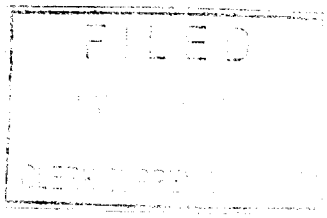
IN THE COURT OF APPEALS OF IOWA

No. 9-236 / 97-1997
Filed May 26, 1999



STATE OF IOWA,
Appellee.

vs.

STEPHEN KEYES,
Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

Stephen Keyes appeals from his convictions for two counts of first degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

HUITINK, P.J.

I. Background Facts and Proceedings.

Sandra and Joshua Keyes died in a fire at their Springville home on December 26, 1996. The State accused Sandra's husband Stephen Keyes of setting the fire to collect insurance proceeds and charged him with two counts of first-degree murder.

The State's evidence included expert testimony by Michael Hiles concerning accelerant detection at the fire scene by a dog trained for this purpose. Over Keyes objection Hiles testified the arson dog "alerted" at nine spots in the garage attached to Keyes' home. Hiles was also allowed to demonstrate the dog's ability to detect a drop of gasoline concealed in the courtroom.

Other inculpatory evidence included Keyes' failing marriage to Sandra, threat to kill her, and recent purchase of substantial life and renter's insurance policies. Keyes was convicted of two counts of first-degree murder and sentenced to life in prison.

On appeal, Keyes contends Hiles' opinions were admitted without adequate foundational evidence of the arson dog's reliability. He also argues the in-court demonstration was not based on conditions substantially similar to the fire at the Keyes' home and should not have been permitted. Keyes additionally claims he was denied affective assistance of trial counsel.

II. Standard of Review.

We review questions of admissibility of evidence for an abuse of district court discretion. We accord wide latitude to the district court's assessment of the sufficiency of foundation to support admission of evidence. *State v. Buller*, 517 N.W.2d 711, 712 (Iowa 1994). Established rules of evidence however cannot be ignored under the guise of trial court discretion. *Id.* To the extent Keyes' ineffective assistance of counsel claims raise constitutional issues, we review de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994).

III. Expert Testimony.

Expert testimony concerning the reaction of a dog trained in accelerant detection is admissible in cases of suspected arson. *State v. Buller*, 517 N.W.2d at 713. The foundation requisite to its admission may include the dog's training, accreditation, experience, and other investigative corroboration. *Id.*

Michael Hiles is a recognized expert in training dogs for use in accelerant detection. He testified concerning the dog's training and certification as an arson dog. Additionally, the record includes other evidence corroborating the dog's findings. Firefighters suspected the presence of an accelerant due to the fire's "low burning" and the fact that the fire spread across the concrete floor of the garage. Firefighters also reported seeing a "rainbow effect" on the water as they washed the garage floor, and tests on gravel outside the garage were positive for gasoline.

We conclude the State's foundation for admission of Hiles' testimony was sufficient. We affirm on this issue.

IV. In-Court Demonstration.

Keyes argues the district court erred in allowing the in-court demonstration of the dog's detection capabilities due to the dissimilarities between the sterile atmosphere of the courtroom and the actual fire scene. Keyes therefore contends the demonstration was not relevant to the dog's ability to find an accelerant in his garage.

Our supreme court has addressed this issue in the following terms:

> The conditions and circumstances of the accident and the evidence of experiments sought to be adduced must be substantially similar. The burden of showing similarity in essential conditions is on the party offering the evidence. The circumstances do not have to be identical, and in certain situations evidence of experiments may be admitted for some purposes despite failure to show similarity of circumstances in several particulars. The degree of similarity depends on the purpose for which the evidence is to be introduced. The question of similarity lies within the discretion of the trial court, as does the whole question of admissibility.

Hubby v. State, 331 N.W.2d 690, 698 (Iowa 1983)(citations omitted.)

Keyes placed the dog's ability to detect gasoline in issue. The State offered the demonstration in part to rebut Keyes' claims that the dog was unreliable and unable to detect small quantities of gasoline.

The State did not purport to re-create the conditions at the fire scene. In fact, Hiles testified the difference in conditions did not bear on the dog's detection skills. Although the conditions of the demonstration were not substantially similar, we find no error given the limited purpose of the demonstration.

V. Ineffective Assistance of Counsel.

Keyes contends he was denied his Sixth Amendment Right to counsel. He contends his trial counsel was ineffective in (1) failing to object to evidence of Keyes' "check kiting" offenses; and (2) failing to cross-examine Keyes' son Michael about his recall of the events surrounding the morning of the fire.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate Keyes' claim without counsel's explanation. We therefore preserve Keyes' ineffective assistance of counsel claim for postconviction proceedings.

We affirm Keyes' conviction and sentence.

AFFIRMED.

No. 97-1997. [9-236] STATE v. KEYES

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Huitink, P.J. Sackett, C.J., takes no part. (5 pages $2.00)

Sandra and Joshua Keyes died in a fire at their Springville home on December 26, 1996. The State accused Sandra's husband Stephen Keyes of setting the fire to collect insurance proceeds and charged him with two counts of first-degree murder. The State's evidence included expert testimony by Michael Hiles concerning accelerant detection at the fire scene by a dog trained for this purpose. Over Keyes objection Hiles testified the arson dog "alerted" at nine spots in the garage attached to Keyes' home. Hiles was also allowed to demonstrate the dog's ability to detect a drop of gasoline concealed in the courtroom. Keyes contends Hiles' opinions were admitted without adequate foundational evidence of the arson dog's reliability. He also argues the in-court demonstration was not based on conditions substantially similar to the fire at the Keyes' home and should not have been permitted. ***Expert Testimony.*** Michael Hiles is a recognized expert in training dogs for use in accelerant detection. He testified concerning the dog's training and certification as an arson dog. Additionally, the record includes other evidence corroborating the dog's findings. We conclude the State's foundation for admission of Hiles' testimony was sufficient. ***In-Court Demonstration.*** Keyes contends the demonstration was not relevant to the dog's ability to find an accelerant in his garage. The State offered the demonstration in part to rebut Keyes' claims that the dog was unreliable and unable to detect small quantities of gasoline. The State did not purport to re-create the conditions at the fire scene. In fact, Hiles testified the difference in conditions did not bear on the dog's detection skills. Although the conditions of the demonstration were not substantially similar, we find no error given the limited purpose of the demonstration.