IN THE COURT OF APPEALS OF IOWA

No. 8-025 / 07-0854
Filed July 16, 2008

GLEN GOODENOUGH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha Bergan, Judge.

Applicant appeals the dismissal of his action seeking postconviction relief on the grounds he received ineffective assistance of counsel and there is newly-discovered evidence. **AFFIRMED.**

Dennis J. Naughton, Marion, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Harold Denton, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan, and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SCHECHTMAN, S.J.

Appellant, Glen Goodenough, appeals the dismissal of his application for postconviction relief. Goodenough, who pled guilty on October 28, 2004, to attempted burglary, an aggravated misdemeanor, in violation of Iowa Code sections 713.1 and 713.6B(1) (2003), contends that his attorney was ineffective in a number of ways and his plea should be vacated because of newly-discovered evidence. We affirm.

BACKGROUND AND PROCEEDINGS. The evening of August 26, 2004, was stormy, experiencing lightning and a heavy downpour. Goodenough left his leased apartment in Cedar Rapids to "walk back" to his native LaCrosse, Wisconsin. Goodenough, then forty-five, had been diagnosed with chronic paranoid schizophrenia upon exiting high school. He had resided in Cedar Rapids less than a month, having chosen to come there to "get away from my problems." Goodenough opted to leave Cedar Rapids because he "was having problems with my life; I just wanted to leave town." He was unemployed with social security disability payments being his sole income source.

At approximately 10:30 p.m., Goodenough was discovered by police exiting a retail building owned by Cedar Rapids Tent and Awning, near downtown, having activated a security alarm. It was described as "very loud" by the owner, to the degree that one "wouldn't want to spend much time there" which had alerted the police. The locked front door had been pried open as fresh wood chips from the door were found underneath it. There was nothing missing and it did not appear that the entry went beyond the foyer or entryway.

An officer safety check yielded a pocketknife and a flashlight upon his person. Upon inquiry, Goodenough stated he "was homeless[1] and going from bridge to bridge to get away from the storm, got frightened and entered the building." He was arrested, charged with burglary in the third degree, and taken to the Linn County Jail. He made his initial appearance before the magistrate the following day, wherein counsel was appointed, and bond set at $10,000, cash or surety. Shortly thereafter, an investigator from the attorney's office interviewed Goodenough, explaining the charge, the amount of the bond, giving him the name of the attorney, and, confirming a telephone number. Routine inquiry was principally directed at relevant information relating to release, but it was disclosed that Goodenough had a previous conviction for theft in another state. The investigator relayed this information to his assigned attorney, Ahmet Gonlubol.

The trial information was filed on September 8, 2004, accusing "Glen C. Goodenough of the crime of Burglary in the Third Degree committed as follows: That the said Glen C. Goodenough on or about the 26th day of August, 2004, in the County of Linn and State of Iowa, did unlawfully and willfully: break and enter Cedar Rapids Tent and Awning, 1213 Second Street SE, Cedar Rapids, Iowa, with intent to commit a theft . . . ."

Goodenough avers that he attempted to contact Gonlubol multiple times, without any results, due to his unavailability or refusal to visit with him. Goodenough admits visiting with him at least two times, which were uneventful. Gonlubol states there were about four telephone conferences.

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[1] He later admitted to the officers to having an apartment.

The attorney obtained the police report, visited with relatives in the LaCrosse area, learned of a previous out-of-state robbery charge, (reduced to a conviction for theft) together with a charge for failure to appear. He decided not to pursue a bond reduction hearing, or to seek a pre-trial release, as Goodenough had no ties to the community and he did not want the prosecutor to learn of the previous conviction. Speedy trial was demanded.

A pre-trial conference was set for October 28, 2004. On the previous day, Gonlubol visited Goodenough at the jail, advising him of his options. Gonlubol had conversed with the prosecutor several times about reducing the charge to a misdemeanor, citing his client's mental distress as a mitigating circumstance. At the pre-trial conference, Goodenough, after being advised of his right to a speedy trial, signed a waiver of presence, waiver of right to file a motion in arrest of judgment, waiver of time for sentencing, waiver of rights, and plea of guilty to the lesser included charge, attempted burglary in the third degree, including admitting to a factual basis for the guilty plea.

On the same day, the district court sentenced Goodenough to a term of seventy-five days in the county jail, gave him credit for time served of sixty-two days, imposed a fine of five hundred dollars plus surcharges, assessed court costs, and awarded restitution of fifty dollars for court-appointed attorney fees.

INEFFECTIVE ASSISTANCE OF COUNSEL. Goodenough contends his attorney was ineffective in that he (1) did not investigate valid defenses, (2) failed to explain to him the impact of entering a guilty plea, and (3) failed to file a motion to vacate his conviction because of newly-discovered evidence.

We review claims of ineffective assistance of counsel asserted in an application for postconviction relief de novo. Iowa R. App. P. 6.4; *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Ineffective-assistance-of-counsel claims are not bound by traditional error preservation rules. *See State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982) (stating the claim of ineffective assistance of counsel is an exception to the general rule of error preservation). Such claims are an exception to normal error preservation rules and the "law of the case" doctrine. *See State v. Callender*, 444 N.W.2d 768, 772 (Iowa Ct. App. 1989) (analyzing ineffective-assistance-of-counsel claim that addressed trial counsel's failure to make a timely objection to a jury instruction).

The right to assistance of counsel, under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. *Powell v. Alabama*, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158, 172 (1932); *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). To prove a claim of ineffective assistance of counsel, Goodenough must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. *State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005). Goodenough's ineffective-assistance claim fails if he is unable to prove either element of this test. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

The prejudice element of an ineffective-assistance claim is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (quoting *Strickland v. Washington*, 466 U.S. 668,

694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). "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. In the context of guilty pleas, prejudice is established when the applicant proves "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *State v. Irving*, 533 N.W.2d 538, 541 (Iowa 1995).

Failure to Investigate a Lack of Factual Basis Defense. Goodenough contends the evidence failed to support a conviction of burglary[2] or attempted burglary[3] and there was no evidence of his intent to commit a felony or to harm anyone. He contends his attorney should have recognized he was only guilty of trespass,[4] and should not have allowed him to plead guilty to a crime for which there was no factual basis.

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[2] Burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1.

[3] Attempted burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure, the occupied structure not being open to the public, or who attempts to remain therein after it is closed to the public or after the person's right, license, or privilege to be there has expired, or any person having such intent who attempts to break an occupied structure, commits attempted burglary.

Iowa Code § 713.2.

[4] Trespass is defined as:

> 2. The term "trespass" shall mean one or more of the following acts:
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> a. Entering upon or in property without the express permission of the owner, lessee, or person in lawful possession with the

There was a breaking and entering and the only question is whether there was evidence of an intent to commit a theft in the structure. There is no direct proof of intent. However intent may be inferred from the circumstances of the transaction and the actions of the defendant. *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006). Yet inferences drawn from the evidence must raise a fair inference of guilt on each essential element, including the element of intent. *State v. Truesdell*, 679 N.W.2d 611, 619 (Iowa 2004) (Larson and Cady, JJ., dissenting). Inferences that do no more "than create speculation, suspicion, or conjecture" do not create a fair inference of guilt. *Id.*; *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). An unexplained breaking and entering in the night time has been held to support a finding the breaking and entering was done to commit larceny. *See State v. Woodruff*, 208 Iowa 236, 239, 225 N.W. 254, 257 (1929).[5] Likewise, the "intent to commit theft may be inferred from an actual breaking and entering of a building which contains things of value." *State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000).

Goodenough's presence in the building in the night time coupled with evidence he had an apartment where he could have sought refuge, the activation of the alarm which drove him from the building and scuttled further entry, and his circumstances in wandering around the downtown area at that hour to "walk back" to Wisconsin, is sufficient evidence from which an inference can be drawn that his presence in the building was directed at committing a theft. His intent

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> intent to commit a public offense, to use, remove therefrom, alter, damage, harass, ...

Iowa Code § 716.7(2)(a); *State v. Waller*, 450 N.W.2d 864, 865 (Iowa 1990) (stating that criminal trespass is a lesser-included offense of burglary under its entering alternative when criminal trespass is defined by Iowa Code section 716.7(2)(a)).

[5] This case interpreted a different but similar statute.

can also be inferred from his actual breaking and entering of the building housing items of value. His possession of the flashlight and pocketknife is additional circumstantial evidence of that intent. Goodenough's attorney was not ineffective in encouraging him to plead guilty to the lesser charge, there being evidence to support the greater charge. There was no breach of duty and Goodenough was not prejudiced as he benefited by his attorney bargaining for a reduced charge of attempted burglary. Goodenough conceded there was a factual basis for the conviction in his written plea. At the postconviction hearing he testified he understood signing the plea would waive his right to challenge the charge, and that his attorney informed him he had a right to proceed to trial if he chose.

Goodenough contends that trespass, a simple misdemeanor, would have been the appropriate plea bargain. But trespass is not a lesser included offense of the breaking alternative of the burglary charge, the trial information charging a violation of both alternatives, breaking and entering.

Gonlubol's testimony ably refuted Goodenough's accusations of ineffective representation, including his alleged lack of communication and investigation. His investigator got the details. The police report was received and read. He learned about Goodenough's mental background and criminal history. He visited with kin. Counsel decided against a bond review due to Goodenough's dire lack of community ties, unemployment, and prior criminal history. Nor was there anyone to release him to, as he was effectually a resident of Wisconsin as he was in the process of returning at the time of the incident.

Counsel pondered the diminished capacity defense, but reasoned that juries rarely accept that defense, and, it would require an evaluation (or two

depending on the results of the first evaluation) which would prolong his time incarcerated.

Gonlubol obtained a rare plea agreement from an aggressive prosecutor, which essentially included a sentence for time served. Trial could result in a felony conviction, as there was evidence of both a breaking and entering, with trespass not a lesser included offense of "breaking." An attempted burglary verdict would be a draw, with a potentially much longer sentence as an aggravated misdemeanor. *See* Iowa Code § 903.1(2). Gonlubol was particularly concerned about a previous conviction for theft if trial ensued.

Failure to confer. Goodenough contends Gonlubol admitted that he did not visit Goodenough for the nine weeks Goodenough was in jail. Goodenough testified a series of calls to Gonlubol were refused, and Gonlubol failed to send him police reports and a copy of the trial information. Gonlubol testified he was confident he had fully advised Goodenough about the defense of his case and his legal rights. Goodenough was promptly visited by an investigator from the attorney's office and jail records show Gonlubol was at the jail once. Gonlubol had no notations in his file to reflect the visits. He testified he had four phone conversations with Goodenough regarding the case. We need not determine whether Gonlubol was ineffective in failing to investigate further and in not spending more time with Goodenough. The failure to investigate does not constitute per se ineffective assistance of counsel. *Irving,* 533 N.W.2d at 541. There was a factual basis for Goodenough's plea, consequently Goodenough cannot show he was prejudiced as he has failed to show that there would have

been a different result absent the errors. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Goodenough admitted that he was advised that he did not have to sign the plea and relating documents, and he could proceed to trial. He further admitted that the plea was explained to him and he was given an ample opportunity to study the plea documents. A crucial bit of his testimony reflected that his primary goal was to resolve it and to "get out faster:"

> Q. If you had known that you could have gone to court and asked a jury to find you either guilty or not guilty of Burglary, even if it would have meant staying a little extra longer, would you have wanted to do that so you had a clean record? A. No.
> Q. You wouldn't? A. No.
> Q. You would rather get out quicker? A. Yes.
> Q. Is that why you signed the papers? A. Yes, I signed the papers to get out faster.

To succeed on his claims of ineffective assistance of counsel, Goodenough must prove he would have insisted on going to trial but for his counsel's errors. *See Irving*, 533 N.W.3d at 541. His testimony proves his decision to waive his right to trial was unrelated to Gonlubol's representation.

Public defender's lack of experience and case load. Gonlubol is a law school graduate and a member of the Iowa bar. He has represented criminal defendants since 1989. He testified he disposed of twelve hundred cases in the prior year. He further testified he never was first chair in a jury trial but has been second chair. Goodenough argues that Gonlubol's lack of first-chair experience left him unable to evaluate the case for trial and his very large case load left him with inadequate time to investigate and defend Goodenough's case. The State responds that our focus should be individualized on this case and the question is whether Gonlubol was performing as adequate counsel. We agree. Gonlubol's

education and experience qualify him to represent persons charged with burglary, such as Goodenough. The question is whether Gonlubol provided effective legal representation to Goodenough, not whether he is overworked.

Failure to use newly-discovered evidence. Goodenough asserts that (1) "newly discovered evidence" justifies a vacation of the guilty plea, and (2) the failure to discover it was detrimental to obtaining a plea to trespass, thus denying him his right to effective assistance of counsel. The appellant fails on both assertions. The subject evidence was the police reports and the building owner's testimony. The police report had been sent to Goodenough when received by Gonlubol. Gonlubol had a copy of it. That report acknowledges a forced entry. The victim stated the entry was limited to the front foyer, nothing was missing from the building, and the alarm was so loud that it would drive a normal person from the inside of the structure.

State v. Smith, 573 N.W.2d 14, 21 (Iowa 1997), sets out four factors for the evidence to be "newly discovered" in order to grant a new trial: (1) discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of the trial. The trial court concluded Goodenough failed to prove all four of the factors. We agree.

This evidence was not intrinsic to the plea. That he had forced the door and entered the foyer was not in dispute, nor was the fact that nothing was taken. The question was his specific intent to enter to commit a theft. The blaring alarm caused his exit. The police report was available. The victim's testimony or affidavit did not address "intent." "Notions of newly discovered evidence have no

bearing on a knowing and voluntary admission of guilt." *State v. Alexander*, 463 N.W.2d 421, 423 (Iowa 1990). We affirm.

AFFIRMED.