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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS GENE COOLEY,)

Petitioner-Appellant,) Filed March 31, 1986

vs) 5-523 / 84-1979

STATE OF IOWA,)

Respondent-Appellee)

37

Appeal from the Iowa District Court for Black Hawk County (No. 64338) - Joseph C Keefe, Judge

Petitioner appeals from the district court's denial of postconviction relief. **AFFIRMED**

James F Whalen, of Dunbar, Dunbar & Whalen, Waterloo, for the petitioner-appellant

Thomas J Miller, Attorney General, and Ann DiDonato, Assistant Attorney General, and Scott Lemke, Assistant Black Hawk County Attorney, for respondent-appellee

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

Thomas Cooley was convicted of burglary in the first degree. He had been accused of entering the victim's home following a quarrel with the intent to assault the victim. At his bench trial, there was a dispute as to whether he had entered the house itself or only the porch. Cooley filed a direct appeal of his conviction, but it was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 104.

Cooley later filed the present application for postconviction relief. After a hearing, the district court denied postconviction relief. Cooley has appealed.

I.

Cooley contends his trial attorney rendered ineffective assistance in numerous ways. He complains the attorney: (1) did not adequately cross-examine the victim and the victim's wife; (2) did not adequately prepare and present Cooley's motion for a change of venue; (3) did not adequately investigate a possible defense of intoxication; and (4) did not adequately research the question whether a porch is "not open to the public" within the meaning of the burglary statute.

To establish the claim of ineffective assistance of counsel, defendant must establish that his counsel's performance did not fall within the range of normal competency by showing: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kyle v. State, 364 N.W.2d 558, 562 (Iowa 1985)(citing Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). Defendant has the burden to prove both of these elements by a preponderance of the evidence. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

We recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Kyle v. State, 364 N.W.2d at 562. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. Sims v. State, 295 N.W.2d at 423. To show prejudice, 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. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Cooley first argues his trial counsel did not fully exploit on cross-examination inconsistencies between the victim's trial testimony and statements given to the police. He claims his trial counsel failed to conduct an adequate investigation by getting access to those statements before the trial and was inadequate because he did not request time to review the statements before beginning cross-examination. We find the record shows otherwise. Cooley's trial counsel deposed the victim and his wife prior to trial and had access to the investigation statements at trial. Using the depositions, trial counsel impeached the trial testimony of both the victim and his wife. On cross-examination, trial counsel got the victim to admit that he originally pointed the rifle at Cooley. We find trial counsel's actions fell within the normal range of competency, and even if it did not, that Cooley failed to show any resulting prejudice.

Cooley's second contention is that his trial counsel did not adequately prepare and present Cooley's motion for a change of venue. Cooley argues his trial counsel failed to submit all of the media accounts concerning Cooley's burglary arrest and his 1981 civil trial arising out of his 1976 manslaughter conviction. Cooley also alleges his trial counsel should have presented lay witnesses to testify that the burglary case was a topic of discussion in the community

and that substantial prejudice against Cooley existed. The state argues this point is moot because the Rule 104 dismissal of the direct appeal by the supreme court stated there was no prejudice to Cooley from the denial of the motion to change venue since Cooley had a bench trial. The state contends that if there was no prejudice from the trial court's denial of the motion for change of venue, then Cooley cannot establish his claim of ineffective assistance of counsel on this ground. Without determining whether the Rule 104 dismissal renders the issue moot, we look at Cooley's claim of ineffective assistance of counsel with regard to the change of venue.

After a review of the record (in particular the hearing on the motion for change of venue and trial counsel's testimony at the postconviction hearing), we find trial counsel made adequate arguments in support of the change of venue and submitted several newspaper clippings to the court regarding "this case and earlier cases." We determine trial counsel rendered effective assistance; and even if he did not, we find Cooley failed to show there was a reasonable probability that "but for" counsel's unprofessional errors the result of the proceeding would have been different.

Cooley next argues his trial counsel did not adequately investigate a possible defense of intoxication. Cooley argues his trial counsel was remiss in not contacting a witness who testified at the postconviction hearing Cooley was drunk. At the postconviction hearing, trial counsel testified he did not think an intoxication defense had much chance of success and he was afraid Cooley would incriminate himself to a charge of OWI in the course of attempting to establish the defense. Whether this tactic was good or bad, it was not so unreasonable that it showed ineffectiveness. See State v. Wilkens, 346 N.W.2d 16, 18-19 (Iowa 1984)(trial counsel not ineffective for failure to present intox-

ication defense); State v. Veverka, 271 N.W.2d 744, 750-51 (Iowa 1978)(defense attorney's strategic decision not to introduce evidence of impaired judgment not ineffective assistance). We do not find Cooley proved by a preponderance ineffective assistance or resulting prejudice.

Cooley's final argument is that his trial counsel did not adequately research the question of a porch defined as a "structure not being open to the public" within the meaning of the burglary statute. Cooley claims if trial counsel had done the research he would have found authority that a porch is an area open to the public. Cooley's trial counsel at the postconviction hearing testified he found no Iowa cases on point and that he looked in the Iowa Code Annotated, the Iowa Digest, and the Decennials. We find the cases cited by Cooley in his brief are not persuasive nor controlling authority on the open porch issue. We find Cooley's trial counsel's research fell into the range of normal competency required to give effective assistance of counsel and that Cooley has failed to show any resulting prejudice.

II.

Cooley also contends: (1) Iowa Code section 713.1, the statute defining burglary, is unconstitutionally vague because it does not give adequate notice that a porch is an area not open to the public; (2) the court erred by finding that a porch is "an occupied structure not open to the public"; (3) the evidence at trial was insufficient to permit a rational trier of fact to find either that the victim's porch was "an occupied structure not open to the public" or that Cooley had entered the house beyond the porch; (4) his waiver of his right to a jury trial was not made knowingly, intelligently, and voluntarily; and (5) he was subjected to selective or vindictive prosecution since he was charged with a more serious crime than similarly situated defendants because the local authori-

ties felt personal hostility toward him due to his involvement in a 1976 traffic accident which killed a police officer.

The state claims Cooley is barred by the supreme court's dismissal of his direct appeal, pursuant to Iowa Rule of Appellate Procedure 104, from further review of the court's finding that the victim's porch was an area not open to the public. In Stanford v. Iowa State Reformatory, 279 N.W.2d 28 (Iowa 1979), the court held a Rule 104[1] dismissal which is contested or objected to by the defendant does not prevent issues which could have been presented upon direct appeal from being embraced in a petition for postconviction relief under Iowa Code section 663A.8. Id. at 34. However, the state argues that where the appellate court rules on a specific issue, that ruling is final and bars relitigation of the issue, even where the defendant resisted the Rule 104 dismissal. Snyder v. State, 262 N.W.2d 574, 578 (Iowa 1978).

We set forth the supreme court's Rule 104 dismissal on Cooley's direct appeal:

> The submission is upon the amended motion of the state appellate defender's office filed May 20, 1982, pursuant to Iowa R. App. P. 104. The same has been submitted to and considered by Justices Harris, McGiverin, and Schultz. The defendant-appellant, Thomas Gene Cooley, filed with the court a request that another attorney be appointed to represent him to continue the appeal. Notwithstanding the request of the defendant it is determined on the basis of a careful review of the files, papers, and claims herein that this appeal is indeed frivolous. Defendant was convicted of burglary in the first degree in violation of section 713.2, The Code. The trial court did not err in overruling defendant's motion for directed verdict as there was ample evidence that the defendant entered a porch, plainly "an area enclosed for the keeping of valuables," under section 713.1, The Code. State v. Newman, 313 N.W.2d 484, 486 (Iowa 1981). There was also evidence to support a finding that defendant's intent at the time he entered the porch was with the intent to perpetrate the burglary. We find no error in

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[1] In that case, the rule was still Iowa Rule of Appellate 16.

> the trial court's evidentiary rulings. Defendant also complains that the trial court abused its discretion in overruling a pretrial motion for change of venue. Since this was a bench trial there could be no prejudice to the defendant from the ruling. In any event we find no abuse on the basis of the venue hearing. The motion to withdraw pursuant to 104 is sustained and this appeal is dismissed.

We find the specificity of this Rule 104 dismissal bars relitigation in post-conviction relief of Cooley's first three issues concerning the open porch issue. Although we do not find this argument was raised at the district court, we find it unnecessary to address the issue of preservation of error. We will address the other two issues.

Cooley claims his right to a jury trial was not waived knowingly, intelligently, and voluntarily. Cooley argues he was induced to waive the jury trial by his trial counsel's misleading advice that a trial to the court was an automatic ground for new trial and the judge assigned to the case was the "easiest judge that there is." Cooley's trial counsel denied making these statements to Cooley and recalled that Cooley was only adamant about having a trial, not necessarily a jury trial. The record reflects the trial court engaged in a thorough colloquy with Cooley regarding the rights he was waiving. Where the record contains no evidence to support defendant's allegations that he waived a jury trial on the basis of misrepresentations of counsel, the defendant has not met his burden of proof in establishing the invalidity of the waiver. State v. Lawrence, 344 N.W.2d 227, 230 (Iowa 1984). We find the defendant's waiver of a jury trial was voluntary and made with full appreciation of the legal consequences. See State v. Johnson, 318 N.W.2d 417, 427 (Iowa 1982).

Finally, Cooley alleges he was subject to vindictive prosecution due to the prosecutor's personal hostility toward him resulting from his involvement in the death of a police officer in 1976. The postconviction court found there was no showing of any selectivity against Cooley as there was "no showing that

all charges of burglary in the second degree are not prosecuted and Cooley failed to meet his burden to show he was selectively prosecuted." We agree.

We affirm the denial of Cooley's postconviction relief.

AFFIRMED.