IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

HERBERT JOSEPH SCHNEE,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

8-274
87-876

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Appeal from the Iowa District Court for Dubuque County (15562), John Bauercamper, Judge.

Petitioner-appellant filed this application for postconviction relief to challenge his 1984 conviction for first-degree murder. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for respondent-appellee.

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

HAYDEN, J. 286

Petitioner, Herbert Schnee, was convicted of first-degree murder in 1984. In an unpublished opinion we affirmed the conviction in 1985. Defendant later filed the present application for postconviction relief. The district court denied his application and he has appealed. We affirm.

Defendant contends his attorney in the 1984 murder trial rendered ineffective assistance in several respects. He asserts the attorney failed to file a notice for an insanity defense. He also claims the attorney failed to offer adequate evidence to support the defense of insanity. Finally, he argues the attorney failed to object to certain hearsay evidence which he deems prejudicial to his case. The State argues defendant's defense counsel did not render ineffective assistance in any respect and further, appellant has waived certain issues raised here because he failed to raise them on direct appeal.

Ordinarily, a postconviction relief proceeding pursuant to Iowa Code chapter 663A (1987) is at law and our review is not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards, the reviewing court makes its own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Hinkle, 290 N.W.2d at 30. Because a postconviction claim

of ineffective assistance of counsel asserts a violation of constitutional safeguards, our review is de novo. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987).

I.

Are Defendant's Claims Preserved? The State initially asserts appellant has waived certain issues raised here because he failed to raise them on direct appeal. The State argues unless the defendant can show "sufficient reason" why the errors were not raised on direct appeal as required by Iowa Code section 663A.8 (1987), we should not address them here. Petitioner argues ineffectiveness of counsel is ordinarily not decided on direct appeal, reserved instead for postconviction proceedings when counsel can defend against the charge. It is true when ineffective assistance claims are raised on direct appeal we often reserve the issue for postconviction proceedings. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Our intent is to allow development of an evidentiary record where the circumstances surrounding counsel's performance may be exposed. Id. We do not determine if the defendant now shows "sufficient reason." Our review of the record indicates the issues raised here were properly raised and preserved on direct appeal.

II.

Ineffective Assistance of Trial Counsel. Defendant is not entitled to perfect representation, but only to that

which is within the range of normal competency. Cuevas v. State, 415 N.W.2d at 632. We presume counsel was competent and a postconviction petitioner has the burden of establishing by a preponderance of the evidence that trial counsel was ineffective. Id. To establish an ineffectiveness claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performing [sic] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Cuevas, 415 N.W.2d at 632 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Hinkle, 290 N.W.2d at 34. The litmus test for determining whether specified errors of counsel have resulted in required prejudice, is a defendant must show there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Finally, we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim.

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of

> sufficient prejudice, which we expect will often be so, that course should be followed. The courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In light of these principles, we now address each of petitioner's assignments of error.

A. Defendant first argues his trial counsel was ineffective in failing to provide notice of an evidentiary support for petitioner's insanity defense. We determined this issue by reviewing whether defendant was prejudiced by counsel's actions, therefore, we address that prong first. Evidence adduced at the postconviction relief hearing indicates that in the trial counsel's judgment it was not prudent to present an insanity defense because trial counsel believed that voluntary drug induced psychosis does not meet the standard necessary to prove insanity in this state. We believe counsel's assessment of the law is correct. The insanity defense, a complete defense, is unavailable where defendant's condition is one caused by voluntary ingestion of drugs. Further, this is true even though the condition results from the effect of alcohol aggravating a preexisting pathological condition not in itself amounting to insanity. State v. Collins, 305 N.W.2d 434, 437 (Iowa 1981). Defendant makes no claim his ingestion of marijuana was other than voluntary. He does

not claim prolonged use of drugs caused a mental defect arising to the level of legal insanity. Two experts testified they did not believe defendant was psychotic when he was seen by them, when he committed the crime, or ever. In addition, petitioner's own expert testified the defendant's psychosis was drug-induced. Given Iowa law barring insanity defense in situations of voluntary intoxication, counsel's decision not to urge insanity breached no sixth amendment duty.

Even if the insanity instruction had reached the jury, defendant fails to show the result would have been different. In convicting the defendant, the jury rejected the claim his state of mind precluded the formulation of specific intent. While the insanity inquiry differs, it is unlikely as a practical matter the jury would have accepted defendant's supposed mental condition as one precluding him from appreciating the nature and quality of the act and from distinguishing between right and wrong but rejected the condition as effecting intent. Under these facts we cannot say a reasonable probability exists that if counsel had filed notice of an insanity defense and produced evidence on such a defense the result of the proceeding would have been different. Thus, no prejudice existed and we will not evaluate the ineffectiveness prong of the test.

B. Defendant next claims that he was given ineffective assistance by virtue of defense counsel's

failure to make proper objection to the testimony of a probation officer who referred to presentence investigation notes in testifying as to defendant's version of defendant's arson attempt. The district court concluded that "Schnee has not shown that defense counsel's failure to object to the probation officer's testimony was so material to the case that but for defense counsel's error, the result would have been different." We agree with the district court's assessment. For defendant to prove that he was prejudiced by this failure, he is required to demonstrate the State would not have been able to cure the alleged defect once alerted to it. In our opinion, the State would have had no trouble complying with these foundational requirements. Even assuming the probation officer's testimony was inadmissible under any theory, its admission was not so prejudicial as to alter the outcome of defendant's trial. The statement neither supported nor refuted whether the defendant was suffering from delusions at the time of the courthouse fire and more importantly, this testimony was merely cumulative to that already in the record. It is well settled that no prejudice will be found from the erroneous admission of hearsay evidence where substantially the same evidence exists elsewhere in the record. State v.Whitfield, 315 N.W.2d 753, 755 (Iowa 1982).

We hold defendant was not prejudiced by his claims of error thus, we affirm the decision of the district court.

AFFIRMED.