IN THE COURT OF APPEALS OF IOWA

No. 6-301 / 95-764

FILED
AUG 30 1996
CLERK SUPREME COURT

CLEON FOREMAN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Cleon Foreman appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

John P. Messina, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano and Melodee Hanes, Assistant County Attorneys, for appellee.

Considered by Cady, P.J., Streit and Vogel, JJ.

CADY, P.J.,

This appeal requires us to determine whether Cleon Foreman's trial counsel rendered ineffective assistance. On our de novo review, we affirm.

The State charged Foreman with first-degree burglary and second-degree sexual abuse. At trial the State produced evidence Foreman broke into a residence, through a basement window. Foreman had previously shared the residence with Jeri Jewitt, his girlfriend and the mother of his two children. After breaking through the window, Foreman repeatedly struck Jewitt in the face and chest, held a loaded gun to her head, threatened to kill her, and forced her to engage in sexual intercourse. Jewitt testified Foreman no longer resided with her, and was living with his aunt at the time of the attack. A jury found Foreman guilty of first-degree burglary and assault with intent to commit sexual abuse in violation of Iowa Code sections 713.1, 713.3 and 709.11 (1991). Foreman, on direct appeal, raised the sole issue of his trial counsel ineffectiveness, which was preserved for postconviction proceedings.

Foreman filed an application for postconviction relief alleging his trial counsel rendered ineffective assistance for failing to present available evidence proving his right to be on the premises. At the postconviction hearing, Foreman's trial counsel testified he had spoken to Foreman's aunt and brother prior to trial and decided not to use their testimony. Trial transcripts introduced also revealed evidence Foreman had lost the key to the residence, he was "in and out" of Jewitt's residence at the time of the burglary, he had sometimes slept in the basement of the house, and he kept

some possessions in Jewitt's basement. The district court denied Foreman's application for postconviction relief. Foreman appeals the district court's denial of his application for postconviction relief.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32.

To impose criminal responsibility for burglary, the State must prove the defendant broke into an occupied structure, in which one or more persons were present, *without permission or authority*, but with the intent to commit a felony, assault, or theft therein, and during the incident, the person possessed a dangerous weapon or inflicted bodily injury on the person within. Iowa Code §§ 713.1, 713.3 (1991). Foreman's ineffective assistance claims all concern evidence to prove his authority to enter Jewitt's residence.

Foreman specifically contends his trial counsel failed to present critical evidence including: (1) he never fully moved out of Jewitt's home; (2) he was briefly

staying with his aunt at the time of the incidence, which he often would do when he and Jewitt would fight, (3) he lost his key to the apartment and Jewitt did not take away his keys, (4) a majority of his clothes and personal belongings remained in Jewitt's basement on the day of the incident, and (5) the phone directory listed his name as residing at Jewitt's address. He also contends his trial counsel failed to present testimony from his aunt and brother concerning his brief stay at his aunt's house during the two weeks prior to the incident, due to a fight he had with Jewitt. He finally asserts his trial counsel rendered ineffective assistance in failing to elicit an explanation for why Foreman's name was not on the lease for Jewitt's house.

Foreman's trial counsel presented ample evidence indicating his reasons for lawfully entering the apartment. Evidence indicated Foreman had lived with Jewitt and their children, and often slept in Jewitt's basement. At trial, Foreman also testified on the day of the incident many of his belongings remained in Jewitt's basement. He also testified he lost the key to Jewitt's residence. Moreover, he stated while he had been living elsewhere, he was "in and out" of Jewitt's residence for the two weeks prior to the alleged assault.

We find Foreman's trial counsel breached no duty in failing to have Foreman's aunt and brother testify about his transient stay with his aunt and his permanent residence at Jewitt's house. Such evidence had already been elicited by trial counsel through Foreman's testimony. Moreover, trial counsel testified at the postconviction hearing he had considered eliciting testimony from Foreman's aunt and brother, but

determined it would be detrimental to Foreman's defense he was still living at Jewitt's residence. As we have previously held, improvident trial strategy or a mistake in judgment does not necessarily amount to ineffective assistance. *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992); *State v. Johnson*, 534 N.W.2d 123, 126 (Iowa App. 1995).

We also find Foreman's trial counsel had no duty to produce evidence he was listed in the telephone directory as living at Jewitt's residence. Foreman and Jewitt testified they lived together for two years, but disagreed whether Foreman had moved out prior to his assault on Jewitt. As such, the phone directory listing would have no probative value to the proceedings and Foreman's trial counsel possessed no duty to present this evidence. *See generally* Iowa R. Evid. 401, 402.

We also cannot find Foreman was prejudiced by his trial counsel's failure to present evidence concerning the reason Foreman's name was not on the lease for Jewitt's residence. Evidence presented in the postconviction proceedings indicated Foreman kept his name off the lease in order for Jewitt to keep receiving Aid to Dependent Children. However, we reject Foreman's contention his status of a "de facto" tenant shields him from liability for entering Jewitt's house. A defendant's interest in property does not preclude his or her liability for unlawful activity to the property. *See State v. Mann*, 463 N.W.2d 884, 884 (Iowa 1990) (estranged husband's destruction of contents in jointly owned house liable for criminal mischief); *State v. Peck*, 539 N.W.2d 170, 173 (Iowa 1995) (estranged husband burglary conviction

upheld even though restraining order allowed him to enter home when wife was not present). Furthermore, evidence of Foreman and Jewitt's attempt to maintain public assistance would not have established his right, license or privilege to enter Jewitt's residence on the day of the incident.[1]

Moreover, ample evidence existed in the record to show Jewitt denied him access to her home. Testimony indicated Foreman resided at Jewitt's home with her permission for two years, but had partially moved out prior to the incident. Jewitt also restricted Foreman's access to her home prior to the assault. She testified she took away his key, only allowed him once to enter the home with her permission, and experienced other times in which he entered by breaking a basement window. She further testified on the day of the attack Foreman knocked on her doors and windows, but Jewitt refused to let him in and called the police. She stated Foreman hid until the police left, broke a basement window, and physically and sexually assaulted her.

We find Foreman's trial counsel did not render ineffective assistance. The district court properly denied his application for postconviction relief.

AFFIRMED.

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[1] We also note trial counsel could have strategically refused to allow evidence of Foreman's attempts to defraud a governmental agency to be admitted into evidence.