

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed November 20, 1984

313

vs.

)

CLARENCE TITSWORTH,

)

4-387

84-413

Defendant-Appellant.

)

Appeal from the Iowa District Court for Pottawattamie County - Leo Connolly, Judge.

Defendant appeals his conviction of robbery in the first degree asserting he was denied effective assistance of counsel when trial counsel failed to object to admission of statements made by defendant during plea negotiations.
AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant, Clarence Titsworth, appeals from his conviction of robbery in the first degree, asserting he was denied effective assistance of counsel when trial counsel failed to object to admission of statements made by Titsworth during plea negotiations. We affirm.

On August 17, 1983, a Burger King restaurant was robbed at approximately 2:40 a.m. by a gun-wielding male wearing a motorcycle helmet. One of the restaurant employees escaped during the robbery and notified the police. The police arrived in time to see the robber fleeing the scene. They followed him to a nearby parking lot and apprehended him in a car. Titsworth, who was in the driver's seat of the car, was also apprehended. The robber was identified as James Goodwin.

Both men were charged with first degree robbery in violation of Iowa Code section 711.2 (1983). Goodwin pleaded guilty to second degree robbery and was sentenced to incarceration for a term not exceeding ten years. Titsworth's case, however, proceeded to trial.

The only witness called by Titsworth was James Goodwin. Goodwin testified that he first met Titsworth at a tavern in Omaha around midnight. He offered Titsworth a ride. Titsworth accepted and Goodwin drove to a Greyhound bus depot. Goodwin testified that he was under the influence of drugs, so he asked Titsworth to drive from the bus depot to Council Bluffs.

Titsworth drove the car to the Razzle Dazzle tavern in Council Bluffs. Goodwin testified he was going to buy drugs from a source there, but he also testified that Titsworth did not know of the drug sale.

Goodwin claimed he met the dealer in the Razzle Dazzle parking lot. The dealer did not have drugs with him, so he allegedly told Goodwin to wait at the parking lot for the dealer to return with some drugs. Goodwin testified he was worried about waiting in the parking lot, so the dealer gave him a pistol and some

shells wrapped in a bandana. After the dealer left, Goodwin returned to his car. He testified that Titsworth was asleep at that time.

Goodwin waited in the car for awhile. He then noticed the nearby Burger King restaurant and decided to rob it. He changed his shirt, loaded the gun, put on the bandana and the helmet, and then left the car. He testified that Titsworth was asleep when he left the car and that Titsworth did not know of the plan to rob the Burger King.

Goodwin also testified that when he returned to the car he yelled at Titsworth to drive off. Titsworth did not move, so Goodwin reached over to start the car. Goodwin testified that Titsworth tried to stop him.

After Goodwin finished testifying, the prosecution called Joseph Reedy as a rebuttal witness. Reedy testified that during plea negotiations Titsworth said he was awake when Goodwin left the car. Titsworth's attorney cross-examined Reedy and moved that Reedy's testimony be stricken because Titsworth had not been given the Miranda warning before he made the statement to Reedy. The trial court overruled the motion.

I. Issues for Review. The motion to strike testimony was raised too late to preserve for review the question whether Titsworth's statement should have been suppressed for failure to comply with the Miranda requirements. See State v. Hrbek, 336 N.W.2d 431, 435 (Iowa 1983); State v. McCowen, 297 N.W.2d 227, 228 (Iowa 1980). Thus, Titsworth's argument on appeal is that he was denied effective assistance of counsel by his attorney's failure to adequately raise and preserve the issue of the admissibility Titsworth's statements to Reedy.

When a defendant relies on a specific act or omission to prove ineffective assistance, he must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). We examine both aspects below.

II. Failure to Perform an Essential Duty. The proper standard for attorney performance was discussed in the recent United States Supreme Court case Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Court stated that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at ___, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. Counsel's performance, to be effective, must be "within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, ___ U.S. at ___, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. These general guidelines must be applied to "the facts of the particular case, viewed as of the time of counsel's conduct." Id.

Titsworth claims that his trial counsel acted unreasonably in failing to move to suppress Titsworth's inculpatory statement, that no justification can explain that failure. He claims this is especially so when there were three separate grounds for suppressing the statement: (1) the statement was made in unfruitful plea negotiations and was thus inadmissible under Iowa Rule of Criminal Procedure 9(5); (2) the statement was inadmissible because Titsworth was not given Miranda warnings; and (3) the statement was not made voluntarily because it may have been a response to an inducement of a lower charge or favorable disposition. In response, the State argues that trial counsel did not have a duty to move to suppress because the statements were largely exculpatory.

Two Iowa Supreme Court cases guide our decision. In State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983), the court indicated that counsel has a duty to try to

suppress inculpatory statements that have the effect, if believed by the jury, of totally undermining the defense. However, in Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982), the court noted that it is an acceptable trial tactic to allow into evidence a statement giving the defendant's largely exculpatory version of the affair, thereby putting the version before the jury without subjecting the defendant to cross-examination. We examine the facts of this case to determine whether a reasonable attorney would conclude the statement at issue was largely exculpatory, or whether it instead was likely to totally undermine the defense.

The rules of criminal procedure required that any motion to suppress Titsworth's statement be made before trial. Iowa R. Crim. P. 10(2), (4). In deciding whether to file a motion at that time, counsel had to rely in part on the minutes of testimony. The minutes of testimony for Joseph Reedy indicated Reedy would testify that Titsworth said he was awake when Goodwin left the car and went to the Razzle Dazzle. The minutes also showed, however, that Reedy would testify that Titsworth denied any involvement in the robbery.

Since Goodwin was going to testify that he left the car twice—once to go to the Razzle Dazzle and once to rob the Burger King—and that Titsworth was asleep when he left for the Burger King, Titsworth's statement about being awake was not necessarily inconsistent with Goodwin's testimony. We believe a reasonable trial counsel could decide as a tactical matter to let Reedy testify and then use cross-examination to point out that Titsworth's statement was not inconsistent with Goodwin's testimony. Moreover, trial counsel would also be able to bring out on cross-exam that Titsworth, in the same conversation that he stated he was awake, denied involvement in the robbery. We do not believe that trial counsel failed to perform an essential duty by not moving to suppress Reedy's testimony.

We hold, however, that trial counsel failed to perform an essential duty during the course of the trial. When Reedy testified at trial, his testimony on direct examination only indicated that Titsworth was awake when Goodwin left

the car. The impression given by this testimony was that Titsworth's statement contradicted Goodwin's testimony. Trial counsel then cross-examined Reedy and moved that his testimony be stricken because Titsworth had not been given the Miranda warning. Counsel's conduct in moving to strike Reedy's testimony constituted failure to perform an essential duty.

We are not questioning the tactical decision to move to strike the testimony. Instead, it is counsel's failure to preserve the issue for review that we find insufficient. See Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). As stated earlier, counsel's motion to strike on the basis of no Miranda warning was untimely. Iowa R. Crim. P. 10(2), (4). Nevertheless, the rules of criminal procedure allow such motions to be made if good cause is shown. Iowa R. Crim. P. 10(3). Thus, counsel should have attempted to show "good cause" and thereby preserve the issue for review. Alternatively, counsel could have successfully moved to strike Reedy's testimony because Titsworth's statement was made in an unsuccessful plea negotiation. Iowa R. Crim. P. 9(5); State v. Epps, 316 N.W.2d 691, 693 (Iowa 1982). We conclude counsel's failure to preserve for review the issue whether Reedy's testimony should be stricken was the result of apparent and inexplicable ignorance of the Iowa Rules of Criminal Procedure. We cannot say that such ignorance is "within the range of normal competency." Snethen, 308 N.W.2d at 14.

III. Prejudice. In State v. Miles, 344 N.W.2d at 234-35, the Iowa Supreme Court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982). Essentially, the Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. (emphasis in original). The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982).

On review of the fifth circuit's decision in Strickland, the United States Supreme Court enunciated a test for prejudice that was more stringent than the standard employed by the fifth circuit. The Court first stated that the benchmark for judging any claim of ineffectiveness is 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." Strickland, ___ U.S. at ___, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The Court then stated the test:

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.

After reviewing the transcript of Titsworth's trial, we conclude that trial counsel's failure to have Reedy's testimony stricken does not undermine our confidence in the outcome of that trial. Titsworth has not met his burden of showing prejudice.

We base this conclusion on two factors. First, Titsworth's statement to Reedy was not necessarily inconsistent with Goodwin's testimony. A jury could find the statements consistent. If that happened, no prejudice resulted. Second, many aspects of Goodwin's testimony undermined his credibility. These aspects were brought to the attention of the jury at closing argument by the prosecutor. We believe they were such that, even if Reedy's testimony had been stricken, the jury would not have believed Goodwin and would have convicted Titsworth.

Because Titsworth has not met his burden to show prejudice, we must affirm his conviction.

AFFIRMED.