IN THE COURT OF APPEALS OF IOWA

No. 1999-369 (9-622) / 98-1976
Filed December 27, 1999

TIMOTHY WAYNE SMITH,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
DEC 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jasper County, Dale B. Hagen, Judge.

Applicant appeals the denial of his application for postconviction relief based on a claim of ineffective assistance of trial counsel. **AFFIRMED.**

Steven J. Holwerda of Selby, Updegraff, Smith & Holwerda, Newton, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Steven Johnson, County Attorney, and James W. Cleverley, Jr., Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer, and Miller, JJ.

ZIMMER, J.

Applicant-appellant, Timothy Smith, appeals the district court's denial of his application for postconviction relief. He claims the court erred in denying his application because trial counsel did not advise him he could not be convicted solely on the testimony of his co-defendants, and counsel allowed him to plead guilty without a factual basis to support his plea. We affirm.

Factual background. Smith and his two co-defendants were arrested at a motel in Newton after one of the others used a stolen credit card to pay for the room. The three men arrived at the motel in a Jeep Grand Cherokee, which was parked outside the room at the time of the arrest. A check revealed the Jeep had been stolen in California. The State charged Smith with first-degree theft. After negotiations, he pled guilty to second-degree theft. Smith stated in the plea proceeding that he and his co-defendants stole the Jeep Grand Cherokee in California and he helped drive it to Iowa. He also submitted a handwritten statement describing his involvement with his co-defendants in the theft of the vehicle in California. The court accepted his plea and sentenced him to up to five years in prison. Smith did not file a motion in arrest of judgment or appeal his conviction.

Postconviction proceeding. Smith filed an application for postconviction relief. He claimed his trial counsel was ineffective in not informing him the State would need to present corroborating evidence in addition to the testimony of his co-defendants in order to convict. He also claimed trial counsel failed to advise him the

court would have to find he exercised control over the Jeep and knew it had been stolen.

Smith's version of the facts changed dramatically at his postconviction trial. He testified he was hitchhiking in Kansas when he caught a ride with two men in a Jeep Grand Cherokee. He stated he never drove the vehicle and did not know it was stolen. He contended he would not have pled guilty if trial counsel had advised him properly. Smith's postconviction counsel successfully objected to the admission of the deposition of his trial counsel concerning Smith's claims. The postconviction court denied his application, finding trial counsel acted competently and Smith was not prejudiced. Smith appeals.

Claims on appeal. On appeal, Smith raises the same claims concerning ineffective assistance of counsel he raised in the postconviction proceeding. The State responds Smith did not preserve error because he failed to establish sufficient cause for failing to appeal and failing to move in arrest of judgment. The State also claims the record contained the corroborating evidence necessary to convict Smith. Smith contends he pled to the wrong theft charge. The State responds that, since the penalty for both charges is the same, Smith is unable to prove prejudice on this basis.

Discussion. Our review of an allegation of ineffective assistance of counsel is de novo. *See State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *See State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice a

defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *See State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *See State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Corroborating evidence. Smith first alleges his trial counsel was ineffective in not advising him that the testimony of his codefendants could not convict him without corroboration.[1] He claims he believed he was facing ten years in prison if he went to trial and was convicted -- which trial counsel told him would occur, based on the testimony of Smith's two codefendants. Smith asserts that, since there is no corroboration for their testimony, he was prejudiced by pleading guilty instead of going to trial, where he would have been acquitted. The State responds that the record contains corroborating evidence.

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[1] Iowa Rule of Criminal Procedure 20(3) requires that testimony of an accomplice be corroborated:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Whether corroborating evidence exists is a legal question for the court. *See State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997); *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981). Once the court establishes the legal adequacy of the corroborating evidence, the sufficiency of the evidence is for the jury. *See State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). Corroborating evidence may be direct or circumstantial. *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). It "need not be strong and need not be entirely inconsistent with innocence." *Dickerson*, 313 N.W.2d at 529. We view all the evidence in the light most favorable to the State, even if contradicted, and indulge in every legitimate inference that may be fairly and reasonably deduced from the evidence. *See State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980); *State v. Cuevas*, 281 N.W.2d 627, 629 (Iowa 1979).

At the plea hearing Smith confessed his involvement in the theft of the vehicle verbally and in writing. He stated he and the others "had this notion to steal the vehicle and drive it cross-country so we acted on that notion." He admitted driving the vehicle and was able to give details of the route he drove. At the postconviction hearing, Smith claimed he merely was an innocent hitchhiker who accepted a ride in Kansas and was planning to go through Kentucky on his way to Florida. He claimed no knowledge the vehicle was stolen, yet described how they took back roads instead of the interstate highway and took steps to avoid being seen by police. He testified he suspected the vehicle was stolen.

The police reports concerning the arrests in Newton reveal Smith was in the motel room with the stolen Jeep directly outside. The motel clerk's testimony would

put Smith in the vehicle when it arrived. When the police knocked on the door, attempts were made to escape through the back window. Smith did finally answer the door. He gave a false name when asked by the police. His correct identity only was established the day after his arrest. During his arrest, Smith voiced concern about his possessions which were in the stolen vehicle. Subsequent inquiries revealed an outstanding Indiana warrant for Smith for vehicle theft.

We determine the record contains evidence to corroborate the testimony of Smith's accomplices. Smith's trial counsel would have known the evidence in the record. We conclude he acted competently and represented his client effectively in negotiating a favorable plea agreement. Smith has not demonstrated counsel failed in an essential duty. In addition, given the existence of corroborative evidence, Smith's claim he would have proceeded to trial and probably would not have been convicted must fail. Consequently, he cannot meet his burden to prove prejudice.

Elements of the charge. Smith also claims his trial counsel was ineffective in failing to advise him the court lacked jurisdiction over a California theft and in failing to explain the elements of the charge which the State would have to prove. The trial information charged Smith with theft in violation of Iowa Code sections 714.1(1)[2] and

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[2] Iowa Code section 714.1(1)(1997) defines theft:

> A person commits theft when the person does any of the following:
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> 1. Takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.

714.2(2).[3] It also charged that Smith "did exercise control over stolen property having reasonable cause to believe that said property was stolen." Smith argues the State would have to prove he exercised control over the stolen vehicle and knew it was stolen. He alleges a "taking" in California does not give an Iowa court jurisdiction over the case.

The postconviction court determined Iowa did have jurisdiction over a theft which took place in California because the stolen property was brought into Iowa. Iowa has long had a common-law continuing offense concept to support venue. *See State v. Hippler*, 545 N.W.2d 568, 571 (Iowa 1996) (citing *State v. Bennett*, 14 Iowa 479, 481-82 (1863)). The trial information also alleged Smith exercised control over stolen property, which more properly falls under the definition of theft in Iowa Code section 714.1(4).[4] Jurisdiction in Iowa would be proper under either definition of theft. Smith's statements in the plea proceeding provided a factual basis for finding

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[3] Iowa Code section 714.2 defines degrees of theft. Subsection (2) defines second degree theft:

> 2. The theft of property exceeding one thousand dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "motor vehicle" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".

[4] Iowa Code section 714.1(4) provides, in pertinent part:

> 4. Exercises control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such property has been stolen, . . .

him guilty under either definition of theft. Since the penalty is the same for either definition of theft, Smith cannot demonstrate prejudice. We need not determine whether or not his trial counsel failed in an essential duty.

Smith's remaining argument concerning the effectiveness of his trial counsel as it relates to the offense charged is a repetition of his earlier lack-of-corroboration claim. He argues there is no evidence to prove his involvement in the theft in California or that he exercised control over the stolen vehicle, knowing it to be stolen. For the reasons set forth in our analysis of his corroboration claim, we find this claim to be without merit.

To succeed on his claim of ineffective assistance of counsel, Smith had to show by a preponderance of the evidence that trial counsel failed to perform an essential duty, and such failure prejudiced him. *State v. Thornton*, 498 N.W.2d 670, 675 (Iowa 1993). To prove the first prong, Smith had to overcome the presumption counsel was competent and show counsel's performance was not within the range of normal competency. *Id.* To prove the second prong, Smith had to show counsel's failure worked to his actual and substantial disadvantage, such that there is a reasonable probability that but for counsel's alleged error the trial result would have been different. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We find Smith has not demonstrated either prong of the *Strickland* test and affirm the decision of the postconviction court denying Smith's application for relief.

AFFIRMED.