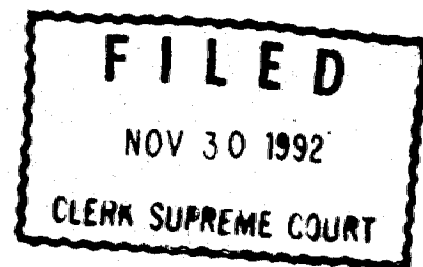


IN THE COURT OF APPEALS OF IOWA

No. 2-270 / 91-111



STATE OF IOWA,

Appellee,

vs.

HARRY BENARD JOHNSON,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, R. J. Curnan, Judge.

Johnson appeals his second-degree murder conviction on the grounds that he was denied effective assistance of counsel. **AFFIRMED.**

C.A. Frerichs and Thomas P. Frerichs of Fulton, Frerichs, Martin & Andres, P.C., Waterloo, for appellant.

Bonnie J. Campbell, Attorney General; Julie A. Brown, Assistant Attorney General; Thomas J. Ferguson, County Attorney; and D. Raymond Walton, Assistant County Attorney, for appellee.

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

HABHAB, J.

FACTS

On March 11, 1990, the defendant, Harry Johnson, was one of several people riding in Maurice Claybon's car. The young men, who were from the east side of Waterloo, went to a predominately residential neighborhood on the west side of Waterloo. The men spotted Jeffrey Wood and Andrea Hurley walking, and one of the youths suggested they beat up Wood. The young men parked the car and got out. Claybon and Keith Walker ran after the couple. The defendant and two others, Richard Smith and Derrick Wilder, followed some distance behind.

Walker and Claybon approached the couple and accosted Wood. Smith and Wilder remained behind the couple and the defendant ran ahead near Claybon and Walker. Walker pushed and shoved Wood back up against a house where Claybon then shot Wood. Wood grabbed his side and the youths ran back to the car. Wood died.

The State filed a trial information charging Claybon, Walker, Smith and the defendant with first-degree murder. Following a trial, the jury found the defendant guilty of second-degree murder. He was then sentenced to a minimum of three years in prison not to exceed fifty years.

Johnson appeals contending he was denied effective assistance of counsel. We affirm.

SCOPE OF REVIEW

When a petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980) (citations omitted).

ANALYSIS

Ordinarily, we preserve a claim of ineffective assistance of counsel for a postconviction action when counsel can defend against such a charge. However, in the case at bar, the record is sufficiently developed to facilitate review of the defendant's claim of ineffective assistance of counsel on direct appeal.

In order to prevail on a claim of ineffective assistance of counsel, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989); State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

Established principles govern our review of defendant's sixth-amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged."

Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

I. Breach of an Essential Duty.

The first prong of the test used to analyze a claim of ineffective assistance requires the defendant to show counsel breached an essential duty. The defendant argues his counsel failed to recognize and raise his defense (to the charge of second-degree murder): the State's failure of proof of the mens rea of malice aforethought and the defense that the defendant lacked the state of mind to be guilty of murder either in the first or second degree. The defendant argues he did not act with malice aforethought nor did he know that Claybon was going to act with malice aforethought. He further contends he was prejudiced by his counsel's failure to advocate this defense. The State responds that the defendant's complaint must fail because his counsel did pursue this defense.

After reviewing the record de novo, we find numerous instances where the defendant's trial counsel did in fact pursue the defense in question in opening and closing statements and through the testimony of various witnesses.

The defendant acknowledges that murder in the second degree is not a specific intent crime. He argues, however, that in aiding and abetting prosecutions the mens rea of malice aforethought must be proven by the State to be possessed by the criminal accused or that the criminal accused had knowledge that the person being aided and abetted possessed the mens rea of malice aforethought. We believe the record supports a finding that this defense was presented to the jury by defense counsel.

The defendant also argues his trial counsel was ineffective in failing to request an instruction setting forth the state of mind requirement for the defendant to be convicted of aiding and abetting a murder; and, in addition, it is argued that defense counsel failed to object to instruction No. 29 for it "did not instruct on the mens rea defense of 'aiding and abetting.'" We disagree.

The jury was given the following uniform jury instruction on aiding and abetting in jury instruction no. 29:

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission shall be treated in the same way.

"Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

The guilt of the person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it and does not depend upon the degree of another person's guilt.

The defendant correctly notes that the uniform instruction contains the following language which was not included in instruction no. 29:

Comment

Note: Add the following paragraph if the offense involves specific intent: "The crime charged requires specific intent. Therefore, before you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either had such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent [he] [she] is not guilty.

1 Iowa Uniform Criminal Jury Instruction 200.8 (1991).

The defendant is correct in arguing the language in the comment above should have appeared in the aiding and abetting instruction as far as it related to the crime of first-degree murder. However, the jury was also instructed on second-degree murder and in fact convicted the defendant of second-degree murder. Second-degree murder is not a

specific intent crime. State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986) (citations omitted).

Instruction No. 36 provides:

1. That on or about the 11th day of March, 1990, Jeffrey Dean Wood was shot.
2. Jeffrey Dean Wood died as a result of being shot.
3. The person shooting Jeffrey Dean Wood acted with malice aforethought.
4. The Defendant aided and abetted the person who shot Jeffrey Dean Wood.

We believe that when the instructions are read and considered together that the jury was properly instructed as to the law in this respect. When read together, the jury was instructed that at the time of the incident the defendant either had to have the mens rea of malice aforethought or had to have knowledge of Claybon's mens rea of malice aforethought. Therefore, counsel did not breach a duty in failing to request the additional aiding and abetting language with regard to the lesser offense of aiding and abetting second-degree murder.

From the circumstances before us, we are unable to conclude the defendant's trial counsel acted unreasonably. We find counsel's acts or omissions were not "outside the wide range of professionally competent assistance." See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. The defendant has failed to establish his trial counsel breached an essential duty. The defendant's claim of ineffective assistance of counsel must fail.

II. Prejudice.

In Part I, we held the defendant's trial counsel did not fail to perform an essential duty. Therefore, technically we do not need to address the second prong of prejudice. Nevertheless, we hold the defendant has failed to show prejudice resulted. We are unable to find to a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would not have convicted the defendant of second-degree murder.

CONCLUSION

After considering all issues presented, we affirm the defendant's second-degree murder conviction and sentence. His claim of ineffective assistance of counsel is denied. We affirm the district court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.