IN THE COURT OF APPEALS OF IOWA

FILED
MAR 23 1988
CLERK SUPREME COURT

KENNETH E. HEARN,

Petitioner-Appellant,

vs

STATE OF IOWA,

Respondent-Appellee.

Filed March 23, 1988

8-84
87-692

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Appeal from the Iowa District Court for Scott County (No. 71077) - Edward B deSilva, Judge.

Appeal from the denial of application for postconviction relief. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and James R. Huff, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney General, William E. Davis, County Attorney; and James L. Ottesen, Assistant County Attorney, for respondent-appellee.

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

PER CURIAM 181

Petitioner, Kenneth E. Hearn, appeals from the district court's denial of postconviction relief. He was convicted by a jury of attempted murder, first-degree burglary, and going armed with intent.

Petitioner contends he was denied effective assistance of counsel. He claims his trial attorney failed to offer the defense of intoxication and diminished capacity at the time of the shooting incident which resulted in his convictions.

The victim of the shooting was petitioner's girlfriend. He alleges he was distraught because the couple had recently broken up, and that he entered her house with the intention of committing suicide. His defense at trial was that the subsequent shooting was accidental.

The general test applied to a claim of ineffective assistance of counsel is "whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Mott v. State, 407 N.W.2d 581, 582 (Iowa 1987) (quoting Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)). When the claim is grounded on counsel's failure to take some action, the claimant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Id. Munz v. State, 382 N.W.2d 683, 697 (Iowa App. 1985). In examining counsel's conduct we review de novo the totality of relevant circumstances. State v. Burrell, 412 N.W.2d 556, 558 (Iowa 1987).

The record supports petitioner's assertion that there was some evidence of intoxication and diminished capacity here. Nevertheless, trial counsel's decision not to raise those defenses and to pursue instead a theory that the shooting was an accident does not constitute ineffective assistance of counsel. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750-51 (Iowa 1978). It is well-settled that the decision not to assert a particular defense is a strategic

decision, which does not provide grounds for a reversal State v. Wilkens, 346 N W 2d 16, 19 (Iowa 1984), Killpack, 276 N W 2d at 372, State v. Rand, 268 N W 2d 642, 649 (Iowa 1978) Counsel acted reasonably in selecting and following through on the chosen strategy

The record does not support petitioner's claim his trial counsel failed to perform an essential duty Petitioner has failed to show counsel's performance was outside the range of normal competency

Finding no ground for relief, we affirm

AFFIRMED