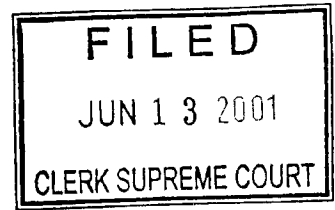


IN THE COURT OF APPEALS OF IOWA

No. 1-369 / 00-1492
Filed June 13, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARVIS UGENE BENTLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

On appeal from his conviction for terrorism, defendant contends the court
abused its discretion in denying his motion for a new trial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant
County Attorney, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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ZIMMER, J.

Charvis Ugene Bentley appeals from his conviction for terrorism, in violation of Iowa Code section 708.6 (1999). He argues the district court abused its discretion in denying his motion for a new trial. Bentley also asserts trial counsel was ineffective in failing to file a notice of alibi defense, and that sentencing counsel was ineffective in failing to make an offer of proof of possible alibi witnesses. We affirm.

I. Background Facts and Proceedings. In the early morning hours of January 9, 2000, Jeremy Holmes was driving in Waterloo when he noticed an individual walking down the street. He thought the individual might be a friend and pulled up next to him to offer a ride. As the man approached his car, Holmes asked, "Who is that?" The man pulled a gun from the pocket of his blue hooded sweatshirt and walked toward the car. He said, "This is Corlione. That's who it is." Holmes realized the man was not his friend, but he recognized him from seeing him in the neighborhood.

Holmes told the man that he had mistaken him for one of his friends. The man put the gun away and asked, "Is we cool?" He tried to shake Holmes's hand, but Holmes refused. Holmes then drove off and heard three or four gunshots and the sounds of his truck being struck by bullets. Holmes drove to his grandmother's house and called the police. He told officers he thought he recognized the shooter and that his first name was Charvis. He also provided police with a physical description of his assailant. He later identified Charvis Bentley from a photographic lineup.

The State charged Bentley with terrorism, in violation of Iowa Code section 708.6. During trial, the defendant attempted to offer alibi evidence. Because Bentley had not filed a notice of alibi defense, the State objected. In compliance with Iowa Rule of Criminal Procedure 10(11)(d), the district court limited evidence of an alibi defense at trial. Following the trial, the jury found Bentley guilty as charged.

Bentley obtained new counsel for sentencing. His new attorney filed a motion for new trial claiming Bentley was prejudiced by his trial counsel's failure to file a notice of alibi defense. The court denied the motion and sentenced Bentley to a term of imprisonment not to exceed ten years.

Bentley appeals. He contends the court abused its discretion in denying his motion for new trial. He also asserts trial counsel was ineffective in failing to file the notice of alibi and that his sentencing counsel was ineffective in failing to identify and make offers of proof as to possible alibi witnesses.

II. Motion for a New Trial. The trial court has broad discretion in determining whether to grant a motion for a new trial. Iowa R. App. P. 14(f)(3). It is presumed that the trial court properly exercised its discretion and we will reverse only upon a finding it abused its discretion. *State v. Holland*, 485 N.W.2d 652, 655 (Iowa 1992). In order to show an abuse of discretion, the defendant must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Martinez*, 621 N.W.2d 689, 695 (Iowa Ct. App. 2000).

Bentley sought a new trial based on his trial counsel's failure to file a notice of alibi defense. Iowa Rule of Criminal Procedure 10(11)(a) requires a

defendant who wishes to offer evidence of an alibi defense to file written notice of such intention. Trial counsel's failure to do so precluded the admission of any testimony regarding Bentley's alibi. Iowa R. Crim. P. 10(11)(d).

In denying Bentley's motion for new trial, the district court found that a postconviction relief proceeding would be a more appropriate venue for addressing whether any prejudice resulted from counsel's failure to file the notice of alibi defense. The district court stated that it needed a more detailed record of what evidence would have been available at the time of trial. It did not know to what defendant's witnesses would have testified and, based on the record before it, could not determine whether an alibi defense would have benefited Bentley. It concluded that the more detailed record needed could be made in a postconviction relief proceeding. We agree with this assessment.

We find that Bentley has not shown the trial court abused its discretion in denying his motion for new trial on grounds or to an extent clearly untenable or to an extent clearly unreasonable. Therefore, we affirm the trial court's decision.

III. Ineffective Assistance of Counsel. To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.* A presumption exists that counsel is competent and that counsel's conduct falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). We will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1994)).

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978); *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

Bentley makes two claims of ineffective assistance of counsel. First, he claims his trial counsel was ineffective in failing to file a notice of alibi defense. Secondly, he contends his sentencing counsel was ineffective in failing to make an offer of proof with regard to his motion for new trial. Because the record is not fully developed with regard to these arguments, we affirm Bentley's conviction and reserve these issues for a postconviction relief proceeding, if any is brought.

AFFIRMED.