IN THE COURT OF APPEALS OF IOWA

No. 0-303 / 99-0443
Filed July 26, 2000

ROSS ANTHONY NEYENS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Ross Neyens appeals from the denial of his application for postconviction relief. He contends the court erred in denying his application as (1) his trial attorneys were ineffective for introducing evidence of prior bad acts and prior convictions and were ineffective in denying him the right to testify, and (2) his appellate counsel was ineffective for failing to raise the issue of insufficient evidence on direct appeal. In the event these issues were not properly raised he contends his postconviction counsel was ineffective. **AFFIRMED.**

Lars G. Anderson of Holland Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Fred H. McCaw, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Applicant Ross Neyens appeals the dismissal of his petition for postconviction relief. He contends 1) trial counsel was ineffective for introducing evidence of his prior bad acts and criminal convictions, and appellate counsel was ineffective for failing to raise this issue on direct appeal; 2) trial counsel was ineffective for denying Neyens his constitutional right to testify, and appellate counsel was ineffective for failing to raise this issue on direct appeal; and 3) appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal, and postconviction counsel was ineffective for not raising this issue in his postconviction action. We affirm.

I. Factual and Procedural Background.

On November 3, 1991, Heidi True suffered twenty-six knife wounds, including two stab wounds to her lungs and two stab wounds to her heart. She died of one of the stab wounds to her heart. Neyens was charged with murder in the first degree, was found guilty by a jury and was sentenced to a term of life imprisonment. Prior to trial he had asserted the defenses of diminished capacity, intoxication, and insanity. In his direct appeal to this court, he raised three issues: 1) whether a certain jury instruction denied him his right to due process of law; 2) whether the district court erred in admitting certain photographs and a videotape of the murder scene; and 3) whether the district court erred in allowing a nine-year-old witness to testify without first taking an oath to tell the truth. *See State v. Neyens*, No. 92-859 (Iowa App. Oct. 28, 1993). We affirmed the conviction, *id.*, his application to the Iowa Supreme Court for further review was denied, and his petition for a writ of certiorari was denied by the United States Supreme Court. *See Neyens v. State*, 511 U.S. 1060 (1994).

In October 1996 Neyens filed an application for postconviction relief. Appointed counsel filed an amended application in November 1998. It made claims that trial counsel in the underlying criminal case had provided ineffective assistance in the following three ways: 1) failing to develop and present evidence at trial on Neyens's blood alcohol content at the time of the crime; 2) denying Neyens his right to testify at trial; and 3) introducing evidence of Neyens prior bad acts and criminal convictions. Neyens withdrew the first claim at the postconviction hearing and trial proceeded on the second and third claims. The postconviction court found no merit to Neyen's claims and dismissed his application. Neyens appeals. Further facts relevant to Neyen's claims will be set forth in discussion of those claims.

II. Scope of Review.

Generally, an appeal from denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994)). This "totality of the circumstances" review is the functional equivalent of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998).

III. Principles applicable to ineffective assistance claims.

A. Procedural principles - (preservation of claims)

Iowa Code section 822.8 provides in relevant part:

> Any ground [for postconviction relief] finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 822.8 (1999). Cases interpreting and applying this provision have long held postconviction relief is not a means for relitigating claims that were or should have been properly presented on direct appeal. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998) (citing *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) and *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981)). In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, the applicant ordinarily must show that the claim was preserved for review by being made on direct appeal. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). Thus any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the alleged error. *Osborn*, 573 N.W.2d at 921. Ineffective assistance of appellate counsel may provide the sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *Id.*

B. Substantive principles.

To establish an ineffective assistance of counsel claim, the applicant mus show that "(1) counsel failed to perform an essential duty, and (2) prejudi resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). test of ineffective assistance of counsel focuses on whether the performan counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999) (citing *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980)). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

We may dispose of an ineffective assistance of counsel claim if the applicant fails to prove either the breach of duty or the prejudice prong of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Appellate counsel's failure to raise issues of claimed ineffectiveness of trial counsel are tested the same as ineffective assistance of trial counsel claims, *Osborn v. State*, 573 N.W.2d at 922, as are claims of ineffective assistance of postconviction counsel claims, *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998).

IV. Merits

For simplicity, we will first address the merits of Neyens's three claims now before this court before addressing preservation of error claims.

A. Introduction of Neyens's Prior Bad Acts by Trial Counsel.

Because of many incriminating statements Neyens made immediately after the crime and very strong physical evidence he had stabbed True to death, Neyens's defense relied upon creating a reasonable doubt concerning whether he could premeditate or form the required specific intent at the time of the crime. In order to do this, the defense presented the testimony of two experts, who testified Neyens suffered from borderline personality disorder and antisocial personality disorder; had an extensive history of mental health problems and hospitalizations; and when drinking, these mental disabilities caused Neyens to be impulsive and made it difficult for him to control his emotions.

In order to set up this expert testimony, the defense presented testimony that Neyens was intoxicated the day of the murder, to the point where he had passed out for several hours. Defense counsel presented evidence that in all likelihood Neyens had an alcohol concentration of .231 to .331 at the time h stabbed True. The defense had earlier presented testimony of Neyens's moth Mary Neyens. Defense counsel testified at the postconviction relief hearing they called Neyens's mother to testify about Neyen's character, upbringin background. Defense counsel also testified they used Mrs. Neyens's te to "put a face on" Neyens and to show the "whole person." The purpose of having his mother testify to his prior bad acts was to support the defense's position Neyens in fact suffered from the mental illnesses or disorders concerning which defense experts would testify, and to support the concept the incident in which Neyens stabbed True was not singular in nature, but was instead part of a pattern of behavior explained by his long-standing mental illness, as exacerbated by his heavy drinking on the day of the incident.

Neyens now complains that trial counsel was ineffective by having Mrs. Neyens testify that he had been involved in burglaries, he had gone AWOL from the Army, and he had been picked up by the police after he took his father's shotgun out in the streets. As Neyens did not testify, none of this evidence could have been introduced by the State. *See* Iowa Rs. Evid. 404(b), 609.

Contrary to Neyens's argument, defense counsel's strategy was a reasonable strategy. Defense counsel reasonably believed Mrs. Neyens's testimony regarding Neyens's character, upbringing and background was necessary or desirable foundation for the testimony of the defense's expert witnesses. Defense counsel felt it crucial that her testimony be seen as credible by the jury, and not as testimony given through a mother's "rose-tinted glasses". The defense strategy on this point was to enhance her credibility and bolster the importance of Neyens's past behavioral problems by presenting a full and accurate picture of Neyens rather than be seen as attempting to present Neyens as a "candidate for sainthood." Prior to her testimony, the jury was already aware of the fact Neyens had once been imprisoned. Neyens himself wanted the testimony of his AWOL status from the Army before the jury, as he felt it would aid his diminished responsibility defense.

Defense counsel hoped to persuade the jury the crime was a result of Neyens's personality disorders and his impulsive actions when drunk. His defense counsel reasonably concluded the jury would be more likely to accept this view if they knew of his prior criminal and anti-social behavior. They also reasonably concluded any attempt to paint a "pretty picture" of Neyens through his mother's testimony might adversely affect the credibility of her testimony. Therefore, we conclude the strategy employed was reasonable, and counsel did not breach an essential duty by eliciting the challenged testimony.

Having concluded trial counsel was not ineffective, we also conclude appellate counsel was not ineffective for failing to raise this issue on direct appeal, as an attorney breaches no duty by failing to raise a meritless issue. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

B. Right to Testify

Neyens's complains trial counsel was ineffective in failing to call him to the stand to testify on his own behalf, and appellate counsel was ineffective in failing to raise this issue on direct appeal.

A defendant's constitutional right to testify on his or her own behalf is grounded in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *See, e.g., Rock v. Arkansas*, 483 U.S. 44, 49-54, 107 S. Ct. 2704, 2708-10, 97 L. Ed. 2d 37, 44-48 (1987). Trial counsel has the obligation to advise the defendant of his or her right to testify or not in a manner that would enable the defendant to make a knowing and intelligent choice. *See, e.g., United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996).

While Neyens testified at the postconviction relief hearing he did not recollect discussing with defense counsel his testifying on his own behalf during the nearly one hundred meetings he had with counsel prior to trial, he did admit it was possible the issue was discussed. On the other hand, defense counsel testified it was his usual practice to discuss the advantages and disadvantages of having the defendant testify with every defendant, as the issue comes up in every criminal defense. Further, defense counsel testified both he and co-counsel did actually discuss the issue with Neyens, and Neyens agreed with defense counsel that more harm than good would come from his testimony.

We therefore conclude Neyens has failed to show an affirmative factual basis that demonstrates trial counsel's inadequacy of representation. Having found trial counsel was not ineffective, we also conclude appellate counsel was not ineffective in failing argue a meritless issue on direct appeal. *See State v. Westeen*, 591 N.W.2d at 207.

C. Sufficiency of the Evidence.

Neyens contends because there is insufficient evidence to support his conviction, counsel on direct appeal was ineffective for failing to raise the issue, and postconviction relief counsel was ineffective in failing to litigate the issue in his postconviction relief action.

Neyens moved for a judgment of acquittal at the close of the State's case, and renewed it at the close of all the evidence, contending there was insufficient evidence of specific intent. On this appeal, Neyens contends because there was substantial evidence to support the defenses of intoxication and diminished capacity, there was insufficient evidence from which the jury could find Neyens had the specific intent necessary to commit murder in the first degree.

Neyens misstates our test on the question of sufficiency of the evidence. We do not evaluate the evidence to determine whether substantial evidence supports the defendant's position. Rather, in reviewing challenges of this nature, we examine the evidence in the light most favorable to the State, and make all reasonable inferences that may fairly be drawn therefrom. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000). We consider all the evidence, not just evidence supporting the verdict, and will uphold a jury's verdict if it is supported by substantial evidence. *State v. Kostman*, 505 N.W.2d 209, 211 (Iowa 1998). Evidence is substantial if a rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Id.* Therefore, the question that is properly before us is whether there was substantial evidence from which a reasonable jury could find Neyens had the ability to form the required specific intent.

The State presented substantial evidence Neyens did have the ability to form the required specific intent and did so. In the hour before True was killed, Neyens made several threats to kill her. He went to her home and argued with her in the home. The jury could find Neyens took the time to go to his car to arm himself with a knife, instead of impulsively grabbing a nearby weapon or using physical force when the argument did not go his way. He inflicted not one or a few wounds on True, but twenty-six wounds, including two stab wounds to her lungs and two stab wounds to her heart. Within an hour after killing True, he confessed the crime to a friend, giving a detailed account of the events. The jury could thus find he was fully capable of planning and carrying out his actions, did so, and was fully aware of what he was planning and doing. Therefore, the trial court did not err in overruling his motion for judgment of acquittal, and neither appellate counsel nor postconviction counsel were ineffective for failing to raise a meritless issue. *See Westeen*, 591 N.W.2d at 207.

AFFIRMED.