S.J.

On February 14, 1992, David Irving pleaded guilty to second-degree burglary and possession of burglar's tools. He was sentenced to ten years on each count.

On June 2, 1993, Irving filed a petition for postconviction relief claiming he was denied effective assistance of trial counsel. The petition alleged that: (1) had trial counsel adequately investigated the case he would have realized the police had elicited a confession from Irving without informing him of his Miranda rights; (2) until the confession, police had no physical evidence to link Irving with the crime; (3) had trial counsel informed Irving his confession could be suppressed and of the possible outcome of the suppression, he would not have pleaded guilty and, thus, his plea was not based on a reasoned and informed decision; and (4) he filed an untimely motion in arrest of judgment because he was not informed of the time limits.

Following a hearing, the district court granted the application for postconviction relief. The court found that his trial attorney had not inquired about the validity of the confession and that this was not competent assistance when representing someone accused of two felony charges. The court also found that, if Irving's confession had been suppressed, there is a reasonable probability the result of the proceedings would have been different. Finally, the district court determined there was sufficient

reason for Irving's failure to raise his claim on direct appeal.

The State appeals, advancing three alternative arguments. First, the State argues the limited investigation undertaken by trial counsel was adequate considering: (1) the existence of substantial evidence besides the confession; (2) the evidence that Irving was given his Miranda warning before the confession; and (3) the fact that Irving instructed his counsel to work out a plea agreement instead of going to trial. Second, the State contends Irving was not prejudiced by counsel's inadequate investigation because he would not have succeeded in suppressing the confession and, even if the confession was suppressed, sufficient evidence supported his guilt. Third, the State claims Irving has not even alleged, nor can he show, sufficient reason for failing to raise his ineffectiveness claim on direct appeal.

We affirm.

Where a defendant, on a petition for postconviction relief, claims on appeal that the assistance of counsel was ineffective, our review is de novo. State v. Yaw, 398 N.W.2d 803 (Iowa 1987).

In such a proceeding, the defendant by a preponderance of the evidence must show two things--one, that his counsel failed to perform an essential duty, and two, that prejudice resulted to him in the trial of the criminal matter. State v. Risdal, 404 N.W.2d 130 (Iowa 1987).

The defendant here faced two class C felony charges, but trial counsel failed to make any independent investigation of the circumstances surrounding the arrest. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court of the United States held that there must be a reasonable investigation, including "an independent examination of the facts and circumstances . . . ."

The trial counsel here asked for no bill of particulars, did not seek to examine the State's evidence or files, failed to interview the arresting officers, and failed to go to the scene of the reported burglary to examine it in conjunction with other facts and circumstances that might have been developed by a reasonable investigation.

The defendant contends he did not receive the Miranda warning before his confession. His trial counsel made no inquiry regarding the circumstances surrounding the giving of the Miranda warning although the defendant told counsel that he had not received a statement of Miranda rights at the time he was apprehended. Trial counsel testified that he thought the defendant indicated by his comments that he had not been given the Miranda warning at the time he was physically placed in custody. Trial counsel had handled some 100 or so criminal cases during his period of practice and had, during that time, filed only one motion to suppress. His conduct in this matter obviously comported with his usual practice.

The confession purportedly given by Irving was fundamental to the trial of the charges against him, yet trial counsel failed to pursue or even to initially make any inquiry as to the circumstances surrounding this matter.

We agree with the trial court that the work done by trial counsel on behalf of the defendant did "not fall within acceptable parameters of an attorney representing one accused of two felony charges."

Even though the defendant asked counsel to negotiate a plea agreement, it was incumbent upon counsel to exercise his independent judgment in order to adequately advise Irving as to whether or not a plea of guilty was appropriate and only after full investigation by counsel. This was not done.

Under these circumstances, we hold that the services rendered by defense counsel were inadequate and ineffective.

If a defendant enters a plea of guilty as a consequence of ineffective or inadequate investigation by his counsel and if the defendant shows he would not have pleaded guilty had an adequate investigation been done but that he would have insisted on going to trial, then prejudice has been shown. Hill v. Lockhart, 474 U.S. 58 (1985). The defendant attempted to ex parte withdraw his own plea of guilty, again without any assistance from counsel. We find that the standard of prejudice established in Hill v. Lockhart has been met.

Without testing the voluntariness of the purported confession, the ensuing physical evidence became available. If it had been determined that the confession was involuntary, the physical evidence might not have been admissible since its discovery flowed from the confession. Thus, not only under the Hill doctrine, but under the general proposition that there be a "reasonable probability" the outcome would have been different, has been met.

Under the circumstances of this matter, we find there was sufficient prejudice to the defendant.

The State asserts that the defendant did not raise these matters on direct appeal and, therefore, cannot now raise them. However, we have held that failure of trial counsel to file an appeal on behalf of the defendant is sufficient cause for not raising such issue on appeal. State v. Bloom, 510 N.W.2d 175 (Iowa App. 1993). The record is clear that the defendant did ask his trial counsel to file an appeal, but, consistent with his pattern of conduct in this matter, trial counsel believed that his services were at an end at the time of the sentencing and refused to take any further action on behalf of Irving. The record is barren of any evidence that trial counsel advised the court of his refusal to file a notice of appeal on behalf of the defendant. Similarly, the record is barren of evidence to indicate that trial counsel advised the court of the defendant's wish to appeal in order that the court could have appointed other counsel.

The defendant was left bereft of any assistance on this crucial issue. No assistance of any sort was offered to him by his counsel by advising the court of the defendant's wish to appeal and of counsel's withdrawal from the matter. Such minimum assistance on the part of counsel would have resolved this issue.

Based upon the foregoing, we, therefore, affirm the ruling of the district court in all respects.

AFFIRMED.