IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1986
vs.	)	6-315 85-1292
GARY ROBERT SUMPTER,	)	
Defendant-Appellant.	)	321

Appeal from the Iowa District Court for Black Hawk County (No. 077X003192) - Joseph C. Keefe, Judge.

Defendant appeals from his conviction for burglary in the second degree and sentence as habitual offender asserting he was denied effective assistance by trial counsel's failure to properly object to testimony concerning prior crimes and statements made to arresting officers. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, and defendant-appellant pro se for defendant-appellant.

Thomas J. Miller, Attorney General, David L. Dorff, Assistant Attorney General; and Thomas J. Ferguson, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

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SACKETT, J.

Defendant Gary Sumpter appeals from his conviction for burglary in the second degree and sentence as a habitual offender. Defendant asserts he was denied effective assistance by trial counsel's failure to properly object to testimony concerning prior crimes and statements made to the arresting officers. Acting pro se, defendant also asserts the habitual offender statutes violate constitutional provisions concerning due process, equal protection and separation of powers. We affirm.

At approximately 9:45 P.M., February 11, 1985, Rocky's Repair Shop located outside the Waterloo city limits, was burglarized. Michael Tripp, who lived across the street from Rocky's, heard a car running at the shop and went outside to look. Tripp saw the car which he stated later he thought was a brownish 1972 or 1973 Oldsmobile Cutlass. Tripp then saw a man swing an object and break the shop's front window. Tripp saw the man reach through the broken window, remove oil cans and other items from the shop and place them in the back seat of his car. Tripp testified later he could not get a good look at the man.

Tripp ran into his house and told his father to call the police. Tripp went back outside and positioned himself to observe the person at Rocky's. After about five minutes Tripp said the man looked toward the area where he was hiding and then drove away from the shop at approximately 25 miles per hour. The man did not turn on the headlights until he had gone a few blocks.

Approximately two minutes later the police arrived at Rocky's. Tripp gave police a description of the car. The police proceeded eastbound to apprehend the suspect. The officers observed a car resembling Tripp's description. When the officers turned on the red lights the suspect accelerated his car. The suspect's car traveled another quarter mile, hit a patch of ice and slid into the ditch.

Once the car was stopped, approximately four minutes after the police had left Rocky's in pursuit of the suspect, the officers tried to get the driver, defendant Sumpter, out of the car. Defendant locked the car door and resisted attempts to remove him from the car. During the confrontation defendant told police "he was going to get us and the same thing was going to happen to us that happened to T-Bone Taylor." While trying to get defendant out of the car an officer saw cans of oil in the back seat of the car. The car was searched pursuant to a search warrant and the missing items were seized. Thereupon, defendant was arrested for second-degree burglary of Rocky's Repair Shop.

Defendant relied upon an intoxication defense at trial. Following a jury trial he was convicted of burglary in the second degree. Following a second jury trial he was convicted and sentenced as a habitual offender.

I.

Because we are confronted with an alleged constitutional violation we resolve the issue by making our own independent evaluation of the totality of the circumstances. State v. Conger, 375 N.W.2d 278, 279 (Iowa App. 1985); State v. Losee, 353 N.W.2d 876, 878 (Iowa App. 1984). Our review is de novo. State v. Hillesheim, 291 N.W.2d 314, 316 (Iowa 1980).

II.

Defendant argues he was denied effective assistance of counsel as secured by the sixth amendment. Defendant contends counsel was ineffective in failing to object to testimony of prior crimes by defendant introduced through a substance abuse counselor.

The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-95

(1984). The person claiming his trial attorney was ineffective must show the court that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2065, 80 L.Ed.2d at 693. Defendant has the burden to prove both elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

Defendant is not entitled to perfect representation, only that which is within the normal range of competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985). In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Where counsel makes reasonable decisions concerning strategy, regardless of the success or failure of such strategy, the reviewing court will not interfere simply because the strategy did not achieve the desired result. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

Rarely do we find failure to preserve error to be sufficiently egregious to deny defendant his right to effective assistance of counsel. Halstead, 362 N.W.2d at 508. In determining whether defendant was prejudiced by his counsel's performance, we require the person making the claim to show counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland the supreme court articulated a similar test for establishing prejudice:

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> 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.

Strickland, 466 U.S. at 694, 104 S.Ct. at 1068, 80 L.Ed.2d at 698.

A. Prior crimes testimony introduced through substance abuse counselor. Defendant relied on an intoxication defense at trial. Defendant presented testimony by David Towle, a Waterloo substance abuse counselor about defendant's contact with the Northeast Council on Substance Abuse. Through Towle's testimony defendant was attempting to establish that he had a severe substance abuse problem and had a history of blackouts associated with alcohol abuse. Specifically, defendant introduced evidence of his severe substance abuse problem to establish his assertion that he had suffered an alcohol-induced blackout on the day Rocky's was burglarized. On direct examination Towle referred to a report he had prepared after defendant had been referred for treatment following an arrest for OWI:

> Q. . . . Beginning on October 30th, what sort of substance abuse problem was the primary reason for Mr. Sumpter's contact with your agency? . . . A. He was referred by a probation officer following, I believe, a second offense OWI arrest, referred by probation officer Cheryl Cook.
>
> Q. All right. Do you find in your records a social or psychological background summary dated December 22, 1980? A. Uh-huh.
>
> Q. I want to call your attention specifically to some items on page 3 having to do with a substance abuse history that was taken of Mr. Sumpter about the use of alcohol. Maybe to set the stage for this, is the substance abuse history essentially taken from the client's own reports of his history? A. Yes, it is.
>
> Q. And do you have to some extent an ability to cross-check that, if that substance abuse

> history includes a history of having problems with the law while using alcohol? A. When the referral is made by the Department of Correctional Services, they usually provide us with at least part of the record.

Towle's report, in addition to documenting defendant's history of alcohol abuse and his opinion about the genuineness of reports of memory lapse in alcoholic blackouts, also contained references to defendant's prior convictions. After defense counsel's direct examination of Towle, defense counsel filed a motion in limine in camera seeking to limit the state from impeaching Sumpter with his past convictions:

> MR. BRINER: Thank you, Your Honor. May it please the Court. Prior to this recess I raised a question with the Court and with Mr. Ferguson concerning the record of prior convictions. It was my impression that if the State were allowed to impeach Mr. Sumpter's testimony to the full extent that some recent cases appear to allow, at least in other specific situations, Mr. Sumpter would be placed in the position of admitting to prior convictions, which at least until now he has not elected to admit. So in connection with the second phase of this trial dealing with the allegation that he is an habitual felon, he is being put to an impossible election either to give up his right to testify in his own defense or else to preclude his own defense in the second phase of the trial to which he will be entitled in the event of conviction. For that reason, I now move in limine that the State be limited in impeaching Mr. Sumpter's testimony to asking whether he was previously been convicted of a felony. I concede the State is entitled to an affirmative answer and he is entitled to the instruction concerning impeachment of a witness about prior felony convictions, and I ask the Court to make a protective order limiting the cross-examination of that matter.

In response to defense counsel's motion, the trial court ruled Towle's testimony and report did not necessarily open the door to questioning defendant about his prior convictions. However, the court also ruled that defense counsel's reference to the social and psychological reports on direct examination had "opened the door" to Towle's cross-examination regarding anything within the reports, including references to defendant's prior crimes.

We determine the trial court's ruling regarding the permissible scope of cross-examination of Towle was correct. Where a defendant in examination before the jury seeks and obtains testimony which he subsequently asserts prejudiced the jury against him, defendant is not entitled to complain of error with respect to admission of such testimony. State v. DeWitt, 286 N.W.2d 379, 383 (Iowa 1979), cert. denied, 449 U.S. 844, 101 S.Ct. 127, 66 L.Ed.2d 53 (1980). See State v. Washington, 257 N.W.2d 890, 893 (Iowa 1977), cert. denied, 435 U.S. 1008, 98 S.Ct. 1881, 56 L.Ed.2d 390 (1978) (quoting State v. Hunkle, 229 N.W.2d 744, 750) ("[A] party to a criminal proceeding will not be permitted to complain of error with respect to the admission or exclusion of evidence where . . . he himself has acquiesced in, committed, or invited the error").

Defense counsel's motion in limine was a recognition there were certain risks inherent in proceeding with the intoxication defense. Towle's testimony did support defendant's blackout claim. However, Towle's reports also contained information which could damage defendant's defense. Trial counsel's tactical decision, after weighing those facts, was to proceed with Towle's testimony. The fact defense counsel's strategy got away from him or was not successful does not mean counsel's performance was deficient. Counsel argued the matter to the trial judge and was bound by the trial court's ruling on defendant's motion in limine and the permissible scope of Towle's cross-examination. State v. Jones, 271 N.W.2d 761, 766 (Iowa 1978). As defense counsel, he was under a restraint against rearguing a point which had been fully argued. See United States v. Maynard, 476 F.2d 1170, 1175 (D.C. Cir. 1973). We determine defense counsel was entitled to treat the trial court's ruling as definite and complete and to do what he fairly could to limit the prejudicial impact of the ruling and Towle's cross-examination. We therefore determine defense counsel did not render

ineffective assistance by failing to object to Towle's cross-examination on defendant's prior crimes.

We also determine defense counsel did not waive his right to assert error regarding the trial court's motion in limine and could have directly challenged the trial court's ruling on this appeal. Jones, 271 N.W.2d at 766. As such, we find defendant has not proved by a preponderance of evidence that he was prejudiced by defense counsel's failure to object to cross-examination of Towle about defendant's prior crimes.

B. Testimony regarding statements defendant made at the time of his arrest. Defendant next asserts trial counsel was ineffective in failing to object to testimony by law enforcement officers regarding statements defendant made at the time of his arrest.

Black Hawk County Sheriff Officer Michael Kubik, one of the arresting officers, gave the testimony in question. It was given on the context of whether Kubik thought defendant was drunk at the time he was arrested:

> Q. At the scene of the stop of defendant and defendant's vehicle, did you have an occasion to overhear any conversation between him and yourself or you and Officers Keefe and Johnson? A. Remarks, you mean?
>
> Q. Yes, sir. A. Yes, I did.
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> Q. And at that time was his speech at all slurred? A. No, sir.
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> Q. Was the defendant's speech coherent, were you able to understand what he was saying? A. I could understand everything.
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> Q. And what he was saying made sense? A. I don't know if what he said made sense; I didn't like what he said.
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> * * *
>
> Q. What was he saying? A. I don't know the exact words.

> Q. What was the nature and substance of his conversation? A. It had to do with T-Bone Taylor. Something to the effect that what had happened to him would happen to us. I don't know the exact words. Keefe was closer to him and he knows the gist of it. I just caught bits and pieces of that part.

Defendant argues Kubik's testimony regarding defendant's statements at the time of arrest destroyed defendant's credibility before the jury and prejudiced the jury against him. Defendant contends counsel's failure to object to the testimony was egregious.

We need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffective claim. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack or prejudice . . . that course should be followed"); Taylor, 352 N.W.2d at 685. We determine Kubik's testimony was probative on the issue of defendant's condition at the time of his arrest. The testimony supported the state's contention defendant was sober and conscious of his actions at the time he broke into the shop. We find the probative value of Kubik's testimony for rebutting defendant's intoxication defense outweighs any claims of unfair prejudice.

We find defendant has not produced sufficient evidence to show that but for counsel's failure to object to Kubik's testimony the decision in this case would reasonably likely have been different. We affirm the trial court on this issue.

III.

In a pro se amendment to appellant's brief and argument defendant generally attacks the constitutionality of Iowa Code § 902.8 (1985) governing habitual offenders. Section 902.8 permits enhanced sentences to be given to persons

convicted of Class C or Class D felonies if they have twice before been convicted of felonies. Defendant asserts the three-year minimum sentence requirement of § 902.8 is unconstitutional because (1) it punishes persons twice, once by the district court and once by the parole board, and thereby constitutes double jeopardy; and (2) it is not imposed on all those who have been convicted of a third felony, but only on those who have been convicted of a third Class C or Class D felony. We reject defendant's contentions.

The Iowa courts have already addressed squarely defendant's first constitutional challenge. In State v. Popes, 290 N.W.2d 926, 927 (Iowa 1980), the court held the habitual offender statute does not create a separate crime, but rather it is merely a sentencing procedure by which punishment already entered is enhanced. Therefore, the court held § 902.8 did not constitute double jeopardy. Id. See State v. Smith, 282 N.W.2d 138 (Iowa 1979); Davis v. Bennett, 400 F.2d 279 (8th Cir. 1968), cert. denied, 395 U.S. 980, 89 S.Ct. 2137, 23 L.Ed.2d 768 (1969).

The Iowa courts have also held former Iowa Code § 747.1 (1975), now § 902.8, which was invoked only for larceny-connected crimes did not deprive the defendant of equal protection of the law. State v. Kramer, 235 N.W.2d 114, 116-17 (Iowa 1975). See Wessling v. Bennett, 410 F.2d 205, 207 (8th Cir. 1969), cert. denied, 396 U.S. 945, 90 S.Ct. 384, 24 L.Ed.2d 248 (1970). The gist of defendant's argument in Kramer is identical to Sumptner's. In Kramer the defendant contended that in the habitual offender statute the Iowa legislature had singled out a few crimes which were made the sole basis for imposing additional punishment while other crimes were not similarly treated. Kramer, 235 N.W.2d at 116. In upholding the constitutionality of the statute the court stated:

> We start out with a strong presumption of constitutionality; and all reasonable intendments must be indulged in favor of the statute. He who challenges constitutionality has the heavy burden to negate every reasonable basis upon which the statute may be sustained. We will not declare a statute constitutionally bad unless it is clearly, palpaly and without doubt violative of a constitutional right.
>
> Certainly, the classification adopted by the legislature is subject to differences of opinion. Some of the crimes included might well have been omitted; some omitted might well have been included. Unless patently arbitrary, that is a legislative determination. We cannot say the classification adopted is clearly and palpaly unreasonable and bears no rational relationship to the legislative purpose of regulating certain repeated criminal conduct.

Kramer, 235 N.W.2d at 116-17. Section 902.8 is not limited to larceny-connected crimes. As such, there is even less merit to any contention the section is under or over inclusive. We determine Kramer is analogous and applicable to the instant case. We therefore reject defendant's challenge to § 902.8.

We affirm the trial court on all counts. **AFFIRMED.**