



IN THE COURT OF APPEALS OF IOWA

ANTHONY L. STREET,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed May 28, 1987

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7-04
85-1628

Appeal from the Iowa District Court for Scott County (No. 69470), James E. Kelley, Judge.

Petitioner appeals from the trial court's denial of his application for post-conviction relief from the judgment and sentence imposed upon his conviction for arson in the first degree. **AFFIRMED.**

Theresa M. Semel of Buzzell, Semel & Vesole, Davenport, for petitioner-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Mary E. Howes, Assistant Scott County Attorney, for respondent-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

The petitioner, Anthony Street, appeals from the trial court's denial of his application for postconviction relief from the judgment and sentence imposed upon his conviction for arson in the first degree. Street contends that he was denied effective assistance of counsel by his trial counsel's failure to (1) investigate and call favorable witnesses; (2) present a defense that petitioner did not start the fire in question; and (3) claim that the petitioner did not start the fire in his opening and closing arguments. Petitioner also alleges that he was denied effective assistance at his postconviction hearing by his counsel's failure to investigate, call, or recall favorable witnesses. We affirm.

The testimony offered at trial reveals that about 9:00 P.M. on October 23, 1983, a fire broke out in a compressor in the back room of June's Tap in Davenport. Most of the patrons and the bartenders went to the back room to tend to the fire. Upon their return, they discovered that a pair of curtains was ablaze. Street was observed leaning over a jukebox by the curtains, with an arm outstretched. None of the witnesses, however, actually saw Street set the curtains on fire. Street and his companion, John Hendren, immediately fled the tavern.

The police subsequently arrested Street at a home across the street from the tavern. The police officers found a book of matches with one or two matches missing. A department of criminal investigation lab report concluded that a match found on the floor by the curtains was the fifth match from the left in the book of matches found in Street's possession.

A number of defense witnesses testified that on the day of the fire Street had been drinking excessively. All of these witnesses testified that at the various times they saw Street during the day, including the time of the fire, he was extremely intoxicated, and, as one witness testified, Street was functioning like a "zombie." The prosecution witnesses who were present at the bar on

the night of the fire testified that Street was not intoxicated. The prosecution witnesses testified that Street did not appear to have any difficulty in speaking and appeared to have no difficulty in playing pool. The trial court submitted a jury instruction on the issue of Street's alleged intoxication. The jury returned a verdict finding Street guilty of arson in the first degree. The trial court subsequently denied Street's application for postconviction relief.

Ordinarily a postconviction relief proceeding pursuant to Iowa Code Chapter 663A is at law and our review is not de novo. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). Where, however, a petitioner seeking postconviction relief asserts a violation of constitutional safeguards, we must make our own evaluation based on the totality of the circumstances, which is the equivalent of a de novo review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). A party claiming ineffective assistance of counsel in violation of his or her sixth amendment rights must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted from the omission. Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985); State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). Where such claims are asserted in postconviction proceedings, the applicant bears the burden of proving both of these elements by a preponderance of the evidence. Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94 (1984). The ultimate test is whether under the entire record and the totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313

N.W.2d 522, 524 (Iowa 1981). In evaluating ineffective assistance claims, it is axiomatic that the fact that the defense was not successful does not mean that counsel was ineffective. Hall, 360 N.W.2d at 836.

When deciding the second component of a claim of ineffective assistance, we have required the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage, thereby constituting "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The crux of the prejudice component rests on whether the defendant has shown "that there is 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. 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. Bearing these principles in mind, we first address Street's argument that his trial counsel was ineffective in failing to investigate and call favorable witnesses.

Street first contends that trial counsel was ineffective in failing to investigate, call, or examine Ruby Davis at his trial. At the postconviction hearing, Ms. Davis testified that she had known Street for approximately seventeen years, but that she was not present at the time the tavern fire was set. Ms. Davis also testified that had she been called at trial, she would have testified as to what June's Tap was really like and that she would have been a character witness for Street. Most importantly, Ms. Davis testified at the postconviction hearing that a Robert Chavez told her after Street was sentenced that he had set the fire. Street, however, contends that Ms. Davis knew of two witnesses, Lloyd Carleton and Billy Villafalla, who would have testified that Street could not have started the fire. Street contends that as a result of trial counsel's

failure to investigate these alleged witnesses, his trial was prejudiced thereby. We disagree.

The United States Supreme Court stated in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984), the standards by which counsel's performance is to be judged. Concerning counsel's method of investigation of a particular case, the Strickland court opined that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. The Court further opined: "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

The Strickland court recognized that usually counsel's actions are based on strategic choices made by the defendant and on information supplied by the defendant. 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Specifically, the Court pointed out that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. Consonant with this view, the Iowa Supreme Court has recognized that the duty to investigate and prepare a defense is not limitless. Schrier v. State, 347 N.W.2d 657, 662 (Iowa 1984). "It does not require that counsel pursue every path until it bears fruit or until all conceivable hope

withers.'" Id., citing United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983). Another important consideration when considering the efficacy of counsel's conduct is what the evidence at the time of the alleged ineffectiveness led counsel to believe when investigating the various possibilities for defense. Beans v. Black, 757 F.2d 933, 936 (8th Cir. 1985).

Trial counsel at the postconviction hearing testified that while he was unable to recall his conversations with Ms. Davis, his notes indicated that he had spoken to Ms. Davis before trial. Trial counsel's notes indicate that Ms. Davis told trial counsel that Street had a very severe alcohol and drug problem. The record, however, is void of any evidence that Ms. Davis told trial counsel that she was aware of a witness who could offer exculpatory evidence on Street's behalf. The record reveals that Ms. Davis did not even learn that Chavez was claiming to have set the fire until after Street's sentencing. Nor is there any indication that Ms. Davis had any knowledge of Carleton and Villafalla. Furthermore, any testimony Davis may have offered concerning Carleton and Villafalla would clearly have been hearsay, and Ms. Davis could only have established that she knew the two men. We therefore do not believe that trial counsel's failure to call Ms. Davis as a witness in any way prejudiced Street's defense. Other defense witnesses fully testified as to Street's problem with alcohol and drugs.

We further note that there is no evidence in the record that Street objected to trial counsel's decision not to call Ms. Davis to testify. Trial counsel testified at the postconviction hearing that it was his usual practice of informing his client what defense he was going to use, what witnesses were to be called, and why certain witnesses were not going to be called. Trial counsel testified that he could not recall Street making any protests regarding their trial strategy. Because Street has failed to rebut the strong presumption of trial counsel's

competency and has failed to show that, but for trial counsel's alleged errors, the outcome of the trial would have been different had Ms. Davis been called to testify, we find no merit in Street's claim that trial counsel was ineffective in failing to call Ms. Davis.

Street next contends that trial counsel was ineffective in failing to call John Hinden, Lloyd Carleton, and Billy Villafalla as witnesses in his behalf. We likewise find no merit in this argument. Trial counsel testified at the postconviction hearing that he had attempted to contact Hinden, but that Hinden had left town and could not be found. We additionally note that prior to and up to the time of trial, Street, who was also obviously aware that Hinden might be a defense witness, gave trial counsel only one name as a defense witness to call at trial, that being Ms. Davis. Street makes no claim that Hinden indeed was actually in town and capable of being called as a witness, nor does he present any evidence that trial counsel did not in fact use his best efforts in locating Hinden. Having closely examined the record, we find no evidence of ineffective assistance of counsel in failing to procure Hinden as a witness, nor do we find that, given the overwhelming evidence in this case, Street suffered any actual prejudice as a result of trial counsel's failure to procure Hinden as a witness. Street has simply failed to show a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different.

At the postconviction hearing, Street testified that Lloyd Carleton and Billy Villafalla had told Ms. Davis that there was no way Street could have started the fire because the two men had seen Street leave before they entered the bar and that there was a fire in the bar when the two went in to the bar. The record reveals no evidence that trial counsel was ever aware of the existence of Carleton or Villafalla. Street's postconviction counsel testified that he was aware of the existence of Carleton and Villafalla and the gravamen of their

testimony, but that neither he nor Ms. Davis were successful in locating Carleton or Villafalla. Additionally, any exculpatory evidence within the particular knowledge of Carleton and Villafalla would have to come from these men themselves. Any testimony by Ms. Davis as to the truth or veracity of statements made by Carleton or Villafalla to Ms. Davis would have been hearsay and therefore inadmissible. Given the facts of the present case, we cannot say that trial counsel was ineffective in failing to call Carleton or Villafalla as witnesses, nor has Street offered any evidence showing that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Strickland, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697.

Street next claims that trial counsel was ineffective in failing to properly advocate his cause. Specifically, Street claims that his trial counsel: (1) failed to present an alternative available defense; and (2) failed to make appropriate opening and closing statements to the jury by not stressing that Street did not actually set the fire in the bar. We disagree.

The main defense offered at trial by Street's trial counsel was hinged on Street's intoxication on the evening of the fire. Street testified at the post-conviction hearing that trial counsel had urged him not to testify. Street testified that he had told counsel that he could not remember everything that happened that evening. Because there was evidence that Street had a severe drinking problem and was extremely intoxicated that evening, trial counsel apparently decided that given the strong evidence against Street, the best strategy would be to base a defense on Street's intoxication.

As we noted earlier, in determining whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired

or that another attorney would have prepared and tried the case differently. Fryer, 325 N.W.2d at 413-15. We have also recognized that trial counsel need not pursue every possible defense until it bears fruit. Schrier, 347 N.W.2d at 662. Trial counsel in the present case decided to proceed with a defense of diminished responsibility based upon the evidence to be offered at trial and the information obtained from Street. We believe that given the evidence against Street to be offered at trial, and given the information given to trial counsel from Street and other witnesses, trial counsel's decision to proceed with a defense of diminished responsibility was well within the normal range of competency of an attorney. We find no evidence of ineffective assistance of counsel here.

Street lastly contends that trial counsel's opening and closing statements deprived him of effective assistance of counsel since trial counsel did not deny Street's guilt. During trial counsel's opening remarks, trial counsel stated that "[w]hether or not [Street] set the fire is a matter relating to the evidence that's already in." Street apparently argues that this statement in effect admitted Street's guilt. We disagree.

The district court, in its order denying Street's application for postconviction relief, noted that trial counsel did not admit to Street's guilt, and we agree. Trial counsel's statement simply told the jurors whether or not Street actually started the fire in the bar was to be determined by the evidence and that they should carefully weigh the sufficiency of the evidence presented. Trial counsel further stated in his opening argument that even "if [Street] did, or if [Street] was actually the one that set the fire," he was so intoxicated that he was incapable of having the intent to commit the alleged crime. From these facts, we find no evidence that trial counsel admitted that Street had actually set the fire in his opening statement. Moreover, Street has not provided any evidence that trial counsel's closing remarks in any way resulted in ineffective assistance

of counsel or that any prejudice resulted therefrom. Street's argument therefore has no merit.

Street additionally argues that his postconviction counsel was ineffective for failing to investigate, call, or recall favorable witnesses. To the extent that this claim relates to the failure of postconviction counsel to assert the same claims of ineffective assistance of trial counsel and to call or recall those witnesses trial counsel did not call at trial, which are now being urged in this postconviction proceeding, we reject these claims for the same reasons we rejected such claims alleged against trial counsel. See Schrier, 347 N.W.2d at 667.

AFFIRMED.