IN THE COURT OF APPEALS OF IOWA

No. 9-305 / 97-1594
Filed August 29, 1999

FILED
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CLERK SUPREME COURT

HANI WADIH KHOURI,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Hani Khouri appeals the denial of his postconviction relief action. **AFFIRMED.**

Hani Wadih Khouri, Anamosa, pro se, and Philip B. Mears of the Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ. Zimmer, J., takes no part.

HUITINK, P.J.

Hani Khouri appeals the denial of his petition for postconviction relief. We affirm.

I. Background Facts and Procedure.

Hani Wadih Khouri was convicted of first-degree murder for the July 14, 1991, slaying of Jacqueline Chacey in Cedar Rapids, Iowa. Khouri's conviction was affirmed on direct appeal in *State v. Khouri*, 503 N.W.2d 393 (Iowa 1993).

At trial, the State called several eyewitnesses who testified they saw the passenger in Chacey's vehicle fire several gunshots into Chacey's body. Other witnesses stated they heard Chacey's cries for help immediately prior to the shooting. One of the eyewitnesses was Cedar Rapids police officer Harvey Caldwell. Caldwell was stopped at a stoplight when he heard a gunshot. He looked in Chacey's car and saw the flash of a second shot. As he maneuvered his car to point his lights at the car, he observed two more flashes and that the passenger, Khouri, had a gun in his hand and shot the driver again in the head.

In August 1993 Khouri filed an application for postconviction relief, alleging numerous instances of ineffective assistance of both trial and appellate counsel. In July 1997 the district court denied Khouri's application, finding he failed to demonstrate a reasonable probability of a different outcome but for counsel's breach of essential duties.

Khouri appeals. Through his attorney, he contends his trial counsel was ineffective in (1) failing to investigate and present a diminished capacity defense, (2) failing to investigate defendant's competence to stand trial, (3) admitting defendant's guilt to voluntary manslaughter, and (4) failing to investigate and present a provocation defense. Khouri also raises a number of other issues in a pro se appellate brief including: (1) the trial information was defective, (2) the prosecutor engaged in prosecutorial misconduct, and (3) the jury instructions were ambiguous and confusing.

II. Scope of Review.

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction petitioner asserts violations of constitutional safeguards—such as ineffective assistance of counsel—we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.*

III. Ineffective Assistance of Counsel.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance of counsel claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

> 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. 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.

Id. at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700). Pursuant to *Taylor*, we may affirm applicant's conviction because he has failed to prove prejudice, without deciding whether there was a failure of duty. *See Taylor*, 352 N.W.2d at 685.

An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. *See* Iowa Code § 822.8. Before an applicant may raise a claim of ineffective assistance of trial counsel for the first time in postconviction proceedings, he must demonstrate a "sufficient reason" for not raising the claim on direct appeal. *See id*; *Polly v. State*,

355 N.W.2d 849, 855 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). Ineffective assistance of appellate counsel may provide 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. *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995).

A. Failure to Present Diminished Capacity Defense.

At trial, Khouri's attorney advanced an extreme emotional disturbance defense. This defense had not been recognized in Iowa and was expressly rejected on Khouri's direct appeal. *See Khouri*, 503 N.W.2d at 394-95.

Khouri contends counsel breached an essential duty by failing to investigate and present a recognized diminished responsibility defense. He cites evidence of his intoxication, drug use, and mental illness.

The defense of diminished responsibility requires a showing the defendant did not possess sufficient capacity to form the requisite intent element of the charged offense. *See State v. Jacoby*, 260 N.W.2d 828, 836 (Iowa 1977). Diminished responsibility is only capable of negating specific intent. *Id.*

We find substantial evidence indicating Khouri had the capacity to form and did in fact form the requisite specific intent to commit first-degree murder. Khouri's emphasis on his history of mental illness, head injuries, and history of psychiatric treatment are belied by evidence indicating his symptoms and treatment occurred at least fifteen years prior to Chacey's murder. The record indicates Khouri did not

"wake up" to all these things until recently. We fail to see how counsel, under these circumstances, could make a credible assertion of Khouri's diminished responsibility.

Khouri also asserts his trial counsel was ineffective in failing to investigate and present an intoxication defense. He cites evidence of his heavy drinking at or near the time of the murder, as well as his use of Valium and history of alcoholic blackouts. Although the record contains evidence of these factors, there is substantial evidence indicating Khouri was not intoxicated at the time of Chacey's murder. Several witnesses testified concerning their observations of Khouri's sobriety prior to and following these events.

We find Khouri has failed to demonstrate a reasonable probability the outcome of his trial would have been different had his trial counsel presented and asserted a diminished responsibility defense. We affirm on this issue.

B. Failure to Assert Khouri's Incompetence to Stand Trial.

Khouri asserts his trial co· nsel was ineffective for failing to investigate his competency to stand trial and failing to request a competency hearing. He contends his counsel knew of his "extensive mental problems" as well as significant hearing loss and difficulties understanding English. He maintains the confluence of these mental, auditory and linguistic disabilities negated his ability to assist in his own defense, resulting in a trial while he was "essentially absent."

In *Jones v. State*, the court held:

> As a general rule, a competency hearing is required if the record contains information from which a reasonable person would believe a

> substantial question of the defendant's competency exists. A criminal defendant is initially presumed to have been competent. The burden is on that defendant to establish otherwise; if the evidence is in equipoise, the presumption of competency prevails. Our task on our de novo review is to examine the totality of the circumstances to determine if, at the relevant time, a substantial question of the applicant's competency reasonably appeared. The relevant factors to consider include: (1) the applicant's irrational behavior; (2) any demeanor at the hearing which suggests a competency problem; and (3) any prior medical opinion, of which the trial court is aware, on competence to stand trial. Although Jones presented a history of mental illness to the postconviction court, it is well-established that the mere presence of mental illness does not equate to incompetency to stand trial.

Jones v. State, 479 N.W.2d 265, 270 (Iowa 1991). The critical question in applying the *Jones* factors is whether Khouri "has a present ability to (1) appreciate the charge, (2) understand the proceedings, and (3) assist effectively in the defense." *See State v. Edwards*, 507 N.W.2d 393, 395 (Iowa 1993); Iowa Code § 812.3 (1991).

Our review of the entire record convinces us Khouri has not demonstrated a reasonable probability he would have been found incompetent to stand trial.[1] Although Khouri claims his ling stic, auditory, and mental deficiencies hindered his ability to consult with his attorneys, the postconviction record does not support his assertions.

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[1] We recognize a claim of ineffective assistance of counsel based on incompetence to stand trial does not allow for an easy application of the "outcome" test of *Strickland*. The conviction of an incompetent person is a per se due process violation, rendering the guilt or innocence of the charged offense irrelevant. We therefore review Khouri's claim to determine whether he has established a reasonable probability he was incompetent sufficient to undermine our confidence in the outcome of his trial. *See Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990).

The record reflects Khouri had no difficulty remembering events and conversations leading up to the murder. His recollection of the days prior to the murder and the evening of the crime were lucid. He was able to recall many of the conversations he had with Chacey clearly and often word for word. Although Khouri continually complained of memory loss, severe headaches, and inability to concentrate, his examining physicians determined he was malingering and feigning cognitive defects. Further, Khouri's trial counsel, Jose Olvera, testified at the postconviction hearing that Khouri's recollection of the time surrounding the murder never changed from the day after the crime through Khouri's testimony at trial. Finally, Olvera testified Khouri's hearing difficulties did not cause problems in preparing his defense. Olvera testified that although he had to repeat things for Khouri on occasion, "Mr. Khouri's hearing was adequate with my assistance."

We find the record does not demonstrate a reasonable probability that Khouri was incapable of appreciating the charges against him, understanding the criminal proceedings, or effectively assisting in his defense. We therefore affirm the postconviction court on this issue. *See Vogt v. United States*, 88 F.3d 587, 592 (8th Cir. 1996) (finding trial counsel was not ineffective for relying on their own assessment of defendant's competence when defendant's demeanor before and during trial did not exhibit signs of incompetence).

C. Counsel's Admission to Voluntary Manslaughter.

During the defense's opening statements at trial, defense attorney Olvera set the stage for claiming Khouri was guilty of no more than voluntary manslaughter. This theme continued throughout the entire trial, culminating in Khouri's closing argument, wherein Olvera stated:

> The elements of this tragedy, ladies and gentlemen, are not murder. They are not murder. The evidence before you is that of an act of voluntary manslaughter. If you find Mr. Khouri guilty of more than he did, just as if you find him guilty of less than he did, that would not be justice.

Khouri claims his counsel effectively admitted his guilt to voluntary manslaughter in his closing argument. He asserts he did not consent to his counsel's admission. He contends his attorney's admission in closing argument amounts to ineffective assistance of counsel. Khouri cites the Nevada case of *Jones v. Nevada*, 877 P.2d 1052 (Nev. 1994), for the proposition that the admission "completely eroded any doubt that might have been raised in the juror's minds by [his] protestations of innocence, and in fact made all of [his] testimony incredible . . . ." The *Jones* court found, under the limited facts presented, that such an admission constituted ineffective assistance of counsel. *Id.* at 1057.

We decline to follow the *Jones* analysis. We find the record in this matter does not mandate a similar outcome. Our review of the record indicates defense counsel did not breach an essential duty in making the strategic decision, throughout the entire course of trial, to present evidence tending to establish Khouri's culpability of

voluntary manslaughter instead of first-degree murder. Additionally, the record establishes Khouri was informed of, and consented to Olvera's trial strategy.[2]

The State's evidence of Khouri's guilt was overwhelming. Faced with extensive eyewitness testimony of the murder and of Khouri's physical and mental state the evening of the murder, Olvera made a tactical decision which permeated the entire trial. Olvera decided to focus on evidence, which if believed, may have reduced Khouri's level of culpability to that of voluntary manslaughter. We will not find trial counsel's reasonable strategic decision amounts to ineffective assistance. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989) (holding reversal not warranted where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail).

D. Counsel's Failure to Adequately Investigate and Present Provocation Defense.

Khouri contends he suffered ineffective assistance of counsel due to his attorney's failure to properly prepare defense witness Namet Hanna for his deposition. Khouri also claims his attorney failed in his duty to investigate what knowledge Hanna had which would be helpful to the defense. Khouri specifically argues his counsel failed to elicit that Hanna did not see Khouri with the murder weapon immediately prior to his getting into Chacey's vehicle the night of the murder. Khouri

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[2] At the postconviction hearing, Olvera testified as follows:

Q: My question is did he know that you were going to stand up and say he was guilty of voluntary manslaughter?

A: Oh, I'm sure he did. That is the only way you do that. There is no other way of doing it.

also asserts defense counsel was ineffective for failing to introduce his booking photographs into evidence. He maintains these failures by counsel fatally compromised his attempted provocation defense. We find Khouri has not demonstrated he suffered prejudice as a result of his counsel's representation.

Khouri claims his counsel was ineffective for failing to prepare defense witness Hanna for deposition by the State, resulting in his impeachment at trial. During his deposition by the State, Hanna testified he did not know anything "important" about the case. At trial, however, Hanna testified for the defense that he was with Khouri immediately before Khouri went to dinner with Chacey. On cross-examination, the State elicited that Hanna had not testified to being with Khouri prior to the murder during his deposition.

Our review of the entire record convinces us Khouri's conviction did not turn on Hanna's credibility as a witness. Hanna's testimony on direct examination was very limited in scope. Even assuming no impeachment was attempted by the State, we find no reasonable probability the outcome of Khouri's trial would have been different. Additionally, although Hanna testified at the postconviction hearing that he did not see Khouri with the murder weapon during the two hours he spent with Khouri the day of the murder, we find no reasonable probability of a different outcome had he so testified at Khouri's trial.

Khouri also claims his trial counsel was ineffective for failing to offer his booking photograph into evidence. The photograph showed abrasions on the right

side of Khouri's forehead and on the bridge of his nose. He claims these photographs corroborate his claim of provocation in that Chacey first struck him with the gun. We find Khouri's argument without merit. The record reflects the injuries to Khouri's face occurred when police officers took him out of Chacey's vehicle and forced him to the ground to effectuate his arrest. Officer Harvey Caldwell, an eyewitness to the murder, testified he did not see any abrasions on Khouri's face before removing him from the vehicle. We therefore determine Khouri has failed to demonstrate a reasonable probability of a different outcome had the booking photograph been entered into evidence. We affirm the postconviction court on this issue.

E. Defense Counsel's Failure to Object to Malice Instruction.

The district court instructed the jury on both first-degree murder and the lesser-included offense of voluntary manslaughter. The district court's murder instruction provided in pertinent part:

> Instruction No. 13
>
> The State must prove all of the following elements of Murder In The First Degree:
>
> 1. On or about the 14th day of July, 1991, the Defendant shot Jacqueline Lee Chacey.
> 2. Jacqueline Lee Chacey died as a result of being shot.
> 3. The Defendant acted with malice aforethought.[3]
> 4. The defendant acted willfully, deliberately, premeditatedly and with a specific intent to kill Jacqueline Lee Chacey.

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[3] Malice aforethought was defined in Instruction 14 as:

> [A] fixed purpose or design to do some physical harm to another which exists before the act is committed. It does not have to exist for any particular length of time. It is sufficient if it exists any time before the killing.

The district court's voluntary manslaughter instruction provided in pertinent part:

> Instruction No. 22
> The State must prove all of the following elements of Voluntary Manslaughter:
> 1. On or about the 14th day of July, 1991, the Defendant shot Jacqueline Lee Chacey.
> 2. Jacqueline Lee Chacey died as a result of being shot.
> 3. The shooting was done solely by reason of sudden, violent and irresistible passion resulting from serious provocation.

The district court's jury instruction defining malice aforethought did not define the term "malice."[4] Khouri contends his trial counsel was ineffective for failing to object to the district court's redacted version of Iowa Uniform Criminal Jury Instruction 700.7. He contends the omitted paragraph of the uniform jury instruction was necessary to explain the relationship between malice and provocation. He asserts its omission resulted in the jury not being informed that adequate provocation negates the element of malice.

We find Khouri's position to be without merit. There is no way the jury could have convicted Khouri of first-degree murder without considering whether his actions were the result of some provocation. The relevant instructions contain intent elements which are, by definition, mutually exclusive. In order to find Khouri guilty of first-degree murder, it must have found he "acted willfully, deliberately, premeditatedly and with a specific intent to kill." On the other hand, the jury could only find Khouri

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[4] The district court's jury instruction number fourteen essentially was the second paragraph of Iowa Uniform Criminal Jury Instruction 700.7.

guilty of voluntary manslaughter if he shot Chacey "solely by reason of sudden, violent and irresistible passion resulting from serious provocation." If the jury found, as it did here, that Khouri acted willfully, deliberately, and premeditatedly, then it necessarily found he was not spurned to act solely by reason of sudden, violent and irresistible passion. *See* J. Yeager & R. Carlson, 4 *Iowa Practice: Criminal Law and Procedure*, § 145, at 41 (1979) ("The existence of a sudden, violent and irresistible passion is not compatible with the existence of premeditation and deliberation.").

We find Khouri has failed to demonstrate he was prejudiced by his counsel's failure to object to the district court's instruction on malice aforethought. We therefore affirm the postconviction court on this issue.

F. Remaining Assignments of Ineffective Assistance.

We have considered all of Khouri's remaining claims of ineffective assistance. We find he has either failed to demonstrate he suffered prejudice as a result of any of his remaining claims, or has failed to preserve the issues by raising them on direct appeal. For those issues not raised on direct appeal, we find he has failed to establish sufficient reason for failing to properly preserve them. *See Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981). We affirm the postconviction court's treatment of these claims of ineffective assistance of counsel.

AFFIRMED.