FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,
vs.
RICHARD WALLACE JOSS,
Defendant-Appellant.

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9-63
88-441

Appeal from the Iowa District Court for Linn County (CRF10582), William L. Thomas, Judge.

Defendant appeals his conviction, following a jury trial, of conspiracy to commit second-degree theft and being an habitual criminal in violation of Iowa Code sections 706.1, 706.3, 714.1(6), 714.2(2), and 902.8 (1987). **AFFIRMED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark Joel Zbieroski, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J. 141

Defendant Richard Wallace Joss appeals his conviction, following a jury trial, of conspiracy to commit second-degree theft and being an habitual criminal, in violation of Iowa Code sections 706.1, 706.3, 714.1(6), 714.2(2), and 902.8 (1987). He contends that the trial court erred in denying his motion for a new trial based on newly-discovered evidence and that he was denied effective assistance of counsel when his trial attorney failed to object to prejudicial hearsay testimony. We affirm.

Joss and a codefendant, Ronald Evans, were charged with conspiracy to commit second-degree theft for their involvement in a scheme whereby they opened a checking account under a false name and then cashed numerous checks against it that were all returned for insufficient funds. The State dropped similar charges against another alleged coconspirator, Jeannette Meyer, when she pleaded guilty to a lesser charge and agreed to testify against Joss and Evans. After a joint trial, the jury found Joss guilty as charged.

I. Joss first contends that the trial court erred by overruling his motion for a new trial based upon newly-discovered evidence, specifically, information showing that Meyer had lied when she testified on cross-examination that she had personally passed only "about eight or nine" bad checks. The newly-discovered

information, which Joss claims he did not know about until three weeks after the trial, suggests that Meyer actually cashed seven more checks than she admitted to. The additional checks were drawn on a different account which was not the focus of this trial. Joss argues that since the trial judge found that Meyer's credibility was the key issue, this new evidence could be used to impeach her and it would, under the circumstances, "become material to the only real fighting issue in the case."

To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) that the evidence could not have been discovered earlier in the exercise of due diligence; (2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

In the case at bar, it is clear the first element of the test was met. We find, however, that Joss failed to satisfy the second and third elements necessary to prevail

on his motion for new trial. Although we do not dispute the trial court's determination that Meyer's credibility was important to the case, we fail to see how the newly-discovered evidence was material to the issues in the case. We believe the evidence here was merely cumulative of other evidence in the record, which clearly cast serious doubt on Meyer's credibility as a witness. Moreover, we are not in agreement with the defendant that the newly-discovered evidence was necessarily inconsistent with Meyer's testimony and would have changed the outcome of the trial. In ruling on defendant's motion, the trial judge noted:

> My recollection of Miss Meyer's testimony and particularly this discussion of the checks is that it was . . . that the context of the questions related to the account that was in question . . . my recollection of the context of the testimony [was] that it was not general and by the way how many bad checks have you ever written in your life sort of question, ...

In State v. Gilroy, 313 N.W.2d 513, 522 (Iowa 1981), the supreme court stated:

> Regarding the probability of a different result if a new trial was granted, the trial judge was confronted with a problem requiring evaluation of conflicting evidence. Since he saw and heard the witnesses, he was in a superior position to make this evaluation.

We find that the defendant has failed to show that the newly-discovered evidence would probably have changed the outcome if a new trial was granted. The trial court properly denied defendant's motion for a new trial.

II. Joss also alleges ineffective assistance of counsel in the failure of his trial attorney to object to damaging hearsay introduced during his codefendant's cross-examination of Meyer. Meyer testified that Evans' wife had told her of a mutual agreement between Evans and Joss to commit theft. Joss argues that such hearsay evidence is clearly prejudicial in a conspiracy case.

As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation. In claims of ineffective assistance of counsel, we are concerned with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Id. To constitute ineffective assistance of counsel, the record must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Id. Although ordinarily we prefer that a claim of ineffective assistance of counsel be litigated in postconviction proceedings, see State v.

Williams, 285 N.W.2d 248, 271 (Iowa 1979), cert. denied, 446 U.S. 921, 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980), we believe the record here is adequate to allow us to adjudicate the matter of trial counsel's effectiveness, and that nothing would be gained by requiring a further hearing on the question. See Schoelerman, 315 N.W.2d at 71.

In the instant case, Meyer's statements that Evans' wife, Pam, had told her of a mutual agreement between Evans and Joss to commit theft constituted hearsay, Iowa Rule of Evidence 801(c); State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979), and in the absence of affirmatively established evidence to the contrary, the admission of such hearsay evidence is presumed to be prejudicial error. Id.

Despite counsel's error in failing to object to the hearsay testimony, we believe that the record fails to support Joss's claim that, but for this error, the result of his trial would have been different. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). The record indicates that there was sufficient evidence of Joss and Evans's agreement or combination to commit a criminal act in violation of Iowa Code section 706.1. Although such evidence was circumstantial, we note that direct and circumstantial evidence are equally probative in determining that there was an agreement between Joss and Evans. Iowa R. App. P. 14 (f)(16). We therefore hold that the defendant in this case has failed to establish

prejudice from counsel's failure to object to the hearsay testimony, and defendant has failed to establish that counsel was ineffective.

AFFIRMED.