

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

HERBERT JOSEPH SCHNEE,

)

Defendant-Appellant.

)

Filed May 28, 1985

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5-145
84-874

Appeal from the Iowa District Court for Dubuque County, L. D. Lybbert,
Judge.

The defendant appeals from his conviction, following a jury trial, for first-
degree murder. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for the defendant-
appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant
Attorney General, for the plaintiff-appellee.

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

The defendant in this case has appealed from his conviction for first-degree murder, saying he should have been allowed to present evidence concerning an insanity defense and that certain testimony was admitted in violation of the hearsay rules. We affirm.

Defendant Herbert Schnee was found guilty by a jury of the premeditated murder of a woman he had dated. Schnee had been seeing Sharon Kieffer during a period when he and his wife were considering a divorce. Prior to the killing, Schnee's wife testified he had been acting strangely. Each day she said he would get up at noon, smoke marijuana, and read the Bible. He spoke of tree gods and would take walks where he would "clean up" areas around trees by picking up cigarette butts and other litter. On occasion he would take some of the debris to a sewer opening where he would turn in a circle several times and then drop the litter into the grate. Shortly before the murder Schnee told several people he could remove wrinkles from their faces. The murder occurred on October 31, 1983, and was a particularly violent killing. Schnee beat Kieffer in the face until the swellings ran together, broke her right collarbone, dislocated her elbow, tore out one of her eyes, snapped her spine in half, and then strangled her to death. Immediately after the killing, he was seen by his wife and friends who described him as glassy-eyed and shaky. He said that he had gotten some bad drugs and said he thought he had killed the devil.

Notice was filed pursuant to Iowa Rule of Criminal Procedure 10 (11)(b)(1) that the defendant intended to rely on a defense of diminished responsibility. The notice made no reference to an insanity defense. Prior to trial a deposition was taken of defense witness Father James Barta, a psychologist, who indicated in that deposition that it was possible defendant did not know the nature of his acts at the time of the crime and was suffering from paranoid schizophrenia. At trial

the deposition was not entered into evidence, and instead the defense counsel's questions related to the defense of diminished responsibility. The court refused to instruct on the insanity defense because notice was never given to the State, as required by the criminal procedure rules, and because there would be no evidence presented regarding whether defendant understood the nature and consequences of his acts.

Defendant now claims the court erred in not allowing him to put on expert testimony in support of an insanity defense. Defense claims that although notice was never technically given to the State regarding the intent to use an insanity defense, the State was well aware defendant intended to rely on it. He points to several court orders and the State's minutes of testimony which refer to an insanity defense as an indication the prosecution had ample notice.

While this might have alerted the State to the possibility of an insanity defense, the actions by defense counsel at trial indicate he did not desire to pursue the insanity defense. At trial the defense counsel made the following offer of proof in questioning Father Barta:

Q. Father, do you recall my question to you that led us now to being in chambers? If not, please permit me to state that question again. With this information you obtained in your interview, the bits of testimony I have just provided you, and your experience as a psychologist for twenty-two years, do you have an opinion on the probable state of mind of Herbert Schnee on the date Sharon Kieffer was killed, 10-31-1983? A. Do you want an answer now?

Q. Yes. A. Yes, I do have an opinion.

Q. And what is that opinion, Father? A. And my opinion was at that time he was operating under a delusional system.

Q. And, in fact, at that time was psychotic, is that your opinion? A. I would say that.

The court then made the following inquiry of counsel:

THE COURT: Do you intend to seek to elicit testimony from this witness or any other witness that gets down to the basic requirements of the law with respect to insanity, that is, the so-called M'Naghten rule, and elicit testimony that the defendant at the time of this event was, had a condition, a deranged condition of the mind so as to render the person incapable of knowing the nature and quality of the act he or she is committing or incapable of distinguishing between right and wrong in relation to that act?

MR. McCAULEY: My intention was to go no further than what I have here in the offer of proof.

THE COURT: Do you intend to ask for an instruction on legal insanity then?

MR. McCAULEY: Yes, I would.

THE COURT: In addition to diminished responsibility?

MR. McCAULEY: Yes, I would, Your Honor.

The record shows that the only testimony elicited from the psychologist, and the only testimony defense counsel intended to obtain, went to diminished responsibility and not insanity. Counsel stated to the court he did not intend to go further with the offer of proof and the evidence counsel presented would not have gone to prove the elements of the insanity test. Nevertheless, he still asked the court for an instruction on insanity.

Therefore, defendant's claim that "the trial court failed to allow him to put on expert testimony in support of his defense of insanity or submit that issue to the jury" is without merit since counsel stated he did not want to present the evidence. While defendant has not specifically claimed failure to allow the insanity instruction was error, the court was correct in refusing the instruction since no evidence was presented to justify such an instruction. Whether the State received notice of an insanity defense is irrelevant since the trial counsel limited testimony to the defense of diminished responsibility.

Defendant also claims his counsel was ineffective in failing to offer Father Barta's deposition in support of presenting the insanity issue to the jury, and in not correcting the problems caused by lack of notice. In another case the supreme court dealt in a direct appeal with the question of whether counsel was ineffective in failing to introduce testimony of a witness. State v. Williams, 285 N.W.2d 248 (Iowa 1979). The court responded:

Recently, we have been extremely reluctant to adjudicate claims of ineffective assistance on direct appeals. This reluctance has been due to the lack of full development of the facts surrounding the representation complained of. There has been increasing concern that the State and the attorneys whose effectiveness is being attacked should have an opportunity to rebut allegations of

ineffectiveness. See State v. Smith, 282 N.W.2d 138, 143-44 (Iowa 1979); State v. O'Connell, 275 N.W.2d 197, 205-06 (Iowa 1979); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). See also State v. Barber, 301 So.2d 7, 9 (Fla. 1974); State v. Bosler, 432 S.W.2d 237, 239 (Mo. 1968); Commonwealth v. Wade, 480 Pa. 160, 172-74, 389 A.2d 560, 566-67 (1978)(remand from direct appeal ordered for evidentiary hearing on ineffective assistance). We therefore decline to consider whether defendant's counsel were ineffective.

Id. at 271. On appeal the defendant claims that failing to introduce the deposition could not have been a strategic maneuver, saying that counsel never abandoned the claim of a defense of insanity. We do not believe the record is clear on this point. Counsel did not seek testimony which would have established the defense. Without the benefit of a postconviction relief hearing, in which counsel could explain the reasons for his actions, we are unwilling to decide whether he was ineffective.

During trial the prosecution revealed a statement made by the defendant during a presentence investigation on a crime committed by defendant in 1977. Defendant was sentenced for arson after setting fire to the courthouse. Schnee's former probation officer testified as follows:

Q. And as part of your duties as a probation officer was it your job to provide to the district court of Iowa presentence investigations? A. Yes, it was.

Q. Did you have an opportunity to prepare a presentence investigation with respect to the defendant, Herbert J. Schnee, on or about January 23, 1979? A. Yes, I did.

Q. Was that presentence investigation with respect to an arson at the courthouse on the 30th day of December, 1977? A. Yes, it was.

Q. Do you, sir, recall the defendant's version of that offense? A. Yes, I do.

Q. What was the defendant's version? A. He stated-

MR. McCAULEY: Excuse me, Your Honor, I would object to the offering of this testimony at this time to the effect that it is hearsay and he is about to be testifying from a document that is not in evidence at this time.

THE COURT: It's overruled as to hearsay. I don't know whether the witness is using the document simply to refer to or refresh his memory, or whether he is going to be testifying entirely from it. You will have to determine that.

Q. (By Mr. Gallagher) Mr. Menadueu, do you have independent recollection or will you need to refer to notes? A. I would need to refer to notes.

Q. And would you refer to those notes, Mr. Menadueu, and tell us what the defendant's version was

with respect to the fire at the Dubuque County courthouse?
A. Okay. I have no recollection of the events, I had a doctor's prescription for Valium, I overused it and was drinking alcoholic beverages at the same time and smoking marijuana.

MR. GALLAGHER: Nothing further, Your Honor.

MR. McCAULEY: Your Honor, before interrogating the witness, I would like an opportunity to see the entirety of the document that he is testifying from.

THE COURT: You may do so.

MR. McCAULEY: No questions, Your Honor.

The State says that defense counsel failed to preserve error and we agree. Counsel objected, but the court indicated he would have to determine how the report would be used. When the officer read from the report, an objection would have been in order. A trial court may not be put in error unless the issue was presented for a ruling. Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980). No ruling was obtained here since no objection was made.

We affirm defendant's conviction.

AFFIRMED.