FILED
DEC 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HAROLD EVANS TODD,	)	
Petitioner-Appellant,	)	Filed December 23, 1986
vs.	)	
STATE OF IOWA,	)	358
Respondent-Appellee.	)	
RONALD DEAN TODD,	)	
Petitioner-Appellant,	)	
vs.	)	6-385 85-1866
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Madison County (No. 22634) - Thomas S. Bown, Judge.

Petitioners appeal from the trial court's dismissal of their application for postconviction relief, contending the trial court erred in holding that petitioners were not prejudiced by a communication from the trial court to the jury in petitioners' absence and in holding that they were not denied effective assistance of counsel because their attorneys failed to preserve error regarding the allegedly prejudicial jury-court communication. **AFFIRMED.**

Richard B. Clogg of Elgin, Hoyman, Clogg & Patin, Indianola, for petitioners-appellants.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Arlen F. Hughes, County Attorney, for respondent-appellee.

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

PER CURIAM 353

This is a consolidated appeal by Harold Todd and Ronald Todd from the district court's dismissal of their applications for postconviction relief. On August 7, 1981, following a jury trial, appellants were convicted of second-degree murder and first-degree robbery. Their convictions were affirmed on appeal. On May 2, 1985, appellants filed their applications for postconviction relief. A consolidated hearing on the applications was held on December 6, 1985. The district court dismissed the applications following the hearing. This appeal followed.

After the jury commenced its deliberations in the underlying criminal trial, the presiding judge received a written communication from the jury foreperson. The precise contents of this communication are unclear due to the interstices of human memory and the communication's destruction sometime during or shortly after the jury's deliberations. Upon receiving the communication, the presiding judge contacted the attorneys for the defendants and the State, read them the jury's question, solicited their suggestions, and told them he intended to tell the jury to reread certain instructions. This he proceeded to do via a written message. No record of these proceedings was made and no one notified the defendants of the court-jury communication. Neither defendant was present for any part of this communication between the court and the jury. The appellants contend that the procedure followed by the district court violated Iowa Rules of Criminal Procedure 18(5)(g) and 25(1) and that the postconviction court accordingly erred in dismissing their petitions for postconviction relief. In addition, the appellants maintain the postconviction court erred in holding that they were not denied effective assistance of counsel when their trial counsels failed to preserve error regarding the jury-court communication.

The appellants concede that the communication between the jury and the court was not an issue presented for review on direct appeal. Although the postconviction court decided the merits of this issue, we note that a postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). We will not ordinarily allow a defendant to claim in postconviction proceedings that the trial court erred on issues that were not properly preserved for our review on direct appeal. Id. As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence of conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code section 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

The appellants' brief does not address these necessary "sufficient reason" and "prejudice" showings. We assume that allegations of ineffective assistance of counsel are to serve as the "sufficient reason" for the issues under rules 18(5)(g) and 25(1) not being properly presented on direct appeal. Our courts recognize valid ineffective assistance claims as satisfying this requirement. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1985). Our review of ineffective counsel claims is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

In order to succeed on a claim that he was denied effective assistance of counsel, appellants must show that their counsel failed to perform an essential

duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Appellants have the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 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). Appellants must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Appellants must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsels' performances were within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, appellants must show that counsels' failure to perform an essential duty worked to their actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, appellants

> 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, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; Taylor, 352 N.W.2d at 685.

In analyzing this claim, we note first that we need not determine whether counsels' performances were deficient before examining the prejudice component of an ineffectiveness claim. Taylor, 352 N.W.2d at 685 (Iowa 1984). We accept the counsel of the United States Supreme Court in this regard that

> [t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700; Taylor, 352 N.W.2d at 685.

Rule 18(5)(g), Iowa Rules of Criminal Procedure, states as follows:

> g. Report for information. After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. Where the court gives the jury additional instructions, this appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Our courts recognize that attorneys need not be "crystal gazers" who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant. State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982). The appellants were convicted on August 7, 1981. At that time, the leading case interpreting what is now Iowa Rule of Criminal Procedure 18(5)(g) was State v. Dreessen, 305 N.W.2d 438 (Iowa 1981). In Dreessen, the jury had informed the trial judge that it was unable to reach a unanimous verdict. The judge responded by informing the jury that they would need to deliberate further the next day. This communication was held not to invoke the protection of Iowa Rule of Criminal Procedure 18(7)(g) (now Iowa R. Crim. P. 18(5)(g)). In support of its holding, the Dreessen court cited cases where, similar to the facts of

this case, trial courts had merely referred the jury back to instructions they had already been given. See State v. Mullenix, 212 Iowa 1043, 1050, 237 N.W. 483, 486-87 (1931); State v. Johnston, 221 Iowa 933, 945, 267 N.W. 698, 704 (1936). Although the precise holding of Dreessen was that such communications were not "instructions" within rule 18(7)(g), we believe it reasonable for counsel to have read the case as stating that that rule would apply only where additional instructions were given and not when the trial court merely told the jury to reread the instructions. That, in fact, was the way in which this court interpreted Dreessen a year later in State v. Griffin. Although Griffin was later vacated by the Iowa Supreme Court, 323 N.W.2d 198 (Iowa 1982), we think that in light of the case law as it stood at the time of the appellants' trial their counsel could reasonably have believed that, pursuant to Dreessen, the defendants' absence during the jury-court communication presented no appealable issue under rule 18(5)(d). Accordingly, they were not derelict in failing to preserve it.

Appellants also allege ineffective assistance with respect to their counsels' failure to preserve the issue that the jury-court communication violated Iowa Rule of Criminal Procedure 25(1). That rule states that

> in felony cases the defendant shall be present at the arraignment and plea, unless a written arraignment form as provided in R.Cr.P. 8(1) is filed, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. In other cases the defendant may appear by counsel.

Our courts have said on numerous occasions that the better practice is for trial courts to communicate with jurors only in the presence of counsel and the accused. E.g., Dreessen, 305 N.W.2d at 440. In the present case, however, we pass over the opportunity to grade the appellants' counsel by this standard because we believe appellants have made an insufficient showing of prejudice.

Appellants argue that had they been present they could have suggested that the entire instructions be reread rather than particular ones or that if the trial judge referred the jurors to the instruction on murder in the first degree without mentioning other lesser offenses, they could have excepted to the judge's action. We think that these speculations are a far cry from the type of actual and substantial prejudice that Miles and Taylor require the appellants show. Even accepting, arguendo, appellants' contention that these responses would have been pertinent and advanced by them had they been present, appellants have made no showing that their inability to advance these arguments prejudiced them in any way. Nothing in the court's response to the jury was improper so as to lead us to believe that any conceivable error here was anything other than harmless. See Dreessen, 305 N.W.2d at 440-41. Certainly appellants have not shown that, had counsel preserved error on the alleged rule 25(1) violation, the outcome of this criminal proceeding would have been different in any way other than length.

Accordingly, we reject appellants' allegations of ineffective assistance of counsel and, pursuant to Polly, 355 N.W.2d at 856, and Iowa Code section 663A.8 (1985), do not reach their contentions under Iowa Rules of Criminal Procedure 18(5)(g) and 25(1).

AFFIRMED.

Oxberger, C.J., and Snell, J., concur; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

An applicant for postconviction relief must show: 1) "cause" for failure to challenge alleged errors in the trial court; 2) actual prejudice resulting from these errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984).

Ineffective assistance of counsel can provide an adequate basis for showing "cause" for the purposes of section 663A.8. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1985). To show ineffective assistance of counsel, the petitioner must show that he suffered an actual and substantial disadvantage due to counsel's failure to perform an essential duty. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). I think counsel here clearly failed to perform an essential duty. First, counsel did not adequately inform petitioner of his right to be present at a crucial stage of the trial proceedings. A defendant's right to be present at every stage of trial is one of those decisions of constitutional magnitude that cannot be waived by his attorney. State v. Turner, 345 N.W.2d 552, 559 (Iowa Ct. App. 1983); State v. Foster, 318 N.W.2d 176, 178-79 (Iowa 1982). Second, counsel should have been sufficiently aware of the unsettled state of the law at the time of petitioner's trial to have made an objection to the trial court's procedure. The State's brief virtually concedes that the law was unsettled as to the relevant rules of criminal procedure in this area at the time of trial. This being true, counsel should have preserved any error which may have resulted from the jury-court communication. Since counsel should not have "waived" defendant's right to be present at the proceedings and should have made a timely objection to the jury-court communication, I would find that counsel failed to perform essential duties to his client.

In order to determine whether specified errors of counsel have resulted in the required prejudice, our courts have adopted the test articulated in

Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699, that the defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Taylor v. State, 352 N.W.2d at 685. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The essential inquiry to be made is whether there has been a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). I believe two elements of this case establish the requisite showing of prejudice. First, the defendant's right to be present at every stage of the trial is of constitutional magnitude and the "waiver" of such a right by an attorney is an error which infects the entire proceedings. See State v. Turner, 345 N.W.2d at 559. Second, the Iowa Supreme Court has approved the following caveat to the placing of the burden on defendant to show actual and substantial prejudice: "The burden does not require the petitioner to produce evidence to which he is unlikely to have access." State v. Miles, 344 N.W.2d at 235. In the instant case, the failure to give defendant a chance to be present at the time of the court-jury communication was a constitutional deprivation of the highest magnitude. The destruction of the actual communications significantly impaired the defendant's ability to meet his showing of actual harm suffered. Since we have said that the defendant's burden does not require the petitioner to produce evidence to which he is unlikely to have access, I would find that in these circumstances defendant has adequately met his burden of proving prejudice resulting from his counsel's failure to perform an essential duty.

I further believe that the prejudice prong of Polly is also met by the above analysis. The burden to show prejudice for postconviction relief is the same as for demonstrating ineffective assistance of counsel. See Polly v. State, 355

N.W.2d at 856. I believe the majority should recognize that the defendant has the right to either a new trial or a determination whether or not the prejudicial error was harmless in the context of the whole record. See State v. Griffin, 323 N.W.2d at 201.