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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL D. QUICK,)
Plaintiff-Appellant,)
vs.)
STATE OF IOWA,)
Respondent-Appellee.)

Filed September 6, 1984

4-179
83-456

Appeal from the Iowa District Court for Polk County--M. J. V. Hayden, Judge.

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

Raymond E. Rogers, Assistant Appellate Defender, for the petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

Petitioner appeals from the denial of his application for postconviction relief. He contends that his trial attorney rendered ineffective assistance of counsel by failing to impeach a witness and by failing to present evidence about the allegedly violent nature of a crowd into which petitioner fired a shotgun. Petitioner also contends that appellate counsel rendered ineffective assistance by failing to raise these arguments about the performance of trial counsel. We affirm.

On the night of May 28, 1978, petitioner confronted what he believed to be a rowdy crowd which had congregated near his auto repair business. Fearing that crowd members would vandalize cars entrusted to his care, petitioner directed the crowd to disperse. When the crowd did not disperse, petitioner loaded a shotgun and fired several shots. One of the shots was fired directly into the crowd and, as a result, one of the crowd members died.

At petitioner's subsequent trial, he testified that the crowd appeared to be advancing on him in a threatening manner and that he only fired into the crowd when his previous warning shots went unheeded. Members of the crowd gave conflicting testimony concerning whether crowd members were ever on petitioner's property and concerning whether petitioner audibly asked them to leave before firing. However, all testified that no threats were made to petitioner. One crowd member, Johnnie Woodrow Wallace, testified that no one was on petitioner's property, that petitioner made no audible request to disperse before he fired, and that he, personally, would have left the area if requested rather than risking a fight.

Petitioner was convicted of second-degree murder. He took a direct appeal, and raised just one issue: whether the State had knowingly and recklessly presented false testimony at trial. We rejected petitioner's argument and affirmed his conviction.

Petitioner then filed an application for postconviction relief. Postconviction relief was denied and petitioner has taken this appeal.

I. Ineffective Assistance of Counsel

When a claim of ineffective assistance of counsel is raised, we look to see "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Where, as here, petitioner's claim is grounded on a specific omission of counsel, he must prove by a preponderance of the evidence that "counsel failed to perform an essential duty, and . . . prejudice resulted." Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). Petitioner has failed to meet his burden here.

A. Failure to Impeach

Petitioner asserted at trial that the crowd members confronting him were the aggressors, and that he had acted in self-defense. He argues on appeal that his trial attorney rendered ineffective assistance by failing to introduce evidence to show that one of the State's witnesses, crowd member Johnnie Woodrow Wallace, had been convicted of assault on several previous occasions. We find no merit in this argument.

Counsel did not offer evidence concerning Wallace's prior convictions because he had concluded that this evidence was not admissible. Counsel's conclusion was clearly correct. Evidence of prior convictions is admissible in a very limited number of instances. First, evidence tending to show that an alleged agressor has a violent and dangerous character may be introduced to show that defendant possessed an apprehension of danger which might justify his resort to prompt and violent measures of self-defense. "Of course such evidence is admissible for this purpose only if these character traits were known to the accused." State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977). In the present case, petitioner did not know any of the members of the crowd he was confronting and had no idea that Wallace had a history of assaults on his record. Thus, evidence concerning Wallace's prior convictions was not admissible to show petitioner's state of mind.

Evidence concerning an alleged aggressor's character is also admissible to prove who was the aggressor. Such evidence may be admitted even if the character traits described were unknown to defendant. However, the violent character of an alleged aggressor may not be proven by evidence of specific acts. State v. Jacoby, 260 N.W.2d at 837. It may only be shown by evidence of his reputation in the community or "by witnesses who can testify from an actual knowledge of [his] character." Id. Wallace's prior convictions were therefore not admissible to show that the crowd members were the agressors.

Finally, evidence of prior convictions is admissible to impeach a witness, but only if those prior convictions tend to show a lack of truthfulness or a disposition to lie. "[C]onvictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not." State v. Martin, 217 N.W.2d 536, 541 (Iowa 1974). Prior convictions for assault do not serve to undermine the veracity of a witness and may not be used for impeachment purposes unless the witness opens the door by offering testimony which may be rebutted by the fact of such prior convictions. Wallace's testimony at trial was not inconsistent with having been convicted of assault, and his prior convictions were therefore inadmissible for impeachment purposes.

Even if Wallace's prior convictions could have been admitted to impeach him, petitioner cannot prevail, since he has not proven that he was prejudiced by counsel's omission. Wallace's testimony was not crucial to the State's case. Indeed, the prosecutor presented ten other eyewitnesses to the shooting, all of whom testified that petitioner fired into the crowd without provocation. It is not likely, under these circumstances, that counsel's failure to impeach Wallace had any effect on the jury's ultimate decision.

B. Failure to Present Evidence

Petitioner argues that counsel rendered ineffective assistance by failing to present evidence regarding the violent character of the crowds that frequent the area where the shooting occurred. Because petitioner did not know any of the crowd members confronting him, the essence of his complaint is that counsel should have offered evidence regarding the general reputation for violence the neighborhood allegedly possessed.

Reputation evidence is admissible under State v. Hobbs, 172 N.W.2d 268 (Iowa 1968), only if a proper foundation is established. The purpose of this requirement is to show that the reputation is broadly and generally held in the community rather than being the opinion of a particular group. Id. at 272. To establish a proper foundation, evidence must be introduced showing that comments have been made concerning the reputation at issue. This includes describing the place at which the comments were made, the number of comments which have been made, over how long a period, and by whom. Id. at 272. These foundational requirements are the same whether the evidence is offered to show the reputation of a person or the reputation of a place. State v. Massey, 275 N W.2d 436, 438 (Iowa 1979).

Petitioner has failed to show, and the record does not indicate, that he could have satisfied the foundational requirements set out in Hobbs. Thus, the evidence may have been inadmissible. Under these circumstances, petitioner has offered nothing to rebut the presumption that counsel provided effective assistance in this particular. Allegations that counsel ignored evidence are insufficient unless petitioner can show that such evidence was admissible and that admission of the evidence would have altered the jury's verdict.

II. Ineffective Assistance of Appellate Counsel

Petitioner argues that appellate counsel was ineffective in two particulars. First, he argues that she rendered ineffective assistance by failing to challenge the trial court's ruling on the State's motion in limine (which precluded the defense from offering any evidence of Wallace's prior convictions other than what is permissible under State v. Martin). Second, he argues that she rendered ineffective assistance by failing to raise the issue of the effectiveness of trial counsel. Both of these arguments are without merit.

Appellate counsel did not challenge the trial court's ruling on the motion in limine because she believed that the ruling was correct. As we noted earlier, evidence concerning Wallace's prior convictions could only be offered for impeachment purposes as per State v. Martin (and then only if the witness opened the door to its introduction). The trial court's ruling was clearly correct, and counsel was not ineffective for failing to challenge it. Since we have already held that trial counsel rendered effective assistance, appellate counsel was not ineffective for failing to raise that issue on appeal.

AFFIRMED.