

IN THE COURT OF APPEALS OF IOWA

No. 7-461 / 06-0573
Filed August 22, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILLIP EARL LEE,
Defendant-Appellant.

Appeal from the Iowa District Court for Appanoose County, Kirk A. Daily,
District Associate Judge.

Phillip Earl Lee appeals his conviction for second-degree theft.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Stephan Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Boesen, Assistant Attorney
General, and Robert Bozwell, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Phillip Earl Lee appeals his conviction for second-degree theft as a habitual offender in violation of Iowa Code sections 714.1 and 714.2(2), and 902.8 (2005). He argues (1) the district court erred in allowing hearsay evidence at trial and (2) his attorney rendered ineffective assistance. We affirm his conviction and preserve his ineffective assistance claims for postconviction relief proceedings.

I. Background Facts and Proceedings

Several thefts were committed in the early morning hours of July 19, 2005. Evidence and various citizen reports led police to a home in Centerville. Inside the home, police found Scott Wilkins and his girlfriend. Wilkins is Lee's cousin. They also found several items that had been reported stolen. Police took Wilkins and his girlfriend to the police station for questioning. Meanwhile, Tim Shanahan, an employee at Mercy Life and Fitness, called to report a man acting as though he was intoxicated or disoriented at the facility. The man was wearing all black and asked employees for a lighter and cell phone charger. He pulled a walkie talkie and cell phone out of his pocket and asked to use the telephone. He made a phone call, then left. Forty-five minutes later, he came back to the facility and emptied a black bag containing several items into trash bin. Shanahan picked out the items the man had dumped into the bin. They included a radio, a walkie-talkie, a set of keys, a necklace, and a broken lock. The man was later identified in a photo lineup as Lee. The items he dumped in the trash bin were identified as stolen in the same set of thefts as the items found with Wilkins.

Back at the station, Wilkins asked to use a telephone located at the station's front desk to make telephone calls. Unbeknownst to him, the telephone line was always recorded. Lee called Wilkins on that line. In the recording of the call, the two men can be heard discussing the details of the explanation they planned to give police concerning the stolen items. The State alleged Lee and Wilkins were co-conspirators in the thefts and charged them as co-defendants. Wilkins, however, fled and could not be located for trial.

Prior to trial, Lee filed a motion in limine to exclude "certain audiotapes of telephone conversations of which the State was not a party" which "involve telephone calls made on a telephone line made available to Scott Wilkins by law enforcement officers." The motion sought to exclude the recordings because there was no notice of recording, in violation of Iowa Code section 727.8. The district court ruled the conversation between Wilkins and Lee would be admitted. It determined the other tapes, including Shanahan's, would be dealt with as the trial proceeded.

At trial, defense counsel made no objection to admitting the recording of either Shanahan's phone call or Lee's conversation with Wilkins. The following exchange took place concerning the Lee/Wilkins conversation:

DEFENSE: Your Honor, I don't have any objection to the playing of S-17 if S-17 is what I have as S-28; and I believe [the prosecutor] will tell me that it is.

PROSECUTION: I believe it is, and you have a copy of S-17 because you asked me for a copy of the thing I made.

DEFENSE: And it's my understanding [the prosecutor] made the audio recording.

PROSECUTION: I produced that; and you asked if you could have a copy of my document, and I gave it to you.

SHERIFF [on the stand]: I can tell you S-17 and S-28 is the same. There is only one telephone recording.

Lee was convicted for second-degree theft. He appeals.

II. Merits

Lee claims the recordings of Shanahan's call and the Lee/Wilkins conversation were both hearsay and a violation of his Sixth Amendment right to confrontation. Neither of these claims, however, is preserved. First, Lee's motion in limine made no mention of the Shanahan call, and he failed to object to its admittance at trial. See *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (“[A] party cannot sing a song to us that was not first sung in trial court.”). Second, Lee based his motion to exclude the Lee/Wilkins conversation on the grounds the recording was illegal. The motion and subsequent hearing addressed neither hearsay nor the right to confrontation. *Id.* He did not object to the recording at trial at all, but affirmatively stated he had no objection. See *State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981). For these reasons, we must conclude his claims are not preserved.

Lee also argues he received ineffective assistance of counsel and requests we review his above two claims as ineffective assistance. In order to establish ineffective assistance of counsel, Lee must show both that his counsel breached a duty and that the breach prejudiced his defense. *Strickland v. Washington*, 433 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate*, 710 N.W.2d 237, 240-41 (Iowa 2006). This practice ensures both that an adequate record of the claim is developed and that the attorney charged with ineffectiveness has an opportunity

to respond. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We conclude the record here is inadequate to address Lee's claims. Because Lee makes no other challenge to his conviction, we affirm and preserve his ineffective assistance claim for possible postconviction relief proceedings.

AFFIRMED.