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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-227 / 89-1041

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DALE RAY FRELAND,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Story County, Timothy Finn, Judge.

Appellant appeals the denial of his postconviction relief. **AFFIRMED**

Daniel E. Bappe, Nevada, for the appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; Mary E. Richards, County Attorney; and Dennis Parmenter, Assistant County Attorney; for the appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

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In 1985, a jury found Dale Freland guilty of burglary in the second degree, attempted burglary in the second degree, and possession of burglar's tools. Freland was then convicted of those crimes. He was determined to be a habitual offender and was therefore sentenced to three concurrent prison terms of fifteen years each.

In December 1986, the Iowa court of appeals affirmed Freland's convictions and sentences on direct appeal.

In 1989, Freland filed the present application for postconviction relief. The district court denied postconviction relief, and Freland has appealed.

Freland contends his attorney in the 1985 criminal trial rendered ineffective assistance in numerous respects.

Freland's first complaint of ineffective assistance arises from the fact he was accused of breaking into a coin-operated vending machine. At the time of the offenses (June 1984), Iowa statutes permitted the act of breaking into a vending machine to be prosecuted as the crime of burglary. However, on July 1, 1984, prior to the filing of the informations against Freland, certain statutory amendments took effect and changed the definition of an "occupied structure" subject to the burglary statutes. These amendments had the effect of providing that breaking into a vending machine no longer constituted the crime of burglary. Freland contends he should have been tried under the law in effect at the time the informations were filed,

rather than the law in effect at the time of the offenses. He contends his trial attorney should have moved to quash the information charging burglary on the ground the charge of burglary no longer applied to the facts of his case under post-July 1, 1984, law. He argues his trial attorney rendered ineffective assistance by failing to do this or to file some other motion seeking to have post-July 1, 1984, law applied to his case. The State claims the applicable statutes are those in effect at the time of the offense.

Freland also complains his trial attorney: (1) failed to move for severance of the three charges against him; (2) failed to object to prejudicial testimony indicating that Freland's fingerprints were already on file with law enforcement agencies; and (3) failed to argue adequately on a motion for directed verdict alleging insufficient evidence to prove the elements of the crime of attempted burglary.

Freland complains his attorney on the direct appeal rendered ineffective assistance by failing to raise any of the issues listed above. He argues he is not precluded from raising those issues at this time.

In addition, Freland complains his attorney on direct appeal rendered ineffective assistance: (1) by failing to obtain a transcript of a pretrial hearing on a motion to suppress evidence; and (2) by failing to argue on appeal Freland's three concurrent fifteen-year sentences were so disproportionate to the crimes they constituted cruel and unusual punishment.

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We first address Freland's contention he should have been tried under the Iowa burglary law (section 713.1) of the Iowa Code as it was amended effective July 1, 1984. In his brief Freland quotes, "When a statute is newly enacted it may be applied prospectively only or it may be applied both prospectively and retrospectively. Legislative intent determines which of these two applications is to be given." State Ex. Rel. Turner v. Limbrecht, 246 N.W.2d 330 (Iowa 1976) (overruled on other grounds by State ex. rel Miller v. Hydro Mag, Ltd., 436 N.W.2d 617 (Iowa 1989)) (citations omitted). However, the court also went on to state, "In determining such intent, the general rule is that a statute operates prospectively only unless it clearly appears the legislature intended the law to have retrospective effect. . . . If a statute relates to a substantive right, it ordinarily applies prospectively only." Id. (citations omitted). Because the law in question relates to substantive rights and there is no indication the legislature intended the change to have a retrospective effect, we find it to be prospective only.

Freland contends since the trial information was filed after the effective date of the amendment to the burglary law, the amended law should have been applied. This is not correct. In discussing the same amendments at issue in this case, the supreme court stated, "Because these amendments came after the date of this offense, they are, of course, not directly applicable." State v. Dean, 357

N.W.2d 307, 309 (Iowa 1984). Because the offenses in the present case were committed prior to the date the amendments were enacted, the amendments are not applicable.

Freland also argues the amendments merely clarified and interpreted the Iowa burglary statute and should therefore be persuasive when interpreting the statute prior to the amendment. This also violates the findings in Dean.

> There is no explanation accompanying the amendments to section 713.1, or in its legislative history, which overcomes the presumption that the change was substantive. . . . These changes are substantive, not merely formal or interpretive, and we do not consider them in construing section 713.1 in its prior form.

Id. Dean is controlling in the present case. Freland was properly charged and tried under section 713.1 prior to its amendment on July 1, 1984.

Freland also claims he was denied effective representation of counsel. Established principles govern our review of Freland's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality

of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, [appellant] must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test Freland must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to Freland's specific claims.

Freland claims his trial counsel was ineffective by withdrawing the request for severance of charges against his express direction not to do so.

As the trial court found, the only evidence supporting Freland's claim the motion to sever was withdrawn against his express direction not to do so, was his uncorroborated testimony. This testimony does not overcome the strong presumption his counsel's actions were reasonable under the circumstances.

Next, Freland argues his trial counsel was ineffective by failing to object to certain testimony at trial, both his trial and appellate counsel were ineffective for not properly arguing the motion for directed verdict on the attempted burglary charge. He also alleges appellate attorney was ineffective by failing to obtain a transcript of the preliminary hearing. We have examined the record concerning these claims and found there are possible reasons and explanations for each.

> The term "ineffective use of counsel" does not mean that every mistake in judgment or error in trial strategy by an attorney serves to deprive an accused of a constitutional right. Trial tactics may dictate that counsel forgo certain avenues of defense in pursuit of the perceived best interests of the accused.

Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982),(citing State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978)).

We conclude Freland's counsels' performance fell within the range of professional competence.

Lastly, Freland argues his sentence of fifteen years for burglary amounts to cruel and unusual punishment. "We interfere in discretionary sentencing only if there has been an abuse of discretion. An abuse will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Stanley, 344 N.W.2d 564, 567 (Iowa App. 1983) (citations omitted). Freland fails to demonstrate how a fifteen-year term for a habitual offender/burglar is cruel and unusual.

We affirm the district court's decision. 236

AFFIRMED.