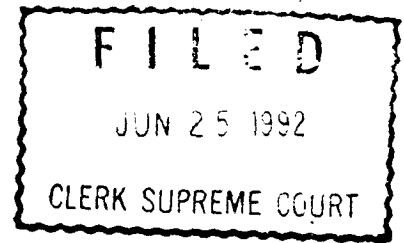


IN THE COURT OF APPEALS OF IOWA

No. 2-161 / 91-875



BENJAMIN PERRY CALDWELL,

Appellee,

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vs.

STATE OF IOWA,

Appellant.

Appeal from the Iowa District Court for Johnson County,
William R. Eads, Judge.

State appeals a judgment of the trial court granting
Caldwell postconviction relief because his trial counsel
gave ineffective assistance. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, Ann E. Brenden,
Assistant Attorney General, and J. Patrick White, County
Attorney, for appellant.

Sally Weyer of Bergan & Weyer, Iowa City, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

SCHLEGEL, P.J.

Benjamin Caldwell was charged in 1983 with second-degree murder in the death of Ellen Egan. The night of her death, Caldwell and Egan went to several Halloween parties. They became very intoxicated throughout the evening. They eventually quarreled and separated; Caldwell went home, and Egan went to another party. Once Egan decided to leave the party, evidence suggests she tripped and fell down the second floor stairway of the apartment building. She then took a cab to the home she shared with Caldwell. When she arrived Caldwell wanted to know where she had been. Caldwell testified he was angry because she had left him at the party and he accused her of being with another man. He then began shoving and slapping Egan. When she tried to get away from him, he hit her head against the bathroom door four or five times. The two later went to bed. When Caldwell awoke at 5 a.m. he could not awaken Egan and noticed fluid coming from her mouth. He called an ambulance, but paramedics were unable to revive her. Egan died from a subdural hematoma and cerebral edema.

Prior to trial Caldwell, on the advice of his trial counsel, refused to accept a plea of guilty to voluntary manslaughter, claiming he did not have the intent to kill Egan. Instead, Caldwell based his defense on the theory that he was so intoxicated he could not have possessed the requisite intent to kill. Caldwell was subsequently found

guilty and sentenced to a term of imprisonment not to exceed fifty years. The supreme court affirmed his conviction in State v. Caldwell, 385 N.W.2d 553 (Iowa 1986).

In August 1986 Caldwell filed a pro se application for postconviction relief, claiming he was denied his right to a fair and impartial jury due to the trial court's failure to include manslaughter in the instructions. Caldwell also maintained his trial counsel was ineffective in failing to urge inclusion of the verdict of manslaughter. In 1988 Caldwell amended his application, arguing trial counsel failed to properly advise him of the current state of the law on voluntary intoxication. A hearing was held, and the postconviction court rendered judgment on January 28, 1991.

The court held Caldwell would have most likely been acquitted absent an intoxication defense and sustained the application for postconviction relief. The court ruled the State had twenty days in which to provide Caldwell an opportunity to plead guilty to manslaughter, and if not, the conviction would be overturned and Caldwell would be granted a new trial. The court also determined if Caldwell did not plead guilty to manslaughter if the State provided such an opportunity, his conviction would stand.

The State filed a motion for new trial, which the court denied. The State subsequently filed a notice of appeal and a petition for writ of certiorari, arguing the postconviction court's ruling was beyond the scope of its

authority. The appeal and the petition for writ of certiorari were granted by the supreme court pursuant to an order dated August 22, 1991.

I.

The State first argues Caldwell has waived his ineffective assistance of counsel claims. On Caldwell's direct appeal to the supreme court, he did not raise any claim of ineffective assistance of counsel. Caldwell, 385 N.W.2d at 555-57. Ineffective assistance of counsel claims that are first raised in postconviction proceedings are deemed waived unless sufficient reason is shown for failing to present the claim on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Caldwell is entitled to review of this claim if he can establish sufficient reason for not having raised the issue on direct appeal and resulting actual prejudice. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984).

The postconviction court found the claim was not waived:

the Court concludes that it was inferentially established why [Caldwell] did not raise this claim on the appeal or prove why it was not so raised. Even though he had different counsel on appeal, the plea advice, attorney conferences and negotiations were made outside the record. A layman would not know to claim such a ground when he did not know of its existence until it was raised by his new counsel on post-conviction application.

We agree and find (1) the ineffective assistance of counsel claim could not have been decided on appeal because it

depends on evidence that does not appear in the record of the trial proceedings and (2) Caldwell was prejudiced. We determine Caldwell has shown sufficient reason for not having raised this issue on appeal.

II.

The State next argues the court erred in finding trial counsel gave ineffective assistance for pursuing intoxication as a defense. In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption that counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Caldwell bears the burden of proving by a preponderance of the evidence counsel failed to perform an essential duty and prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted).

In Iowa voluntary intoxication is not a defense to a crime but may be relevant to negate a specific intent if such intent is an element of the offense charged. State v. Booth, 169 N.W.2d 869, 873-74 (Iowa 1969). Voluntary intoxication may not reduce a charge when specific intent is not an element of the crime. State v. Wilson, 166 Iowa 309, 319-21, 144 N.W. 47, 51-52 (Iowa 1913). Second-degree murder is a general intent crime so voluntary intoxication cannot negate malice aforethought and reduce the crime to manslaughter. State v. Hall, 214 N.W.2d 205, 208-09 (Iowa 1974) (quoting 40 Am. Jur. 2d Homicide § 129, at 420-21 (1968)).

Trial counsel argued to the court that Iowa Code section 701.5 indicated intoxication was relevant to whether Caldwell had the requisite state of mind or malice aforethought. The statute provides:

The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates his or her guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged.

Iowa Code § 701.5 (1983). The trial court rejected counsel's argument. Citing State v. Collins, 305 N.W.2d 434, 437 (Iowa 1981), the court found the enactment of section 701.5 did not overrule long-established law. In Collins the supreme court stated section 701.5 is substantially a codification of prior law and "[t]emporary intoxication is simply evidence to be considered by the jury on the issue of intent." Id.

The State argues trial counsel did not misadvise Caldwell about the possibility of relying on an intoxication defense. We disagree, and we find there was a breach of an essential duty. Counsel advised Caldwell not to plead guilty to voluntary manslaughter; he told Caldwell it was more likely that he would be acquitted or found guilty of involuntary manslaughter than he would be convicted of second-degree murder. Because Caldwell believed intoxication was of critical importance, he decided to not plead guilty to voluntary manslaughter.

The State believes the district court engaged in "Monday morning quarterbacking." We find, however, trial counsel was mistaken about Iowa law concerning the applicability of an intoxication defense to a second-degree murder charge. Based on this error, counsel misadvised Caldwell about the availability of an intoxication defense. If counsel was aware of the state of the law and was attempting to change the law, he should have communicated this to Caldwell so that Caldwell could make a knowing choice among alternative courses of action. See Standards for Criminal Justice § 4-5.1 (1986).

The State also argues defense counsel had a second reason for pursuing intoxication as a defense in this matter: to present Caldwell in a more sympathetic, believable light. The record shows that this use was not diligently pursued. The testimony of Doctors Varner and Gersh was elicited to show how Caldwell's intoxication affected his state of mind. Caldwell's own testimony about his drinking gave a very negative impression. In addition, if defense counsel intended to use intoxication as a means to gain the jury's sympathy, Caldwell nonetheless had the right to evaluate that approach in light of an opportunity to tender an Alford plea. See North Carolina v. Alford, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68, 27 L. Ed. 2d 162, 171-72 (1970). Caldwell was never told such an opportunity existed.

The State further claims causation was an important issue regardless of intoxication. Caldwell believed he was responsible for Egan's death and that the State could prove it at trial. We find his belief is supported by the evidence at the trial. There was no disagreement among the experts at trial that the victim's death was caused by blunt trauma to the head. The State's experts testified the victim's injuries were consistent with the actions of Caldwell as he related them to police officers. In addition, defense counsel himself realized one of the weaknesses of his case was the strength of the State's case on causation.

We find defense counsel gave ineffective assistance because he relied on an intoxication defense and advised Caldwell to not plead guilty to voluntary manslaughter. We next address prejudice. Caldwell must prove he was prejudiced by a preponderance of the evidence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983) (citation omitted).

There is no dispute in the record the State offered to let Caldwell plead guilty to voluntary manslaughter. The difference between a sentence for second-degree murder and voluntary manslaughter is a fifty-year sentence compared to a ten-year sentence. Iowa Code §§ 707.3, 707.4, 902.9 (1983). The offer of voluntary manslaughter was not withdrawn by the State at any time prior to trial.

The State argues there is great importance in the fact that Caldwell rejected the offer to plead guilty to

voluntary manslaughter. We do not find any importance which can be attributed to Caldwell. Caldwell understood his defense at trial would be intoxication, and his counsel advised him not to take the plea offer. Caldwell relied on his counsel's advice in deciding not to take the offer. As Caldwell testified, if he had known intoxication was not a defense to second-degree murder, he would have pleaded guilty to voluntary manslaughter.

The State also claims Caldwell would not have been able to make a factual basis to a plea of voluntary manslaughter because he could not admit to having the intent to kill. However, counsel for the State and defense counsel talked about the possibility of an Alford plea. Caldwell was never told of this possibility.

We find the trial court properly found a breach of an essential duty and prejudice. Caldwell was prejudiced when, due to counsel's misadvice concerning intoxication, he lost the opportunity to plead to a substantially-reduced charge. The district court correctly found there was a reasonable probability the outcome would have been different but for trial counsel's error.

III.

The trial court ordered the State to either offer a voluntary manslaughter plea, or if not offered, afford Caldwell a new trial. The court provided that if Caldwell decides to not plead guilty to voluntary manslaughter if offered by the State, his conviction for second-degree

murder shall stand. The State argues there is no valid factual basis for the plea and, as such, the court does not have the authority to compel the plea. We find the district court's remedy is supported by the law.

The State cites State v. Iowa Dist. Court for Jackson County, 463 N.W.2d 885 (Iowa 1990), to support its contention the decision of whether to offer a plea to a charge should rest with the State alone. In that case the supreme court held a "trial judge is without authority to accept, before trial, a plea to a lesser-included offense, over the stated objection of the prosecutor." Id. at 887. We find the case at hand is distinguishable. In the present case the prosecutor herself, obviously believing there was a valid factual basis, offered Caldwell the chance to plead guilty to voluntary manslaughter. The postconviction court has again left this decision up to the prosecutor. The prosecutor can elect to proceed with the previously-offered plea to voluntary manslaughter. If not, Caldwell will have a new trial on second-degree murder, the offense originally charged by the prosecutor. We find the trial court acted properly. See Turner v. State of Tenn., 726 F. Supp. 1113, 1117 (M.D. Tenn. 1989) (appropriate remedy for defendant who received ineffective assistance of counsel when advised to reject a guilty plea offer is to permit defendant to consider the offer anew).

IV.

We find Caldwell's trial counsel gave ineffective assistance, and the trial court granted the proper remedy.

AFFIRMED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. I would reverse the trial court. This is a direct appeal by the State from the district court's ruling granting petitioner a new trial (or alternatively a plea bargain) based upon his application for postconviction relief.

On November 9, 1983, petitioner was charged with second-degree murder in the death of Ellen Anne Egan. After trial to a jury, defendant was convicted of second-degree murder on May 3, 1984. Judgment was entered on this verdict and defendant was sentenced to fifty years in prison on June 6, 1984.

Defendant took a direct appeal from his conviction, claiming the trial court erred with respect to: (1) the proximate cause instruction, (2) the instruction on recklessness, and (3) the failure to submit intoxication as applicable to second-degree murder. State v. Caldwell, 385 N.W.2d 553 (Iowa 1986). The conviction was affirmed upon review by the Iowa Supreme Court of an Iowa Court of Appeals decision, by ruling dated April 16, 1986. Id.

On August 21, 1986, petitioner filed an application for postconviction relief. His claims were presented in a hearing on November 21, 1990, and the postconviction court ruled in his favor on January 28, 1991.

As to the facts surrounding the murder, the Iowa Supreme Court, in the direct appeal of defendant's conviction, found:

Defendant and [the victim, defendant's live-in girlfriend] Ellen [Egan] were out with friends at several Halloween parties in Iowa City. Throughout the evening they became more and more intoxicated. After a quarrel they separated. Defendant went home while Ellen went to another party where she reportedly became even more intoxicated. Ellen eventually decided to leave that party which was on the second floor of an apartment building. As she left she tripped and tumbled down the stairway but did not seem hurt in the fall. She then took a cab home.

When she arrived Ellen was confronted by defendant who wanted to know where she had been. Defendant testified he was also very intoxicated and that he became extremely jealous when he was drunk. He was angry because she had left him at the party and accused her of being with another man. Defendant then began shoving and slapping Ellen. When she attempted to get away from him, defendant hit her head against the bathroom door four or five times.

Defendant testified he stopped striking Ellen when he noticed a drop of blood coming from her nose. Ellen then came up to defendant in their bedroom but he pushed her away. Defendant then picked her up, laid her on the bed, and went to bed himself. When defendant awoke at 5 a.m. he found he could not awaken Ellen and noticed fluid coming from her mouth. He called an ambulance but paramedics were unable to revive her. She was pronounced dead at 6:37 a.m.

Expert testimony indicated Ellen's skull was not fractured, nor did she suffer any massive blows which alone would have been responsible for her death. Instead, according to medical experts, she died from a subdural hematoma and cerebral edema. The experts could not say for certain whether the trauma causing her injuries was the result of defendant's actions or were instead the result of her fall down the stairs earlier in the evening. Testimony did reveal, however, that repeated blows, even minor ones, could have caused her death.

Defendant denied any intent to kill or harm her. A psychologist testified for defendant that, because he was intoxicated, he did not intend to kill or harm Ellen.

State v. Caldwell, 385 N.W.2d 553, 555 (Iowa 1986).

Prior to trial, the State offered to let the defendant plead guilty to voluntary manslaughter. Caldwell offered to plead guilty to involuntary manslaughter, but the State rejected that offer. The defense effort at trial focused on two factors: (1) evidence of defendant's voluntary intoxication and (2) evidence regarding causation.

The postconviction court found trial counsel ineffective in pursuing an intoxication defense in the face of the second-degree murder charge and found the defendant was prejudiced by this decision in that he declined an opportunity to plead guilty to voluntary manslaughter in favor of a not guilty plea followed by trial.

I believe the record establishes Caldwell personally rejected the offer to plead guilty to voluntary manslaughter because of his unwillingness and inability to admit a factual basis to support it. It is clear Caldwell refused to admit he had the specific intent to kill Ellen Egan when he slapped her and banged her head against the bathroom door and based his decision not to plead guilty to voluntary manslaughter on this fact. Caldwell was willing to plead guilty to involuntary manslaughter, but the State rejected this offer.

I am not convinced the defendant's trial counsel did not understand that intoxication was not a defense to second-degree murder when he pursued that defense. I believe defense counsel did understand the law. If I read

the record properly, he believed a change (codification) in the law "would permit a jury to consider intoxication, not only on the issues of intent, but also of malice, willfulness, recklessness."

The "change" of which defense counsel spoke was the codification of the intoxication statute:

The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt, but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the act or in proving any element of the public offense with which the person is charged.

Iowa Code § 701.5 (1979) (emphasis added).

Counsel believed the last phrase arguably meant that intoxication could go to "any element," malice being one such element. It was at Caldwell's direct appeal that this issue was decided by the Iowa Supreme Court.

I believe defendant's application for postconviction relief should be denied. There is one other reason which has not been touched on in the briefs before us. The defendant takes the position that the offer by the State remained open, but he declined for the reason he thought intoxication was a viable defense for the second-degree murder charge. Assuming the correctness of this position, after the instruction was prepared and before submission to the jury, the defendant and his counsel had to know that intoxication was not going to be submitted as a defense. Even with this indisputable fact, the defendant still did not accept the offer to plead to voluntary manslaughter.

This circumstance alone buttresses the State's position the defendant declined the invitation to plead, not because of the supposed intoxication defense, but because of his unwillingness to admit he intentionally killed the victim and because of his further defense that he attempted to show by independent evidence that his striking was not the cause of her death.