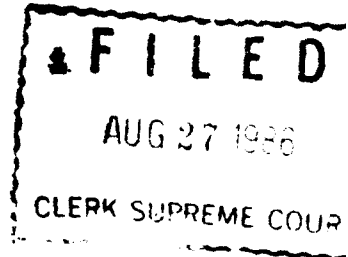


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 27, 1986
vs.	)	
RONALD DEAN SWARTZ,	)	
Defendant-Appellant.	)	$\frac{6-190}{85-1017}$

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Appeal from the Iowa District Court for Black Hawk County (07X002207)

- Dennis D. Damsgaard, Judge.

Defendant appeals from his conviction for robbery in the first degree in violation of Iowa Code section 711.2 (1983), asserting the adverse results of the polygraph test should have been suppressed. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Elizabeth E. Ciebell, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.

Harry McMurray, Jack Smith, and defendant robbed Mark Tull at gunpoint in his Waterloo apartment on July 23, 1984. The three men took drugs and cash. While the crime was being perpetrated, photographs were taken of defendant by Smith and McMurray. Due to the nature of these photographs a photo processor in The Dalles, Oregon, on July 26, 1984, made copies of the pictures and notified the local police. As a result of these photos, defendant was arrested and charged with possession of a firearm by a felon. After giving a statement, defendant was released by the Oregon authorities.

Defendant returned to Waterloo on approximately August 5, 1984. The Waterloo Police Department eventually received copies of the incriminating photographs. Ann Meyer, of the Department, was able to identify the victim in the pictures as Mark Tull. Contact was made with Mr. Tull, out of which arose the issuance, on October 23, 1984, of a warrant for the defendant's arrest.

The formal trial information was filed on November 2, 1984, charging defendant with first-degree robbery in violation of Iowa Code section 711.2 (1983). Approximately two weeks prior to the scheduled trial, defendant was administered and failed a polygraph examination. Defendant filed a supplemental motion to suppress the results of the pretrial polygraph exam, which the trial court overruled. Notice of intent to rely on a compulsion defense was filed on January 30, 1985. Defendant grounded his entire defense on the argument that he was compelled by Harry McMurray to participate in the robbery. On May 15, 1985, the jury found defendant guilty as charged. A motion for new trial was filed on June 24, 1985, and promptly overruled. Notice of appeal was timely filed.

Generally our review of criminal proceedings is at law for correction of errors only, Iowa R. App. P. 4, but when an issue involves a constitutional right, we review the evidence de novo in view of the totality of the circumstances.

State v. Aldape, 307 N.W.2d 32, 36 (Iowa 1981); State v. Fisher, 279 N.W.2d 265, 268 (Iowa 1979).

The issues shall be considered in the order they were argued before this court.

I.

Defendant contends that the trial court erred in not suppressing the adverse results of the polygraph test. He asserts that his first attorney provided ineffective assistance of counsel. Specifically, he contends his counsel misled him into believing he would receive a written list of all questions before the exam, that counsel would be present during the exam, and that the results could be suppressed even if defendant failed the exam. Because of this alleged ineffective assistance of counsel, defendant contends that the results of the polygraph should have been suppressed.

Polygraph evidence is admissible only by stipulation of the parties. State v. Losee, 354 N.W.2d 239, 242 (Iowa 1984); State v. Marti, 290 N.W.2d 570, 586 (Iowa 1980). To have a binding stipulation: first, the stipulation must be agreed to by both parties; and second, the stipulation should be a matter of record, either by written document or by oral agreement of the parties in open court. Marti, 290 N.W.2d at 587.

We have before us the stipulation which defendant signed on January 24, 1985. In this document a "deal" was reached; if defendant passed the test the State would dismiss the pending charges, but if he failed, the State could introduce either the results of the examination or the testimony of the examiner at trial. There is no question but that defendant signed the stipulation and participated in the actual polygraph exam. Defendant contends that his first counsel's misadvice or misinformation regarding the polygraph invalidated the stipulation.

In considering a claim of ineffective assistance of counsel, we consider whether under the entire record and the totality of the circumstances counsel's performance was within the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The party claiming ineffective assistance of counsel, depriving him of his sixth amendment right to counsel, must show that counsel failed to perform an essential duty, and prejudice resulted therefrom. Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985); Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Claimant must satisfy this burden by a preponderance of the evidence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983).

The United States Supreme Court has held that "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would have reasonably likely have been different absent the errors." Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984).

We note that defendant was not provided the written questions prior to exam and that defendant's counsel was not present. Defendant still decided to submit to the test. In view of the stipulation, defendant should not be able to retract the agreement and assert error because the test proved to be unfavorable. Furthermore, regarding defendant's claim of ineffective assistance of counsel, we conclude that defendant failed his burden of proving prejudice. Considering the overwhelming amount of evidence showing defendant's guilt, we cannot say this decision would have been any different absent defendant's first counsel's alleged errors. We affirm the trial court's decision to admit the polygraph test results in this case.

II.

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The second error alleged is that the trial court failed to strike an improper comment by a State's witness as to the defendant's exercise of his constitutional right to remain silent.

When defendant was arrested by Oregon State Police he was presented with a Miranda waiver of rights form, which he refused to sign. Although defendant did execute a written waiver the following day. At trial, Sergeant Jack T. Rodgers of the Oregon State Police Department testified that he stopped defendant and Harry McMurray and proceeded to advise them of their rights. The prosecutor then handed him State's Exhibit 27 and asked him what it was. Officer Rodgers stated that it was the original right statement read to defendant and continued to testify that defendant had refused to sign the form. This was objected to and said objection was overruled.

In State v. Canada, 212 N.W.2d 430 (Iowa 1973), the court held that defendant's right to remain silent was not violated by the admission of statement by police that defendant, after arrest and after the reading of his rights, did not make any statement to arresting officer. Id. at 435. The court based its finding on the proposition that "the admission of testimony as to the conduct of a defendant when first accused of a crime is not objectionable." State v. Myers, 258 Iowa 940, 950, 140 N.W.2d 891, 897 (1966). But see State v. Porter, 283 N.W.2d 351 (Iowa 1979).

Upon reading the record it is clear that the question was asked, and answered, to show the actions of the defendant at the time of his arrest. There was no further reference to his refusal to answer made at trial.

Furthermore, even assuming that admission of this testimony was error, it was harmless error. To conclude that federal constitutional error is harmless we must find that introduction of such error was harmless beyond a reasonable

doubt. State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980). Upon considering the record, we conclude, beyond a reasonable doubt, that the alleged error did not affect defendant's right to a fair trial.

III.

As noted, defendant relied heavily on the defense that he was compelled by Harry McMurray to participate in the robbery. Defendant contends that the court erred in excluding opinion and reputation testimony regarding Harry McMurray's violent and dangerous character. At trial defendant called Tom Webster and attempted to offer evidence of his opinion to McMurray's violent and dangerous character and McMurray's general reputation in the community. Such evidence was excluded, primarily because defendant had failed to lay a proper foundation.

The basis of the compulsion defense is Iowa Code section 704.10 (1985), which provides:

No act, other than an act by which one intentionally or recklessly causes physical injury to another, is a public offense if the person so acting is compelled to do so by another's threat or menace of serious injury, provided that the person reasonably believes that such injury is imminent and can be averted only by the person doing such act.

Obviously McMurray's violent nature was pertinent as to whether defendant was acting because of a threat or menace of serious injury. It is also relevant to show the reasonableness of defendant's belief.

We find that evidence of McMurray's extremely violent nature is strewn throughout the record. This evidence is so overwhelming that the court's exclusion could hardly have been prejudicial. See State v. Gibb, 303 N.W.2d 673, 683 (Iowa 1981). We conclude that the trial court did not abuse its discretion in excluding such evidence on direct exam.

IV.

The fourth alleged error occurred when the court overruled defendant's motion for continuance after Harry McMurray revoked his previous claim of fifth amendment privilege and decided to testify in favor of the State.

During the defense case McMurray was called to the stand, outside the presence of the jury, and invoked his fifth amendment privilege. The next day the State sought to call McMurray as a rebuttal witness; the defense objected on the ground that they needed additional time to prepare for this surprise testimony. Said objection was overruled.

Iowa Rules of Civil Procedure 182 and 183 apply to criminal cases; "they require a timely request and a showing that substantial justice will be more nearly obtained by granting of the continuance." State v. Ware, 338 N.W.2d 707, 714 (Iowa 1983). The decision regarding a motion for continuance rests largely with the sound discretion of the trial court, such discretion is very broad. State v. Kyle, 271 N.W.2d 689, 691 (Iowa 1978). We will interfere with the court's decision only where there has been a clear abuse of judicial discretion and injustice has been done to defendant. Id. (citing State v. Hines, 225 N.W.2d 156, 160 (Iowa 1975)).

Reviewing the record we find no abuse of the trial court's broad discretion. More specifically upon review of defendant's extensive cross-examination of Harry McMurray, we conclude that in no way was an injustice imposed upon defendant by the denial of this motion.

V.

Finally, defendant contends that the trial court erred in overruling defendant's motion for new trial. During the trial McMurray testified that he intended to plead guilty to robbery in the first degree. But at defendant's hearing on motion for a new trial McMurray denied any intent to plead guilty. Defendant

contends that this new evidence of McMurray's perjury should entitle him to a new trial.

In considering a motion for new trial on the basis of newly discovered evidence, to sustain said motion the following criterion must be established: 1) the evidence was discovered after trial and before judgment; 2) it could not have been discovered earlier in the exercise of due diligence; 3) it is material to the issue, not merely cumulative or impeaching; and 4) it would probably change the result if a new trial is granted. State v. Folck, 325 N.W.2d 368, 375 (Iowa 1982) (citing State v. Sims, 239 N.W.2d 550, 554 (Iowa 1976)).

Whether a new trial should be granted is within the discretion of the trial court and will be disturbed on appeal only on a reasonably clear showing of abuse. State v. Frank, 298 N.W.2d 324, 328 (Iowa 1980).

Defendant failed to establish the last two criterion necessary for a new trial. Furthermore, we find no abuse of discretion by the trial court.

AFFIRMED.