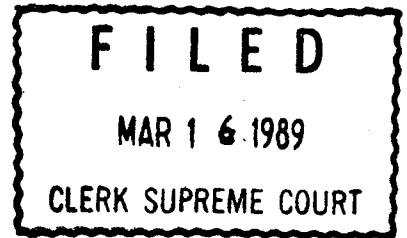


IN THE COURT OF APPEALS OF IOWA



LeROY SEILER,)
Applicant-Appellant,)
vs.)
STATE OF IOWA,)
Resister-Appellee.)

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8-639
88-530

Appeal from the Iowa District Court for Hancock County
(15,624), Stephen P. Carroll, Judge.

The defendant appeals the denial of postconviction relief after a jury found him guilty of first-degree murder. **AFFIRMED.**

Randall E. Nielsen and Jay M. Shriver, of Pappajohn, Shriver, Eide & Nicholas, Mason City, for applicant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and Ted Hovda, County Attorney, for resister-appellee.

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

OXBERGER, C.J.

Defendant, LeRoy Seiler, appeals the denial of postconviction relief after a jury found him guilty of first-degree murder. He alleges ineffective assistance of trial and appellate counsel. Our review is of the totality of the circumstances. See State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984). We affirm.

In 1982 a jury found LeRoy Seiler guilty of first-degree murder for killing an elderly tavern owner in Garner, Iowa. The death was apparently inflicted with a meat cleaver. This occurred during a burglary. The district court sentenced Seiler to life imprisonment and the conviction was affirmed by the supreme court in State v. Seiler, 342 N.W.2d 264 (Iowa 1983). Subsequently, Seiler sought postconviction relief but was denied. He now appeals that denial.

The sole issue is whether the postconviction court properly found Seiler failed to demonstrate ineffective assistance of counsel.

Seiler alleges ineffective assistance of both his trial and appellate counsel. He alleges breach by his trial counsel for failing to pursue the possibility that an accomplice of Seiler actually killed the victim; for failing to impeach a key prosecution witness; for failing to put into evidence exculpatory deposition testimony; and for failing to raise adequate objections to various jury

instructions. Seiler alleges breach by his appellate counsel for failing to raise on appeal the issue of erroneous jury instruction and the issue of ineffective assistance of counsel.

The standards by which we evaluate ineffective assistance of counsel claims are well established:

The petitioner bears the burden of proving by a preponderance of the evidence that his counsel was ineffective and must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

In examining trial counsel's performance, we require more than a showing that trial strategy did not work or that another attorney would have taken different steps in the preparation and trial of the case. See Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). The United States Supreme Court has stated:

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689; 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694-95 (1984) (citation omitted).

In deciding whether or not prejudice resulted, we have required a showing that the attorney's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted a denial of the accused person's due process right to a fair trial. See State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988).

Seiler asserts his counsel should have focused on the inadequacy of an aiding or abetting instruction. Seiler's support for such a claim is found in his "confession" to

cellmate Michael Tobin, when he said that he did not act alone and an accomplice was the one who struck the fatal blow. Seiler contends this allegedly favorable testimony should have been elicited at trial for impeachment purposes. Tobin's testimony at trial was that Seiler struck the fatal blows. In both his deposition and at trial Tobin established Seiler was involved in the beating.

The evidence of the case overwhelmingly indicated Seiler either acted alone or was the principal perpetrator. Only one set of footprints were found in blood around the pool table, with blood near the back door of the tavern and outside Seiler's home. Only one set of bloody clothing was found which was established as Seiler's. One bloody fingerprint was found in the public shower across the street from the tavern. One hair was found in the victim's hand and was found to be like Seiler's. Seiler's clothes contained a missing piece of glass from the corn sweetener bottle near the phone booth in the tavern. Further, it was established the struggle with the 65-year-old victim lasted for some time, as evidenced by the great amount of blood found in several locations. It is reasonable to believe that had Seiler had an accomplice, the struggle would not have lasted as long or been as involved. In light of the evidence reviewed above, Seiler failed to meet his burden on his claim of ineffective assistance with reference to failure to assert

an accomplice theory, failure to impeach Tobin, and failure to elicit Tobin's allegedly exculpatory statement from his deposition. Seiler has failed to show any prejudice as he has failed to show there is a reasonable probability that, but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different.

The State correctly notes that even if the evidence did support an accomplice theory, Seiler's notion that an accomplice's specific intent to kill or knowledge of the principal's intent to kill must be proven in a felony-murder case is misplaced. See State v. Nowlin, 244 N.W.2d 596, 604-05 (Iowa 1976) (felony-murder requires no proof of specific intent to kill).

Seiler also asserts his counsel was ineffective for failing to raise adequate objections to various jury instructions. The instruction on first-degree burglary was found to be erroneous by the supreme court. State v. Seiler, 342 N.W.2d at 268. The applicant argues the supreme court was under a mistaken impression that Michael Tobin's testimony was that Seiler struck the victim with a meat cleaver. The applicant asserts the testimony, rather, was that "the guy" struck the victim. The State asserts, and we agree, that even assuming Seiler did not strike the fatal blow to the victim, he did admit his intent to enter the tavern with the intent to steal. This alone is sufficient evidence of burglary. See Iowa Code section 713.1 (1981).

We conclude in light of the overwhelming evidence supporting Seiler's conviction, there is not a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.

Defendant is entitled to a fair trial, not a perfect trial. State v. Seiler, 342 N.W.2d 264 (Iowa 1983). We conclude any errors committed were not of sufficient magnitude, individually or collectively, to deprive Seiler of a fair trial. As we find no error in the performance of trial counsel, we do not find appellate counsel ineffective in failing to raise those matters or trial counsel's effectiveness on appeal.

AFFIRMED.