

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

MICHAEL T. BOLANDER,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed March 9, 1988

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7-374
86-1002

Appeal from the Iowa District Court for Pottawattamie County (P.C.R.
19131-56015), Keith E. Burgett, Judge.

Applicant appeals the denial of his application for postconviction relief,
claiming that he was denied effective assistance of trial counsel in the trial
resulting in his conviction of first-degree murder. **AFFIRMED.**

Don Peterson, Council Bluffs, for applicant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant
Attorney General, for resister-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Applicant, Michael T. Bolander, appeals the denial of his application for postconviction relief, claiming that he was denied effective assistance of trial counsel in the trial resulting in his conviction of first-degree murder. We affirm.

Bolander contends that counsel: (1) erroneously advised him regarding the availability of a self-defense claim and thereby misled him from accepting a plea to second-degree murder; (2) erroneously advised him to assert an allegedly unavailable justification defense at trial; (3) failed to preserve an accurate record of his confession in the trial court record; (4) failed to request that voir dire and opening statements be reported; (5) erroneously waived his confrontation right by allowing the admission of a codefendant's confession at his trial; and (6) failed to adequately investigate his case and present allegedly viable alternative defenses.

Because petitioner is asserting that his constitutional right to a fair trial has been violated, we make an independent evaluation of the totality of the relevant circumstances; this is the equivalent of a de novo review review. Taylor v. State, 352 N.W.2d 683, 684-85 (Iowa 1984). A party asserting 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 petitioner 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, 80 L. Ed. 2d 674, 694 (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).

1. Bolander first asserts that he was prejudiced by reliance upon his counsel's self-defense theory, causing him to reject a second-degree murder plea bargain offer. He was subsequently found guilty of first-degree murder, resulting in a sentence to life imprisonment.

It is Bolander's position that it is obvious he didn't understand the significance of the plea bargain, had not been involved in the plea bargaining process, and that his counsel gave him faulty advice that a justification defense was available to him.

Bolander offered no testimony by his affidavits, of the proceedings leading up to the plea bargain, of any conversation between him and his attorney, or his reaction to the offer. The claim relating to the plea bargain, and the effect of counsel's reliance upon a justification defense is raised for the first time in Bolander's brief. Issues not raised in the trial court cannot be raised for the first time on appeal. Shill v. Careage Corp., 353 N.W.2d 416, 420 (Iowa 1984). Even issues of constitutional magnitude will not be addressed by the appellate court if they were not presented in the trial court. In re W.E.G., 342 N.W.2d 900, 901 (Iowa App. 1983). We hold that this issue was not raised in the trial court, and therefore has not been preserved for appeal.

Even if the issue had been preserved, we find it to be without merit. Bolander was tried under a theory of premeditated murder. The applicant's statement, and the evidence given by him at trial, consistently relied upon self-

defense as the reason for the fight that occurred, and from which the victim died. The jury was instructed upon the theory of self-defense and obviously rejected it. Counsel's reliance upon that defense was not evidence of ineffective assistance of counsel.

2. For the same reasons, Bolander's claim that his counsel was ineffective for advising him to rely upon a defense of justification must fail. Again, this issue is raised for the first time on appeal. All the evidence that was provided by Bolander pointed to a justification defense. We will not consider this issue for the first time on appeal.

3. Bolander next claims that counsel was ineffective for failing to require that the cassette tape recording of plaintiff's alleged confession be recorded by the court reporter when the tape was played to the jury, and failing to object to the admission of an incomplete police summary into the court record. It is not claimed by Bolander that the so-called summary was given to the jury.

A person claiming that his trial attorney was ineffective, depriving him of his sixth amendment right to counsel, has the burden to prove both that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Taylor v. State, 352 N.W.2d 683, 684-85 (Iowa 1984). The trial court found that the transcription furnished by the State was a substantially accurate transcription of the applicant's statement. In addition, no evidence has been offered to show that counsel's failure to request reporting of the tape resulted in prejudice to Bolander. He has failed to sustain his burden of proof on this issue.

4. Bolander's next complaint is that his trial counsel failed to request that voir dire and opening statements be reported. As in the case of his tape recorded statement, he claims that such failure prejudiced him by depriving him of the record of those items for later review on appeal.

In order to show that specified errors of counsel have resulted in the required prejudice:

[T]he defendant must show 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 v. Washington, 466 U.S. 668, 684, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984); Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Bolander has failed in his proof of the prejudice factor of his claim. He has failed to demonstrate any probability that had counsel had the voir dire and opening statements reported, the result of the trial would have been different.

5. Trial counsel permitted the use of the statement of Bolander's coconspirator, rather than require the State to call her as a witness and subject her to cross-examination. Bolander claims that this was a waiver of his sixth amendment right of confrontation, without his permission or consent.

Pursuant to a request by Bolander's trial counsel, Bolander was granted a separate trial from that of the coconspirator, Edna Marie Stiles. Counsel testified that he didn't particularly want Stiles to testify in Bolander's case. Obviously, the prosecutor sought to introduce the statement given by Stiles, since it established a conspiracy between Bolander and Stiles to harm Stiles' husband, the victim. Since Stiles had not yet been tried for her crime, it would appear likely that she would refuse to testify, in any event, since to do so, would undoubtedly incriminate her. Under those circumstances, it is likely that either direct examination of Stiles by the State, or cross-examination by Bolander's counsel would result in a refusal by Stiles to testify on self-incrimination grounds. Accordingly, it would appear that counsel's decision to let the State introduce Stiles' statement in lieu of her personal testimony was a decision concerning strategy, and was assent to an inevitable occurrence.

The question arises, however, whether the statement was admissible, in any event. The State argues that it is, citing United States v. Inadi, 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986). The statements in that case were unlike Stiles' statement in the case at bar. In Inadi, the prosecutor sought to introduce statements of coconspirators, which were made "during the course and in furtherance of the conspiracy." Id., 475 U.S. at 388-90, 106 S. Ct. at 1123-24, 89 L. Ed. 2d at 394-95. Inadi did, however, indicate that the "unavailability rule" should not be relied upon in every case involving out-of-court statements of coconspirators. Id., 475 U.S. at 391, 106 S. Ct. at 1124, 89 L. Ed. 2d at 396. Iowa, apparently, follows the unavailability rule. In State v. Kellogg, 385 N.W.2d 558, 560 (Iowa 1986), the court cites with approval Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968), and states as follows:

The Barber case suggests a two-pronged test for using out-of-court statements by a witness: (1) Is the witness unavailable to testify at trial; and (2) if the witness is unavailable, has the State made every reasonable effort to secure the attendance of the witness? Id., 390 U.S. at 724-25, 88 S. Ct. at 1319-20, 20 L. Ed. 2d at 260.

In Kellogg, the Iowa Supreme Court went on to hold that "[a] witness who has exercised a fifth amendment privilege is 'unavailable' for purposes of the confrontation clause." Kellogg, 385 N.W.2d at 560 (citing United States v. Inadi).

In Kellogg, counsel took the deposition of an accomplice, one Walker, whom Kellogg alleged killed the victim. In that deposition, Walker very strongly incriminated Kellogg. Subsequently, Walker was charged and obtained counsel. Notice was given that Walker would not provide any additional evidence in the case against Kellogg. At Kellogg's trial, the State sought to introduce the deposition of Walker. The supreme court held that the record showed Walker was unavailable to testify, since she had exercised her fifth amendment right against incrimination, and approved the introduction of the deposition into the evidence.

Id.

Undoubtedly, Stiles was in a position where a refusal to testify was apparent, since to do so would tend to incriminate her. Accordingly, a claim that she was available to testify, so as to disqualify the statement as evidence, would have required only that she be subpoenaed and brought forward to testify. Under these circumstances, since her claim of her fifth amendment privilege would make the statement admissible, it is clear that Bolander's trial counsel's decision to agree to the admissibility of Stiles' statement was without prejudice to Bolander. His counsel's decision not to call Stiles as a witness was a strategic decision that we cannot second-guess. On this issue, we believe that trial counsel was not ineffective.

6. Finally, Bolander claims that his trial counsel was ineffective for failing to adequately investigate his case, and claims that he was ineffective for failing to present any other viable defenses.

The evidence in this case shows that from the start, Bolander claimed he was motivated by self-defense. Also, at the time of trial counsel's commencement of representation, Bolander had given a statement to the police, concerning his involvement in the case. Bolander argues that had counsel interviewed various witnesses suggested by him, counsel would have found that his acquaintance with Stiles was very casual, and that it would have helped eliminate the conspiracy claim of Stiles. Also, some of the witnesses were said to be character witnesses for Bolander. Since he was a previously convicted felon and had a prior prison record, both counsel representing Bolander concluded that character witnesses would not be useful. Counsel investigated the bars said to be frequented by Bolander, and was not impressed with his associations. It was not unreasonable for counsel to conclude that the witnesses were unlikely to be helpful to Bolander's defense.

On the issue of Bolander's relationship with Stiles, there was evidence from a close relative of Bolander that he had told her he intended to marry Stiles

Once again, the issues raised by this branch of Bolander's brief are those which relate to the strategy of counsel, and cannot be second-guessed by the postconviction court

We believe that Bolander received effective assistance of counsel, and we believe the trial court's decision was correct

AFFIRMED.