IN THE COURT OF APPEALS OF IOWA

No. 7-148 / 96-680

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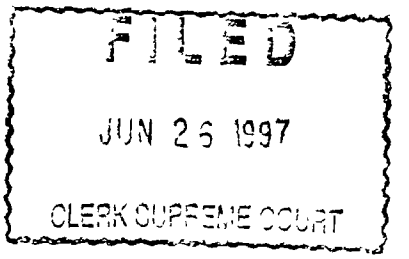
STATE OF IOWA,

Appellee,

vs.

MICHAEL KEITH WILLIAMS,

Appellant.



Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Michael Williams appeals from his convictions, following a jury trial, for second-degree robbery and first-degree theft in violation of Iowa Code sections 711.3, 714.1 and 714.2(1) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock and John M. Priester, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas S. Mullins, County Attorney, and Karrie S. Kelly, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Vogel, JJ.

HABHAB, C.J.

Defendant Michael Williams appeals his convictions of robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (1995), and theft in the first degree in violation of Iowa Code sections 714.1 and 714.2(1). Williams argues he was denied effective assistance of counsel because his trial attorney waived his right to speedy trial. Although we usually reserve ineffective-assistance-of-counsel claims for postconviction proceedings, *State v. Wade*, 467 N.W.2d 283, 286 (Iowa 1991), we may address them when the record is sufficient to resolve the issues involved. *State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996). Because we have the benefit of a record made pursuant to post-trial motions, we address this issue and find Williams's claim to be without merit.

On November 3, 1995, the State filed a trial information charging Williams with four offenses. Williams demanded a speedy trial through written arraignment. Williams's counsel wanted to depose co-defendant Sammel Ford, but the county attorney had difficulty locating Ford until February 1, 1996. On January 25, Williams's attorney, Michael O'Brien, spoke with him following the pretrial conference and discussed the issue of whether to proceed to trial without Ford's deposition. O'Brien told Williams that Ford's deposition was needed to determine whether to call another witness to testify on his behalf. O'Brien told him the lack of Ford's deposition was a crucial issue and it would be irrational to proceed to trial on

the set date without knowing whether Ford or the other witness would be a benefit or a detriment, especially facing a potential penalty of twenty-five years imprisonment. Although Williams wanted a speedy trial, he did agree to continue the trial beyond the speedy trial deadline. *See* Iowa R. Crim. P. 27(2)(b) (providing defendant must be brought to trial within ninety days of indictment); *see also State v. Clark*, 351 N.W.2d 532, 534 (Iowa 1984) (holding indictment encompasses trial information).

On January 29, O'Brien filed a motion for continuance to complete discovery and wrote in the motion that Williams waived his right to a speedy trial through February 6. O'Brien deposed Ford on February 1, trial was held on February 6, and the jury returned a guilty verdict on two counts. From these convictions, Williams appeals.

In reviewing claims of ineffective assistance of counsel, we must independently evaluate the totality of the circumstances in what is equivalent to de novo review. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). To prevail, Williams must prove by a preponderance of the evidence that O'Brien failed to perform an essential duty and this failure prejudiced him. *Id.* at 685. To show deficient performance, Williams must show more than a backfire in trial strategy or that another attorney would have proceeded differently. *Id.* O'Brien is presumed competent, and the ultimate inquiry is whether "under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." *Id.*

To show prejudice, Williams must show that any deficient performance worked to his "actual and substantial disadvantage" and constituted "'a denial of [his] due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation.'" *Id.* (quoting *State v. Miles*, 344 N.W.2d 231, 234 (Iowa 1984)). Williams must show a reasonable probability exists that but for any deficient performance the result of the trial would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Under this standard, Williams's claim must fail because he has not established either prong of the standard. It is clear that an attorney may waive the right to speedy trial without the client's consent when the attorney is acting within the scope of his authority. *State v. LeFlore*, 308 N.W.2d 39, 41 (Iowa 1981). The record in this case reveals that Williams did consent to the waiver, although he did so reluctantly.

Without a waiver, Williams would be facing a four-count felony trial in four days without the benefit of knowing whether Ford or the other witness would have exculpatory or damaging testimony. O'Brien had attended the hearing on Ford's plea but was completely unsure of what testimony Ford might give. He told Williams that Ford's deposition was necessary not only to determine whether Ford would be called as a witness, but also whether the defense should call another witness. O'Brien told Williams it would be irrational to walk into trial blind and face a potential sentence of twenty-five years. Based on this assessment, Williams consented to a waiver.

We fail to see how Williams was prejudiced. Clearly, Williams faced uncertainty at a trial without Ford's deposition and the delay allowed O'Brien to obtain that deposition. Williams has made no showing that the delay caused witnesses to be unavailable or evidence to be lost.

AFFIRMED.