IN THE COURT OF APPEALS OF IOWA

No. 0-131 / 89-530

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DANIEL SULLIVAN ELAM,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

Elam appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Robert W. Thompson, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, and James Metcalf, County Attorney, for appellee.

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

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Elam appeals from the denial of his application for postconviction relief. He contends he received ineffective assistance of counsel in his 1981 trial for first-degree murder and also in the earlier stages of this postconviction proceeding. We affirm.

On a claim of ineffective assistance of counsel, we make our own evaluation of the totality of the circumstances, a review tantamount to de novo. Pettes v. State, 418 N.W.2d 53, 55 (Iowa 1988).

In 1981 Daniel Elam was convicted of first-degree murder. A jury rejected his theory that he shot the victim in self-defense. Upon direct appeal, the Iowa Supreme Court affirmed this conviction in 1982. State v. Elam, 328 N.W.2d 314 (Iowa 1982).

In 1985 Elam filed an application for postconviction relief. The district court denied postconviction relief in 1986. We affirmed the denial of postconviction relief in part on appeal in November 1987. However, we remanded for a new hearing on certain claims of ineffective assistance, holding that Elam's pro se status during part of the proceeding had effectively prevented him from developing a record on those claims.

Following a remand hearing, the district court rejected Elam's remaining claims of ineffective assistance and once again denied postconviction relief. Elam has appealed from this ruling.

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Elam contends his trial attorney rendered ineffective assistance by failing to pursue a defense of diminished responsibility.

We first note that applicants in postconviction proceedings are barred from assigning gounds for relief which were not asserted on direct appeal from the criminal conviction. Iowa Code § 663A.8 (1989). Iowa Code section 663A.8 provides:

> 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.

Iowa Code § 663A.8 (1989) (emphasis added).

In order for Elam to assign new error challenging a conviction, he must show by a preponderance of the evidence "cause" or "sufficient reason" for failure to challenge the alleged errors in trial court and on direct appeal, and he must also show actual prejudice resulting from these errors. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989) (citing Polly v. State, 355 N.W.2d 856, 855 (Iowa 1984)).

Elam was represented at trial and on direct appeal by the same attorney. Elam's defense counsel, understandably, did not raise an ineffective assistance of counsel claim against himself on appeal. Consequently, we find there is "sufficient reason" for defense counsel's failure to previously raise the issue of ineffective assistance of counsel on direct appeal. See Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982).

Elam's first postconviction hearing was held in 1986. The issues Elam attempted to raise in his postconviction petition, amendment, and pro se motion for leave and continuance did not include the issue of ineffective assistance of trial counsel on the ground of failure to present a defense of diminished responsibility. Since this issue was not raised in the original postconviction action, Elam must demonstrate "sufficient reason" for this failure. Elam seems to contend that his postconviction counsel was ineffective in failing to raise this issue in the first postconviction proceeding.

"[I]neffective assistance of appellate counsel may provide the 'sufficient reason' necessary to allow a petitioner to raise for the first time in postconviction the ineffective assistance of trial counsel." Gavin v. State, 425 N.W.2d 673, 675 (Iowa App. 1988)(citing State v. White, 337 N.W.2d 517, 520 (Iowa 1983)). The burden is on Elam to prove by a preponderance of the evidence that (1)

counsel failed to perform an essential duty and (2) that prejudice resulted so as to deprive him of a fair trial. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987) (citing Strickland v. Washington, 466 U.S 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984)). "Representation by counsel is presumed to be competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective." Kane, 436 N.W.2d at 627.

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980).

We have carefully examined the record and hold that the defendant falls short of showing ineffective assistance of postconviction counsel. Elam has not demonstrated that his counsel failed to perform an essential duty. We believe the conduct of his postconviction counsel falls within the wide range of reasonable professional assistance. Elam's postconviction counsel testified that he considered raising the issue of trial counsel's failure to present a diminished responsibility defense but rejected it. This decision, he testified, was prompted by his desire to focus on the one issue he considered to be the strongest. This issue was the recantation by a crucial witness of testimony she had given at trial. We note here that "[h]ighly

competent appellate lawyers generally assign only the strongest points and rely on them for reversal." Cuevas, 415 N.W.2d at 633. This is what counsel sought to do in this case.

We find counsel's decision in the present case was very much a judgment call which was reasonably warranted. Our examination of the record leads us to conclude that Elam has not shown that his counsel in the original postconviction action was deficient.

We further find Elam has not met the second element of the ineffective assistance of counsel test. Elam was not prejudiced by his postconviction counsel. He has not demonstrated that, but for counsel's alleged errors, the result of the postconviction proceedings would have been different. At this point our analysis shifts to trial counsel's decision not to pursue a diminished responsibility defense. The analysis shifts because if we find trial counsel did not render ineffective assistance, no prejudice can be demonstrated for Elam's postconviction counsel's failure to pursue the issue.

Elam contends his attorney in the 1981 criminal trial rendered ineffective assistance by failing to pursue a defense of diminished capacity. Such a defense would have been based on testimony by a psychologist and by Elam's relatives that Elam was an unusually fearful and wary person who reacted with excessive fear to real or perceived threats.

Elam's trial counsel considered and rejected the strategy of relying on a diminished responsibility defense. His trial counsel's decision to not pursue this claim was based on several reasons. These reasons include: (1) counsel did not believe the defense "would have much of a chance because there was a lot of evidence that there was planning activity prior to the commission of the crime"; (2) there was evidence that Elam purposefully tried to conceal the crime; (3) counsel viewed the defense as one "of last resort" because "juries don't buy it" and are reluctant to accept it as a defense; (4) he believed that self-defense was the best defense available to Elam, and; (5) counsel felt that any evaluation Elam would be subjected to by the State's mental health expert would be unfavorable to Elam's case and used at trial.

Based on our review of the record, we believe Elam's trial counsel's performance was within the range of normal competency. His decision to not pursue the defense was a principled decision. As long as counsel's action amount to principled decisions within the normal range of competency, counsel is not ineffective. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985).

We find postconviction counsel was neither ineffective in failing to raise this issue at postconviction nor was the defendant prejudiced by counsel's decision. We find no error on the part of the district court in denying Elam's

request for a new trial based upon his claim of ineffective assistance of counsel. Consequently, we affirm the decision of the district court.

AFFIRMED.