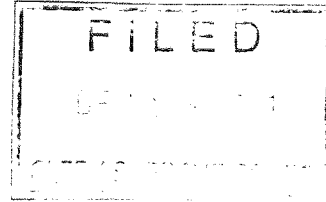


IN THE COURT OF APPEALS OF IOWA

No. 1-892 / 00-1956
Filed December 28, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ANTHONY NEUZIL,
Defendant-Appellant.

Appeal from the Iowa District Court for Fayette County, J.G. Johnson,
Judge.

Defendant Robert Neuzil appeals following his conviction for carrying or
transporting a revolver or pistol in a vehicle, in violation of Iowa Code section
724.4(1) (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Adams, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Sheryl Soich, Assistant Attorney
General, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Robert Anthony Neuzil appeals following his conviction for carrying or transporting a revolver or pistol in a vehicle, in violation of Iowa Code section 724.4(1) (1999).¹ Defendant contends (1) there was not sufficient evidence to support the conviction; (2) the district court erred in overruling defendant's objection to the definition of the word "carry" in the instructions; and (3) he was denied effective assistance of counsel. We affirm.

Defendant was driving a white Cadillac belonging to Jill Kolsch when the car went in the ditch. Kolsch and her young son were passengers in the car. Attempts to drive the car from the ditch were not successful and the parties decided to spend the night in the Cadillac. Defendant testified that at this point he went to the trunk of the car and removed his .44 caliber Smith and Wesson revolver, later placing it on the floorboard beneath the driver's seat. Kolsch's testimony was consistent with defendant's as to the time the gun was carried from the trunk to the inside of the car. Early the next morning law enforcement arrived, opened the driver's door and took defendant from the car. A deputy looking through the car's front windshield saw the gun protruding from under the seat. Defendant was arrested, and the vehicle was searched. In addition to the revolver, a .22 caliber rifle in three pieces was found in the back seat.

¹ 724.4. Carrying weapons

1. Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

Defendant first contends there was not sufficient evidence to support the conviction. He contends the loaded pistol was in the trunk at all times until the car went in the ditch, and that there is no evidence to the contrary.

Our review on this issue is well established. In determining whether there was substantial evidence to support the conviction we view the evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining if there was substantial evidence, we consider all of the evidence in the record, not just the evidence supporting a finding of guilt. *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997).

Defendant's argument focuses on whether he "carried" the gun in the Cadillac. In moving for a directed verdict of acquittal, defendant's trial attorney advanced that the only evidence offered by the State was that (1) there was a loaded pistol in the Cadillac, and (2) there was no evidence it had been carried or transported in the car.

The gun was found in the Cadillac. The district court correctly concluded that the jury could well have disbelieved the testimony that the gun was not placed on the floorboard of the car before it went in the ditch but had instead been in the Cadillac when it was being driven. The jury is never required to believe the defendant's version of the facts. *State v. Pletka*, 310 N.W.2d 525, 527 (Iowa 1981). The gun was found at defendant's feet and he had a spent shell in his jeans pocket. There is substantial evidence to support a finding

beyond a reasonable doubt that defendant was guilty as charged. We affirm on this issue.

Defendant next contends the district court incorrectly defined the word "carry" in the jury instructions by defining it in the context of the charge of carrying or transporting in a vehicle a pistol or revolver, under Iowa Code section 724.4(1). The word is not defined in the code and apparently has not been defined by case law.

We review challenges to jury instructions for correction of errors at law. *State v. Mesch*, 574 N.W.2d 10, 12 (Iowa 1997); *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996).

The jury was instructed as follows:

. . . the term "carry" includes possession of a loaded pistol or revolver in a vehicle; the term "transport" includes "carry" but also encompasses other activity such as movement.

Defendant contends this instruction was erroneous because the district court equated "carrying" with possession. Defendant further contends that carrying a pistol in a vehicle requires more than actual or constructive possession of the weapon in a vehicle.

The defendant advances that the Iowa legislature intended "carry," as it is used in Iowa Code section 724.4, to mean personal, immediate possession by the person. The State contends "carrying" a weapon in a vehicle means actually or constructively possessing a gun in a car. The State advances that to "transport" a gun is to possess it and move it from one place to another.

The word "carry" has been defined to imply personal agency and some degree of possession, whereas the word "transport" does not have such a limited

connotation and in addition, implies the movement of goods in bulk over great distances. See *Muscarello v. United States*, 524 U.S. 125, 134-35, 118 S. Ct. 1911, 1917-18, 141 L. Ed. 2d 111, 119, 120 (1998). The word "transport" is a broader category than "carry" but includes "carry" as well as other activities. See *Id.* The jury was properly instructed.

Defendant's final contention is that his trial attorney was ineffective in failing to assert that, at the point the Cadillac became stuck in the ditch and defendant and his passengers decided to spend the night there, the Cadillac was converted to an immovable dwelling.

To prevail on a claim of ineffective assistance of counsel defendant must demonstrate both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). Both elements must be proven by a preponderance of the evidence. *Oetken*, 613 N.W.2d at 683. Yet both elements do not always need to be addressed. See *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

To establish the first prong, the defendant must demonstrate his attorney performed below the standard demanded of a reasonably competent attorney. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064-65, 80 L.Ed.2d at 693-94; *Artzer*, 609 N.W.2d at 531. We measure the attorney's performance against "prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *State v. Risdal*, 404 N.W.2d 130, 132 (Iowa 1987). There is a presumption that the attorney performed competently. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95; *Oetken*, 613 N.W.2d at 683. The

claim is reviewed in light of the totality of the circumstances. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. The inquiry is an individualized fact-based analysis. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416 (2000); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Defendant contends possession of the gun would not have been a crime under Iowa Code section 724.4(4)(a), which reads as follows:

4. Subsections 1 through 3 do not apply to any of the following:
 - a. A person who goes armed with a dangerous weapon in the person's own dwelling or place of business, or on land owned or possessed by the person.

A "dwelling" is defined by Iowa Code § 702.10 (1999) as:

any building or structure, permanent or temporary, or any land, water or air vehicle, adapted for overnight accommodation of persons, and actually in use by some person or persons as permanent or temporary sleeping quarters, whether such person is present or not.

Iowa Code § 702.10 (1999).

In *State v. Erickson*, 362 N.W.2d 528, 532 (Iowa 1985), the court made the following comment:

We do not believe that the legislature contemplated that a vehicle is a vehicle while being driven on a roadway but becomes a dwelling when the driver pulls off the road and goes to sleep. It is reasonable to believe that a more substantial departure from normal use of the vehicle as a vehicle is required. The dwelling exception reaches habitations like house trailers, campers, and motor homes when they are being used in circumstances analogous to those in which a dwelling is used.

There is no evidence the Cadillac was modified to provide accommodations to facilitate an overnight stay. See *State v. Kaelin*, 362 N.W.2d 526, 527 (Iowa 1985). Nor were items such as bedding and toiletries associated

with an overnight stay present. *Erickson*, 328 N.W.2d at 531. The only evidence was that the Cadillac was intended only for transportation and its off-the-road use as a temporary sleeping quarter was not intended by the owner or driver, but was the result of an unintended accident. See *State v. Kaelin*, 362 N.W.2d 526, 527 (Iowa 1985). The claim, if raised, would not have been successful. There was not substantial evidence to show the Cadillac met the definition of a "dwelling." Therefore defendant's trial attorney did not breach an essential duty in not asserting the Cadillac was a temporary dwelling place. Defendant has failed to show either that his trial attorney was ineffective or that he was prejudiced on this issue.

AFFIRMED.