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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STEVEN ROBERT OLSON,	)	
Petitioner-Appellee,	)	Filed June 25, 1986
vs.	)	6-104 85-421
STATE OF IOWA,	)	
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Polk County (PCR 285), Ray A. Fenton, Judge.

The State appeals the district court's ruling granting appellee postconviction relief. **AFFIRMED.**

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Gregory Biehler, Assistant Polk County Attorney, for respondent-appellant.

Raymond E. Rogers, Assistant Appellate Defender, for petitioner-appellee.

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

OXBERGER, C.J.

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The State appeals the district court's ruling granting appellee postconviction relief. We affirm.

When a defendant relies on specific errors of his counsel to demonstrate ineffectiveness, he must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

The United States Supreme Court has recently stated that the essential duties required of counsel cannot be set out as detailed rules and that the standard to be applied on the first prong of the test is "whether counsel's assistance was reasonable considering all the circumstances." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984). On the second prong, the defendant must meet the following standard of prejudice: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

In proceedings below the trial court found that defendant's counsel was ineffective in: (1) failing to raise defendant's lack of comprehension as to his rights under Miranda v. Arizona, in a timely fashion; (2) failing to prepare his expert witnesses properly so as to enable them to attack the weight and sufficiency of defendant's confession; and (3) failing to prepare for the trial adequately. Appellate counsel did not serve as trial counsel.

Performance

Counsel did not dispute defendant's waiver of his rights under Miranda until the morning of the suppression hearing. The State argues that counsel was not alerted to possible grounds for suppression of defendant's confession

until the night before the hearing. Counsel admitted in the postconviction hearing that he had experienced difficulty communicating with defendant. Defendant's wife testified that she had told counsel four months prior to the trial that her husband had probably confessed "to a lot of things he didn't understand. . ." Two months before the suppression hearing, counsel received communications from Dr. Don Heywood and Ms. Cindy Davis, a clinical psychologist, indicating that defendant suffered from mental deficiencies. Counsel, nevertheless, waited until one day before defendant's trial to attempt substantive interaction with the expert witnesses for his case. We find that counsel did not conduct himself as a reasonably competent attorney in delaying his preparation for the suppression hearing. Counsel failed to contact the experts in a timely fashion to ask if defendant's waiver of his Miranda rights was knowlegeable considering his mental deficiencies. At the postconviction hearing, the experts were finally asked the question they were not asked before, whether defendant's waiver was knowing, intelligent, and voluntary. Each of the experts responded in the negative.

Failure to Prepare Expert Witnesses Properly

The trial transcript, when compared with the postconviction relief transcript, demonstrates a prejudicial difference in the testimony the experts offered. The expert's testimony in the postconviction hearing presented a detailed recitation of clear evidence that the defendant did not understand the rights he waived prior to his trial nor did he understand the gravity of the acts to which he confessed. Indeed, he did not understand the acts involved in his confession.

The State asserts that counsel made a tactical decision to invest his time and efforts to aspects of the case other than preparation of his expert witnesses. We find nothing in the record to support this assertion. Counsel testified that

he recognized the confession as the most damning evidence against his client.

He did not depose the prosecution witnesses until two days before the trial begain. Counsel waited until the night before trial to prepare defendant and his family for their testimony. The transcript shows the consequences of the faulty preparation of a mentally deficient defendant. While on the stand, defendant obviously became confused.

Prejudice

The alleged inculpatory statement was a critical item of evidence in this case. The evidence had the effect, if the jury believed it, of totally undermining the defense. Failure of trial counsel to raise adequately the issues of defendant's inability to understand his Miranda rights resulted in the statement's admission into evidence. We find that if on retrial the statement is ruled inadmissible, that there is a reasonable probability the verdict could be different.

We commend the effort of trial counsel to correct his lack of preparation. In the best of the tradition of the legal profession, he gave no concern to his own personal interest, but thought solely to protect his client's interest. For example, he said:

> . . . And I have to sit here and take all the blame for it. And if it is my fault and I have got to be crucified and thrown up to the wolves, so be it. This man is facing 25 years in prison, and I will be damned - - excuse me, your Honor, - - I cannot sit here and say that I can effectively represent him without the psychiatric testimony concerning this (sic) admission of this statement into evidence.

AFFIRMED.