IN THE COURT OF APPEALS OF IOWA

No. 0-06 / 88-1658

FILED
MAR 27 1990
CLERK SUPREME COURT

ROBERT LEE KERN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

128

Appeal from the Iowa District Court for Cedar County, Margaret S. Briles, Judge.

Defendant appeals the denial of his postconviction relief application. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender; Barbara M. Anderson and Andi S. Lipman, Assistant Appellate Defenders; for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Lee W. Beine, County Attorney; for appellee.

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

SCHLEGEL, J.

Robert Kern was convicted of first-degree murder in 1979, following a jury trial. The Iowa Supreme Court affirmed this conviction upon direct appeal in 1981. State v. Kern, 307 N.W.2d 22 (Iowa 1981).

Kern later filed the present application for postconviction relief to challenge the 1979 conviction. The district court denied postconviction relief, and Kern has appealed. We affirm.

Kern contends his trial attorney in the 1979 murder trial rendered ineffective assistance of counsel in several respects. Kern complains that the attorney: (1) misinformed him of the penalty for first-degree murder; (2) failed to inform him that he would not be eligible for an appeal bond following a first-degree murder conviction; (3) failed to object to three of the State's exhibits at trial; (4) failed to adequately cross-examine three of the State's witnesses; (5) was unfamiliar with Iowa law regarding the corroboration of coconspirator and accomplice testimony; and (6) failed to present a defense after the State rested its case.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80

L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "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). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 697 (1984).

Appellant contends his trial counsel failed to inform him of the penalty imposed for first-degree murder. He states that counsel specifically told him the maximum time he could serve would be ten years. The trial court found, and we agree, that there was insufficient evidence to support appellant's claim. All three of his attorneys stated that he was informed and the appellant himself could not deny that he might have been informed at an earlier hearing. In addition, appellant's claim that if he had known life imprisonment was a possibility he would have put on a defense, is not realistic. The appellant and his trial counsel determined that relying on the weakness of the State's case was the best defense, and it is unlikely that knowledge of the penalty would have changed their strategy. There is no evidence that counsel failed to perform the essential duty of informing the appellant of his possible penalty. It is also apparent that no prejudice would have resulted even had the defendant been misinformed.

Appellant also claims his counsel did not inform him that he would be ineligible for an appeal bond should he be convicted of first-degree murder. We are not convinced that this presents any ground for granting the relief requested. It would not have affected the ultimate outcome of the original trial or cast any doubt upon the integrity of those proceedings. The appellant suggests that he might

have agreed to plea bargain had he known the appeal bond was not possible. The logic of this argument escapes us. The possibility of being on bail for two years could not be a substantial factor in the decision of whether or not to plea bargain for something less than life in prison. In the event that prejudice did result, there is still insufficient evidence to show that defendant was misinformed concerning the appeal bond.

The next claim of ineffective assistance relates to the admission of three exhibits offered by the State. Appellant contends his trial counsel should have objected to these exhibits. The three exhibits were: shotgun shells matching those used by the killer, a photo of a note pad with the word "shotgun" written on it, and the appellant's calendar with the victim's place of employment written on it. Objections were raised as to two of the exhibits. The note pad was objected to as not being the best evidence of a writing, and an objection was raised concerning the calendar's relevance. The attorney's objections and failure to object do not rise to the level of incompetence necessary to sustain a claim for ineffective assistance of counsel. Counsel was aware of the exhibits and attempted to exclude two of them. He chose not to object to the shells and we usually do not second guess an attorney's actions. A claim of ineffectiveness of counsel must be premised on more than

simply questionable or unsuccessful trial tactics. State v. Risdal, 404 N.W.2d 130, 133 (Iowa 1987). The appellant also claims that he could have offered explanations regarding these exhibits. Any claim that defendant should have testified was waived at the postconviction hearing when counsel withdrew the issue. Appellant's trial counsel did not fail to perform an essential duty regarding these three exhibits.

Appellant next challenges trial counsel's cross-examination of three witnesses. Appellant argues that: Judy Kern should have been cross-examined concerning arrears in child support; Phillip Bramer should have been examined regarding a telephone call made by the appellant; and Jeanne Jensen, a coconspirator, should have been cross-examined more thoroughly. An examination of the record discloses that all of the issues complained of by the appellant were adequately covered during cross-examination. The complaint concerning Judy Kern fails because counsel did not possess the necessary records to impeach her testimony. The record also fails to reveal any inconsistency in the testimony of Phillip Bramer. Finally, we cannot require appellant's trial counsel to more vigorously cross-examine a coconspirator when the only result could be more damaging information or the reemphasis of previously damaging information. Trial counsel's strategy during cross-examination of these witnesses did not fall below the required standards.

Appellant also contends trial counsel failed to properly advise him concerning corroboration of accomplice testimony. The postconviction court did not believe the petitioner on this issue. We see no evidence to support appellant's story. To the contrary, the attorneys for the defendants testified that all parties understood the law regarding corroboration of accomplice testimony.

Finally, appellant contends counsel was ineffective for failing to put on a defense. All of the evidence shows that the decision not to put on a defense was a strategic choice made after careful consideration. Counsel testified that the decision was made after a discussion among all the attorneys and both defendants. As stated earlier, appellant withdrew his claim against his attorney for failing to call him as a witness at trial. Calling other witnesses would only highlight the appellant's failure to testify. The determination was made that the State's case was too weak to justify a defense. Counsel for the appellant did not fail to perform an essential duty regarding his strategy for defense.

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 as just result. State v. Risdal, 404 N.W.2d at 131. The appellant's counsel was aware of far more evidence than was in the trial record. There was

testimony at the postconviction hearing that the appellant had made admissions to counsel regarding certain evidence. Trial counsel must often balance the danger of bringing damaging facts before the jury against the prejudice that could be generated by a failure of the defendant to testify or put on a defense. Twenty/twenty hindsight may tell us that the strategy chosen by counsel was unsuccessful, but common sense and experience teach us that the strategy was well within the range of reasonable professional competence. See id.

AFFIRMED.