IN THE COURT OF APPEALS OF IOWA

No. 6-1019 / 06-0138
Filed January 31, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JODY LEE OVERTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Artis Reis, Judges.

Jody Lee Overton appeals from a judgment and conviction for the offenses of theft in the second degree and operating without the owner's consent. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

BAKER, J.

Defendant Jody Lee Overton appeals from the final judgments and sentences for the offenses of theft in the second degree and operating without the owner's consent. The defendant contends that he was denied the effective assistance of counsel by counsel's failure (1) to object to testimony and exhibits concerning the defendant's enrollment in and dismissal from drug court and (2) to argue in his motion for judgment of acquittal that there was not sufficient evidence to support a charge of theft in the second degree as to Count 1 (the Oldsmobile Alero).

I. Background Facts and Proceedings

In November 2004, Michelle Aurand's 1989 Oldsmobile was taken from a church parking lot. She reported the theft to the police. On December 9, 2004, Officer Lovejoy with the Des Moines Police Department spotted the vehicle. When questioned by Lovejoy, the driver, Nicholas Ford, stated he had received permission to drive the car from the defendant.

In December 2004, Pam Von Hemel's red Oldsmobile Alero was taken from her driveway. On December 13, 2004, Paige Rohlf observed the defendant in the parking lot of Hope Lutheran Church. Because she believed he was acting suspiciously, she noted his license plate and called the police. Several hours later, the police contacted her, and she went with the police to the Redwood Motel to identify the car and the defendant as the person she had seen driving the Alero.

On January 11, 2005, the defendant was charged with the two counts of theft in the second degree in violation of sections 714.1 and 714.2(2) of the 2003

Code of Iowa and one count of burglary in the third degree in violation of sections 713.1 and 713.6A(2). On January 12, 2005, the defendant entered pleas of "Not Guilty" to all charges.

In March 2005, the defendant entered the Intensive Supervision Court Program (drug court). As part of his acceptance into this program, the defendant prepared and signed a written confession, which included an admission to theft of the Oldsmobile Alero and the 1989 Oldsmobile, and to breaking into a van and taking a camera.[1] On July 22, 2005, the defendant was revoked from drug court for absconding from supervision.

On November 2, 2005, a jury trial commenced on the two second-degree theft charges.[2] At trial, the defendant testified he did not take the 1989 Oldsmobile. He claimed the car had been given to him to cover a debt, he had given the title to an attorney representing Nicholas Ford, and he did not know the car was stolen. The defendant did admit to taking the Alero, but denied taking it with the intent to deprive the owner of the vehicle. He testified that he took the car but planned to abandon it after he had committed a crime. The defendant testified that he had burglarized a van in the Hope Lutheran Church parking lot.

The jury found the defendant guilty of theft in the second degree and guilty of operating without the owner's consent. On December 21, 2005, the trial court sentenced the defendant to imprisonment for an indeterminate term not to exceed five years on the Theft in the second degree charges and two years each

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[1] His confessions included an admission of his intent to deprive the owners of their property. There was no motion to suppress the confession.

[2] On November 1, 2005 the defendant pleaded guilty to the charge of third-degree burglary. The trial court accepted the plea.

for the operating without owner's consent and burglary in the third degree charges.[3] Notice of Appeal was filed on January 20, 2006.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001).

III. Denial of the Effective Assistance of Counsel

Defendant contends that he was denied the effective assistance of counsel by counsel's failure (1) to object to testimony and exhibits concerning his enrollment in and dismissal from drug court and (2) to argue in his motion for judgment of acquittal that there was not sufficient evidence to support a charge of theft in the second degree as to the Oldsmobile Alero. No record has yet been made before the trial court on these issues, counsel has not been given an opportunity to explain his actions, and the trial court has not ruled on this claim.

We frequently prefer to preserve ineffective assistance claims for postconviction relief proceedings. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000.[4] *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) ("Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim."). The trial record is often inadequate to allow an appellate court to resolve claims of ineffective counsel. *Berryhill v.*

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[3] Prior to sentencing, the defendant entered pleas of guilty to other unrelated charges. All cases were combined for sentencing.

[4] Iowa law allows an ineffective assistance of counsel claim to be filed via an application for postconviction relief or on "direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code 814.7 (2005).

State, 603 N.W.2d 243, 245 (Iowa 1999). Therefore, we ordinarily preserve such claims for postconviction relief proceedings to allow full development of the facts surrounding counsel's conduct. *Id*.[5]

"A defendant is entitled to effective assistance of counsel." *Artzer*, 609 N.W.2d at 531 (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984)). To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate counsel failed to perform an essential duty and that the ineffective assistance prejudiced the defendant. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001); *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). "The test is 'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency.'" *Artzer*, 609 N.W.2d at 531 (quoting *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981)). A defendant is entitled to representation which is within the normal range of competency, but is not entitled to perfect representation. *Artzer*, 609 N.W.2d at 531 (citing *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981)).

> Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. Thus, claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma, 626 N.W.2d at 143 (citation omitted).

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[5] When an ineffective assistance claim is "raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination" under postconviction relief procedures. Iowa Code 814.7 (2005).

Additionally, prejudice may be found only "where there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Artzer*, 609 N.W.2d at 531. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067, 80 L. Ed. 2d 674 (1984).

The defendant asserts that the jury should not have heard evidence about his attempted plea in drug court, his involvement in drug court, problems with illegal drugs, and pending criminal charges. The defendant further asserts that his trial counsel's failure to object to this evidence constituted a failure to perform an essential function and that he was prejudiced by counsel's failure.

In this case, it may have been the trial counsel's strategy, when faced with the defendant's full confession, to argue that the confession was coerced and he made it only to get into drug court to avoid incarceration. Therefore, a postconviction relief proceeding is the proper venue for the defendant's claim of ineffective counsel. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) (because counsel may "have had good reason for each step he took or failed to take," issue of ineffective counsel should be raised in an "application for postconviction relief, where a full evidentiary hearing may be had and where counsel will have an opportunity to respond to defendant's charges.")

Additionally, the defendant contends that his trial counsel failed to include, in his motion for judgment in acquittal, arguments regarding the sufficiency of the evidence of the State's proof of the identification of the Oldsmobile Alero or the victim. The defendant further contends that this failure constituted the ineffective

assistance of counsel. In this instance as well, the defendant's trial counsel may "have had good reason for each step he took or failed to take." *See id*. A postconviction relief proceeding is also the proper venue for this claim of ineffective counsel. *See id*. ("Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.")

IV. **Summary**

Because the defendant's assertions of ineffective counsel likely involved counsel's tactical or strategic decisions, we conclude that the record is insufficient to address defendant's ineffective assistance claim on direct appeal and preserve the issue for possible postconviction relief. *See State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001) ("We can only address ineffective assistance claims on direct appeal if the record is sufficient.") We affirm his conviction and sentence.

AFFIRMED.