IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

MARY ELLIS CUEVAS,)

Petitioner-Appellee,)

vs)

STATE OF IOWA,)

Respondent-Appellant.)

Filed June 24, 1987

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7-124
86-938

Appeal from the Iowa District Court for Polk County (PCR 352), George W Bergeson, Judge.

The State appeals a district court order granting the petitioner postconviction relief. **AFFIRMED.**

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for respondent-appellant.

Mark Pennington and William L. Kutmus of Kutmus & Pennington, Des Moines, for petitioner-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

SCHLEGEL, J.

The State appeals a district court order granting the petitioner postconviction relief. We affirm.

On November 1, 1977, Mary Cuevas was charged with first-degree murder for her role in aiding and abetting Phillip Cuevas in the murder of George Weeks during a burglary of Weeks' home on December 31, 1976. On February 23, 1978, Mary Cuevas was found guilty of murder in the first degree. She appealed this ruling to the Iowa Supreme Court. On July 25, 1979, the Iowa Supreme Court ruled against her on all the issues presented on appeal. On August 18, 1980, Mary Cuevas filed her first application for postconviction relief, claiming the trial court erred in failing to instruct on the lesser included offense of second degree murder and manslaughter. This application was denied on April 1, 1981. She did not appeal this order. On May 3, 1984, Mary Cuevas filed a second application for postconviction relief, alleging that her sentence of life imprisonment constituted cruel and unusual punishment in violation of her eighth and fourteenth amendment rights. On August 4, 1984, this application was denied. Mary Cuevas appealed this decision and on May 28, 1985, the Iowa Court of Appeals affirmed this second postconviction order. On October 3 1985, Mary Cuevas filed her third application for postconviction relief. This application was granted on May 20, 1986. The State appeals this order.

Postconviction relief actions are law actions filed to the court and are ordinarily reviewed only on error; however, when there is an alleged violation of a constitutional safeguard, we will make an independent evaluation of the totality of the circumstances under which the postconviction ruling was made. Thomas v. State, 316 N.W.2d 182, 183 (Iowa App. 1981).

The State first asserts that Mary Cuevas's claim has already been adjudicated in the first postconviction hearing and the doctrine of collateral estoppel

bars her from relitigation of the same claim. In her first application for postconviction relief Mary Cuevas was represented by Lawrence Scalise and Thomas Levis, the same attorneys who did not raise the issue of the failure to instruct on lesser included offenses on Mary Cuevas's direct appeal. In this first application, Mary Cuevas, through counsel, did not argue the issue of ineffectiveness of counsel. The basis of the application for relief was as follows:

> That pursuant to Chapter 663A, petitioner, Mary Ellis Cuevas, respectfully states to the court that the trial court in the initial trial proceedings, committed error when it failed to instruct on the lesser included offenses of second degree murder and manslaughter, and pursuant to the Iowa Supreme Court mandate in State of Iowa v. Phillip Benito Cuevas, 282 N.W.2d 74 (Iowa 1979), the trial court in the case at bar should grant the petitioner a new trial.

Her lawyer explained the failure to raise the issue of the lesser included offenses instructions as follows:

> In her appeal, Mary Cuevas did not raise the issue of the trial court's failure to instruct on murder in the second degree and manslaughter. Based upon the Iowa Supreme Court's view of submission of murder in the second degree and manslaughter in a felony murder case, the defendant, by and through her counsel, believed that to submit such an issue as error, would be frivolous and perhaps detract from other issues believed to be more viable. The state of law concerning the submission of murder in the second degree and manslaughter in a case presented as a felony murder cause of action is exemplified by State v. Conner, supra. The legal analysis for determining whether lesser included offenses should be submitted to a jury has been consistent for a number of years.

The State asserts that this argument by counsel sufficiently raised the issue of ineffectiveness, and the trial court's finding that counsel had made a tactical and strategic decision constituted a determination of the ineffectiveness issue. We do not agree.

Mary Cuevas argued, in her third postconviction application, when represented by new counsel, that the issue of effectiveness of appellate counsel had never been adequately raised or decided. Section 663A.8 provides that:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application. [Emphasis added.]

The first postconviction application contained no claim relating to ineffective assistance of counsel. Mary Cuevas stated, in her affidavit presented for the third postconviction relief hearing, that at no time during her representation by Lawrence Scalise and Thomas Levis did she discuss the issue of ineffective assistance of counsel and that her first opportunity to gain information relating to this issue was when she retained subsequent counsel, William Kutmus. We do not think Levis's statement to the first postconviction court, that he considered the submission of the lesser included offense issue on appeal as frivolous, adequately raised and litigated the issue. Ineffective assistance of appellate counsel and of prior postconviction counsel in failing to adequately raise the issue of effectiveness can provide sufficient reason under Iowa Code section 663A.8 to permit the issue of ineffective assistance of counsel to be raised in a subsequent postconviction proceeding. See Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980). We have held that it is not feasible that a petitioner's counsel would enter an ineffective assistance claim against himself on direct appeal. State v. Turner, 345 N.W.2d 552, 558 (Iowa App. 1983). We think it equally unlikely that the attorney would rigorously pursue such a claim in a subsequent postconviction proceeding. Therefore, we find that since the issue of ineffective assistance was neither fully raised nor litigated in the first postconviction proceeding, the elements required for finding that the doctrine of collateral estoppel bars the defendant from litigating this claim have not been met. See Clark

v Glanton, 370 N.W.2d 606, 607 (Iowa App. 1985). The third postconviction court decided that the claim of ineffective assistance of counsel had never been raised or fully litigated at prior stages of the proceeding. The court believed that Mary Cuevas had a right to a judicial determination, based on a full and fair litigation of the issue of whether or not the former counsel's failure to fully raise and litigate the issue on appeal was due to his ineffectiveness. We agree with the court's conclusion.

We also believe, for reasons discussed below, that the necessary requirements for a postconviction court's consideration of the underlying issue absent presentation on direct appeal have been met in this case. See Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). Therefore, the failure to preserve error in this case does not provide a sufficient basis for barring a judicial determination of the relevant issues.

In order to prevail on a collateral attack upon a state court conviction, the applicant for postconviction relief must show sufficient reason for failure to challenge the alleged error in trial court or on direct appeal as well as actual prejudice resulting from alleged errors of which the applicant now complains. Polly, 355 N.W.2d at 856. Ineffective assistance of counsel may provide a basis to satisfy the two-prong test as articulated in Polly. Waterbury v. State, 387 N.W.2d 309, 312 (Iowa 1986).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must prove by a preponderance of the evidence that 1) counsel's performance was deficient, and 2) counsel's deficient performance prejudiced the defense so as to deprive defendant of a fair trial. White v. State, 380 N.W.2d 1, 3 (Iowa App. 1985). It is not necessary that a court deciding an ineffective assistance claim approach the inquiry in the same order or even address both components of the inquiry if the petitioner makes an insufficient showing on

one. Id. Defendant has the burden to prove both elements by a preponderance of the evidence. Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding the first prong, deficient performance by counsel, we require more than 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 of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of representation. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Defendant is not entitled to perfect representation, only that which is in the normal range of competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985). The ultimate test is whether under the entire record and 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).

We believe an attorney operating within a range of normal competency would have raised the issue of the submission of lesser included offenses instructions on direct appeal. The attorney representing Mary Cuevas at trial thought it important to object to the court's refusal to include the lesser offenses when instructing the jury. The trial attorney made the following record at Mary Cuevas's trial:

> Comes now the defendant and asks the Court to submit to the jury lesser included offenses of second degree murder and manslaughter, so that the jury could consider those forms of verdict. To that extent, I am objecting to Instruction No. 27, which I believe refers to the forms of the verdict. I believe the defendant is entitled under the Constitution and the previous holdings of the Iowa Supreme Court to have those forms of verdict submitted to the jury for their discussion and decision.
>
> I think that's all, Your Honor.
>
> THE COURT: Well, defendant's objections to Instruction 6, 7, 10, 11, 12, 13 and 24 will be overruled.

> The defendant's request that the Court submit the lesser offenses of second degree murder and manslaughter and its objection to Instruction No. 27 are overruled.
>
> The Court will refer counsel to the State against Connor.
>
> Is there anything further, gentlemen?
>
> MR. HOLMES: Could I amend my motion just so I am maintaining my record here, that my objection to the first group of instructions should also include Instruction No. 27, because that is the form of verdict which eliminates the two lesser forms of verdict because of the felony murder rule, as I understand it.
>
> THE COURT: That will be added to your objection and the rulings apply the same way and it will be overruled.

These same grounds were also raised in the motion for a new trial which was denied.

At the first postconviction hearing, attorney Levis asserted that on direct appeal he did not raise the issue of the trial court's failure to instruct on lesser included offenses because he considered it a frivolous claim and thought it might detract from other more important and legitimate issues. The issues from which counsel did not wish to detract were the sufficiency of the evidence to corroborate an accomplice's testimony, sufficiency of the evidence of aiding and abetting, and jury misconduct based on two jurors' visible symptoms of drowsiness.

The State argues that given the existence of State v. Conner, 241 N.W.2d 447 (Iowa 1976), counsel for Mary Cuevas's direct appeal could not have been ineffective in not raising the lesser included offenses issue. We defer to our supreme court's analysis of Conner in State v. (Phillip) Cuevas, 282 N.W.2d 74, 78 (Iowa 1979). In (Phillip) Cuevas, the supreme court said that in Conner there was no factual issue on intent, therefore no instruction on an included offense was required. The court found Conner factually distinguishable from Phillip Cuevas's case since in the latter there was a factual issue on intent and that under the felony-murder instruction given, second degree murder and man-

slaughter were lesser included offenses and should have been submitted. The supreme court in (Phillip) Cuevas cited two previous cases, State v. Reese, 259 N.W.2d 771 (Iowa 1977), and State v. Millspaugh, 257 N.W.2d 513 (Iowa 1977), in which the court was required to reverse felony murder convictions for failure to submit second-degree and manslaughter on lesser included offenses. (Phillip) Cuevas, 282 N.W.2d at 77.

We will not here reach the issue whether or not Phillip Cuevas's case changed the law (as the State intimates) nor whether Reese and Millspaugh changed the law concerning lesser included offenses (as the third postconviction court concluded and Mary Cuevas urges on appeal). We only observe that at the time of Mary Cuevas's trial the law was sufficiently unsettled so that her trial counsel urged the court to submit such instructions based on the law as it existed at that time, that the new trial motion was at least partially dependent on this theory of the law, and that Phillip Cuevas's lawyer did argue these same grounds on appeal and was successful in receiving a new trial. In these circumstances we believe that a lawyer operating within a normal range of competency would have raised the issue of the lesser included instructions. In light of the strength of the other arguments made on appeal, we do not think a decision not to raise the lesser included offenses issues can be characterized as merely a tactical or strategic decision not to detract from the raised issues. We do not believe that holding counsel to the responsibility of advancing the most likely issues on appeal is the same as asking them to be "crystal gazers" who can predict the exact way the law will change. See State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982).

The second prong of our analysis is whether the defendant was prejudiced by counsel's performance. In order to prove prejudice, the defendant must show that counsel's failure to perform an essential duty worked to her actual and

substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, the 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.

State v. Taylor, 352 N.W.2d 683, 685 (Iowa 1984).

We believe, following Millspaugh, Reese, and (Phillip) Cuevas, that if defendant can show a factual basis in the record to support a verdict on a lesser included offense and such instructions were not given, there is a reasonable probability, that is, one sufficient to undermine our confidence in the outcome, that but for counsel's unprofessional errors the proceeding would have been different. After examining the factual circumstances in (Phillip) Cuevas, the supreme court determined that the jury could have found Phillip Cuevas shot the victim during a burglary without finding the shooting was intentional or the jury could have disbelieved that the purpose of Phillip Cuevas's going to the victim's house was to commit a felony. (Phillip) Cuevas, 282 N.W.2d at 78. The supreme court apparently rejected the State's contention that there was no factual basis in the record from which the jury could have convicted Phillip Cuevas on a lesser included offense. Id. We must also then assume that the factual circumstances in this case which are essentially identical to those of Phillip Cuevas's case could support a jury finding that Mary Cuevas was involved in an act not amounting to a burglary or in an act which was not a shooting committed with malice. If this is so, then Mary Cuevas was substantially disadvantaged by the failure of her counsel to appeal the lesser included offense issue. We conclude that the trial court was correct in finding ineffective assistance of counsel on the parts of attorneys Scalise and Levis and that a new trial is here appropriate.

AFFIRMED.

Snell, J., concurs; Donielson, P.J., dissents.

DONIELSON, J. (dissenting)

I respectfully but vigorously dissent. I would hold that petitioner's claim has already been adjudicated and that the doctrine of collateral estoppel bars her from presenting the claim. Even assuming, however, that the petitioner is not barred from presenting this claim, I would find no ineffective assistance of appellate counsel.

Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits. Iowa Elec. Light and Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50, 52 (8th Cir. 1983). Before collateral estoppel may be employed, however, four requirements must be met: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) determination of the issue in the prior action was necessary and essential to the resulting judgment. Clark v. Glanton, 370 N W.2d 606, 608 (Iowa App. 1985). Collateral estoppel applies only to ultimate facts and not to evidentiary facts. State v. Sunclades, 305 N.W.2d 491, 496 (Iowa 1981).

The record reveals that in the petitioner's first application for postconviction relief, the petitioner alleged that the trial court erred in failing to instruct the jury on the lesser-included offenses of second-degree murder and manslaughter. An examination of the petitioner's brief in support of her application, however, reveals that the arguments presented were almost wholly directed to the reasons why petitioner did not raise this issue on direct appeal. In her brief, the petitioner stated that the issue of whether the trial court erred in failing to instruct on second-degree murder was not raised on appeal based upon the Iowa Supreme Court's view of submission of second-degree murder

and manslaughter instructions in felony-murder cases. The petitioner stated that at the time of her conviction, the Iowa Supreme Court viewed such lesser-included offense instructions with disfavor, but that subsequent to her conviction the Iowa Supreme Court in the companion case of State v. Cuevas, 282 N.W.2d 74 (Iowa 1979), changed the law regarding such instructions. As stated in petitioner's brief, "[t]he issue was not raised on appeal, for the simple reason that the Iowa Supreme Court had not ever given any indication that such an issue would be viable in a particular ground for reversal of a criminal conviction." The petitioner's brief further stated:

> The Defendant did not knowingly, voluntarily and intelligently waive her right to raise the issue of the Trial Court's failure to instruct on the lesser included offenses, for, as was stated by the counsel for the Petitioner during the appeal, it was the belief of the Petitioner's counsel that to argue the failure of the Trial Court's decision to not submit Murder in the Second Degree and Manslaughter would have been frivolous and without merit. The basis for this opinion by counsel for the Petitioner during the appeal was the simple fact that the Iowa Supreme Court had been totally and unequivocally against granting relief on such issues and counsel for the Defendant did not believe the Defendant should submit issues to the Iowa Supreme Court which would be frivolous and perhaps detract from other more important and legitimate issues.

Though the petitioner argues, and the majority apparently agrees, that the issues in the first postconviction application and the present application are different, I find an inescapable conclusion that the fighting issues in both applications are the same. The same arguments which were set forth in petitioner's first application are necessarily included in the present application. In either case, the ultimate question was and is whether petitioner's appellate counsel's actions were proper in light of the circumstances then existing. It is clear from Judge C. Edwin Moore's ruling that Judge Moore recognized that in order to determine whether or not the petitioner waived the issue of lesser-included offenses, it would be necessary to examine appellate counsel's performance. Based upon petitioner's own argument, Judge Moore concluded that

based upon the attendant circumstances then existing, the decision not to raise the issue was a tactical or strategic decision on the part of counsel. Because "[o]rdinarily, except for such basic decisions as to whether to plead guilty, waive a jury, or testify in his or her own behalf, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions," Judge Moore held that petitioner had not established by a preponderance of the evidence "sufficient reason" for not raising the issue of failure to submit lesser-included offenses on her direct appeal. See Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980).

I thus find from an examination of the totality of the circumstances that the issue of whether appellate counsel's action were appropriate was raised and litigated in the first postconviction proceeding. The same arguments raised in petitioner's first postconviction proceeding would necessarily be argued again if yet another hearing were held. This issue was decided, and petitioner took no appeal from Judge Moore's decision. Petitioner should not be permitted to use the court's precious time in reasserting issues already litigated and concluded.

Even assuming, however, that the petitioner is not barred from raising the ineffectiveness issue, I would find no ineffectiveness of counsel in the present case. The majority, though stating that in deciding whether counsel's performance was deficient we require more than that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently, nevertheless holds "that a lawyer operating within a normal range of competency would have raised the issue of the lesser-included instructions." I disagree.

The petitioner, in order to prevail on a claim of ineffective assistance of counsel, must show by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced

the defense so as to deprive the defendant of a fair trial. White v. State, 380 N.W.2d 1, 3 (Iowa App. 1985). If, however, the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. Id. In deciding the first prong, we require more than 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). The petitioner must overcome a strong presumption of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of representation. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). The ultimate test is whether under the entire record and 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 the first postconviction proceeding, appellate counsel stated that it was their belief that at the time of the petitioner's first appeal, the Iowa Supreme Court did not view favorably the inclusion of lesser-included offenses in felony-murder cases. It was not until after the petitioner's conviction had been affirmed on appeal that the Iowa Supreme Court in State v. (Philip) Cuevas determined that the instructions regarding lesser-included offenses should have been included. The majority concedes that the law at the time of petitioner's appeal was unsettled. Given this fact, I fail to see how the petitioner's strategic decision to forego raising the issue of lesser-included offenses could be considered ineffective. An attorney need not be a "crystal gazer" who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant. Following the Iowa Supreme Court's decision in State v. (Philip) Cuevas, petitioner's appellate counsel filed the first postconviction application alleging that the trial court erred in failing to submit lesser-included instructions at petitioner's trial. Appellate counsel noted the changes in the Iowa Supreme

Court's view and strongly argued that pursuant to the holding in State v. (Philip) Cuevas, petitioner should be granted a new trial It is clear that appellate counsel was aware of the issue, but decided that given the uncertain state of the law it was best not to raise an issue of questionable merit Whether or not the issue at bar would ultimately prove meritorious as a result of the Iowa Supreme Court's decision in State v (Philip) Cuevas, given the facts and law available to appellate counsel at the time of the appeal, I would find appellate counsel's decision not to raise the issue of lesser-included offenses to be reasonable and competent under the totality of the circumstances