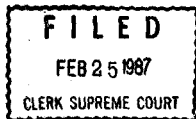


IN THE COURT OF APPEALS OF IOWA



GUY EUGENE RICH,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed February 25, 1987 143

6-401
86-196

Appeal from the Iowa District Court for Black Hawk County (No. 64228)
- Dennis D. Damsgaard, Judge.

Petitioner appeals from a denial of postconviction relief, asserting: (1) that he was denied effective assistance by various acts and omissions of pretrial and trial counsel; and (2) that ineffective assistance of appellate counsel provided sufficient reason for failure to raise the issue of ineffective assistance on direct appeal. **AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.**

James F. Whalen of Dunbar, Dunbar & Whalen, Waterloo, for petitioner-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and James D. Coil, Assistant County Attorney, for respondent-appellee.

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

DONIELSON, P.J.

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Petitioner, Guy Eugene Rich, appeals from a denial of postconviction relief, asserting: (1) that he was denied effective assistance by various acts and omissions of pretrial and trial counsel; and (2) that ineffective assistance of appellate counsel provided sufficient reason for failure to raise the issue of ineffective assistance on direct appeal. The State asserts inter alia: (1) that error was not preserved with regard to a specific claim concerning the calling of two witnesses at trial; and (2) that sentencing error occurred but that correction of sentence rather than new trial is all that is required as a result. In reply, Rich asserts that error was preserved and that, in any event, the specific claim in question was tried by consent. We affirm as modified.

On direct appeal, the Iowa Supreme Court affirmed Rich's conviction on charges of kidnapping in the first degree, sexual abuse in the third degree, and robbery in the second degree. State v. Rich, 305 N.W.2d 739 (Iowa 1981). The appellate brief was prepared and filed by trial counsel. When he withdrew, the appellate defender's office was appointed. No issue of ineffective assistance was raised, nor were any of the substantive issues raised which underlie the ineffective assistance claim made by Rich's application for postconviction relief. The postconviction court denied relief following an evidentiary hearing.

Prior to trial, following a medical examination at Oakdale, Dr. Loeffelholz expressed the opinion that Rich was both competent to stand trial and sane at the time that the crime was committed. The chief public defender, who then represented petitioner, sought a second medical evaluation. Following the breakdown of a plea bargain agreement, he was removed from the case. Another attorney from his office was appointed and proceeded to trial on the next day. At the postconviction hearing, the chief appellate defender testified that, had he remained on the case, he would have requested a continuance for

the purpose of further investigating a defense of insanity and/or diminished responsibility. After he was removed from the case he did not discuss the matter with the subordinate who took over. Witnesses were available who could have testified concerning Rich's history of mental problems and offered opinions which differed from the opinion of Dr. Loeffelholz. Those witnesses were not interviewed or presented at trial.

At trial Rich, *inter alia*, presented a defense of voluntary intoxication. Two witnesses called by the defense testified that Rich appeared normal on the night in question.

No request was made for a separate instruction on specific intent and no objection was made that the instructions as given failed to adequately frame the issue. Neither was any objection made to a failure to instruct on sexual abuse as a lesser-included offense of first-degree kidnapping. The State presently concedes that Rich was subsequently given illegal separate sentences on the two charges, but asserts that correction of sentence is all that is required and that the failure to instruct presently complained of does not warrant a new trial.

Ordinarily a postconviction relief proceeding pursuant to Iowa Code Chapter 663A is at law and our review is not *de novo*. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). Where, however, a petitioner seeking postconviction relief asserts a violation of constitutional safeguards, we must make our own evaluation based on the totality of the circumstances, which is the equivalent of a *de novo* review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). A party claiming ineffective assistance of counsel in violation of his or her sixth amendment rights must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted from the omission. Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985); State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). Where such claims are asserted in

postconviction proceedings, the applicant bears the burden of proving both of these elements by a preponderance of the evidence. Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94 (1984). The ultimate test is whether under the entire record and the totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). In evaluating ineffective assistance claims, it is axiomatic that the fact that the defense was not successful does not mean that counsel was ineffective. Hall, 360 N.W.2d at 836.

When deciding the second component of a claim of ineffective assistance, we have required the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage, thereby constituting "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 crux of the prejudice component rests on whether the defendant has shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. Bearing these principles in mind, we first address Rich's argument that his trial counsel was ineffective

in his investigation and development of his defenses of insanity and/or diminished responsibility.

Rich contends that his trial counsel's failure to adequately investigate and develop the petitioner's potential defenses of insanity and diminished responsibility was not the result of an informed strategic decision or the exercise of reasonable professional judgment. Rich argues that trial counsel failed to investigate and utilize fully the existing records and witnesses who had observed and treated Rich during his youth, which he claims would have shed new light on his ability to form specific intent. Rich additionally argues that he would have received a more favorable evaluation from other psychological experts had trial counsel challenged the adverse mental evaluation received from the Oakdale institution. We disagree.

The United States Supreme Court stated in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984), the standards by which counsel's performance is to be judged. Concerning counsel's method of investigation of a particular case, the Strickland court opined that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonably precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. The Court further opined: "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

The Strickland court recognized that usually counsel's actions are based on strategic choices made by the defendant and on information supplied by the defendant. 466 U.S. at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Specifically, the Court pointed out that "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id. Consonant with this view, the Iowa Supreme Court has recognized that the duty to investigate and prepare a defense is not limitless. Schier v. State, 347 N.W.2d 657, 662 (Iowa 1984). "It does not require that counsel pursue 'every path until it bears fruit or until all conceivable hope withers.'" Id., citing United States v. Tucker, 716 F.2d 576, 584 (9th Cir. 1983). Another important consideration when considering the efficacy of counsel's conduct is what the evidence at the time of the alleged ineffectiveness led counsel to believe when investigating the various possibilities for defense. Beans v. Black, 757 F.2d 933, 936 (8th Cir. 1985).

Turning to the facts of the present case, the record reveals that Rich's first attorney, Gerald Monk, believed that Rich's ability to recall past events was questionable, and thus requested a complete mental examination of Rich. Rich had apparently informed Monk that he had a prior history of hospitalization at the Mental Health Institute in Independence. Pursuant to Monk's request, Rich was sent to the Oakdale institution to undergo an extensive psychiatric examination. Dr. Paul Loeffelholz, in a letter to the trial court dated November 21, 1979, stated that Rich "does not have any mental condition which prevents him from appreciating his charge, understanding the proceedings, or assisting effectively in his defense." Dr. Loeffelholz additionally stated that Rich had a sufficient capacity to distinguish right from wrong and that he understood the nature and quality of the behavior in which he was involved.

For reasons not altogether clear from the record, Bill Wegman, chief public defender in Waterloo, was appointed as chief counsel for Rich. At the postconviction hearing Wegman testified that he believed that one of Rich's major possible defenses was diminished responsibility based on the use of drugs and alcohol. Based on this assessment, Wegman filed a notice of diminished responsibility in February of 1980. Wegman also requested that Rich be evaluated at the Mental Health Institute because he did not believe that the Oakdale evaluation was fair or accurate.

The record also reveals that Wegman did not contact any of the professionals who had treated Rich for behavioral problems in the past. Wegman testified at the postconviction hearing that he had been attempting to reach a plea agreement for some time prior to Rich's trial, that he thought it was a good agreement, and that he was quite shocked when Rich declined to enter into the agreement. Though Wegman was aware that Rich had been treated at the Black Hawk Mental Health Center, he had not questioned Rich about this at that point in time. Wegman additionally testified that prior to his being removed as Rich's defense counsel, little had been done in the preparation of an insanity or diminished capacity defense because of his heavy case load and the fact that he did not believe that the case would go to trial.

When Rich requested that the trial court remove Wegman from the case and the court appointed Theodore Stone as defense counsel, Wegman testified that he did not discuss the case with Stone because he believed that at the time it would have been an ethical violation to do so. Stone testified at the postconviction hearing that he considered himself a "quasi-second chair" to Wegman in the Rich case. Stone testified that he had at length conferred with Rich about possible defenses and the advisability of accepting the plea agreement prior to trial. Stone testified that he was familiar with the facts of the case from

the very beginning. Subsequent to pretrial hearing, Stone was provided the opportunity to review the prosecution's file, and Stone testified that he believed it was a straightforward case. Stone recalled reviewing the Oakdale evaluation and knew that the evaluation took into account Rich's prior psychiatric history and records obtained from other institutions.

Stone additionally testified that his decision not to pursue any further investigation concerning Rich's psychiatric history was based on the Oakdale report. Stone testified that he believed that at that time he felt the Oakdale report was conclusive and that no further investigation was necessary. Though Stone testified that he would not in retrospect have relied upon the Oakdale report, there was no policy in the public defender's office to obtain second opinions on psychiatric evaluations from Oakdale. Stone in fact stated that "[b]ack at that time Oakdale didn't have the bad image they do now." Stone went on to testify that there was nothing in the Oakdale report that led him to believe the Oakdale report was unfair or inaccurate. In Stone's words, "[t]here wasn't anything in there that would give rise to thinking in terms of a second opinion because it was so conclusive."

Rich's own testimony at trial belies any argument that his trial counsel should have investigated and developed a psychiatric defense. While Rich steadfastly asserted that he could not remember details of the evening in question because he was under the influence of alcohol and drugs, he surprised Stone at trial with his ability to recall with particularity most details of the alleged offense. Stone testified that he knew the defense of diminished responsibility was undermined when Rich got on the witness stand and "all the detail came out he told me he didn't know about when I visited with him the day before."

From the above facts, we are compelled to conclude that Rich has failed to show that trial counsel's investigation and preparation of his case was not

within the normal range of competency. All of the evidence indicated that Rich was of normal intelligence. Rich did not exhibit any characteristics that would have prompted Stone to further probe his mental condition. Stone reasonably believed that, armed with the information and reports available to him at the time of trial, no further investigation concerning Rich's mental condition was necessary. Stone discussed the case in great detail with Rich prior to trial. Because Rich explained to Stone that he had taken drugs and had been drinking, Stone pursued an intoxication defense.

Although in hindsight it may have been preferable to have requested an independent evaluation of Rich's mental condition on the night in question, it is not a logical conclusion from the facts of this case that Stone's failure to seek a second evaluation was outside the wide range of professionally competent assistance. A number of federal and state courts have held that trial counsel has no duty to further investigate a potential insanity or diminished responsibility defense once a determination has been made that a defendant is competent to stand trial and was sane at the time of the offense. Beans v. Black, 757 N.W.2d at 936; Hollis v. United States, 687 F.2d 257, 260 (8th Cir. 1982); State v. Vickers, 291 S.E.2d 599, 603 (N.C. 1982); Manson v. United States, 418 A.2d 1071, 1076 (D.C. Cir. 1980); Commonwealth v. Giknis, 491 Pa. 215, 221, 420 A.2d 419, 421-22 (1980); Garton v. State, 555 S.W.2d 117, 118-19 (Tenn. 1977); Shubert v. State, 518 S.W.2d 326, 328 (Mo. Ct. App. 1975). We likewise follow this principle. We therefore hold that trial counsel's performance in the present case did not fall below the range of reasonable professional assistance.

For similar reasons, we find that under the totality of the circumstances Rich suffered no prejudice as a result of his trial counsel's investigation and preparation of his defense. In Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984), the Iowa Supreme Court held that an applicant in a postconviction proceeding

must show not only "cause" for failure to challenge the alleged errors in court, but must also show actual prejudice resulting from these errors. Such prejudice must work to his or her actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. 355 N.W.2d at 855. And as we noted earlier, the applicant must also show that there is a reasonable probability that but for counsel's unprofessional errors, the results of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

Rich contends that had Stone called numerous witnesses on his behalf, such testimony would have refuted the Oakdale evaluation that Rich understood the nature and quality of his acts on the night of the alleged crime. We disagree.

Dr. Richard Bealka, a child psychologist who treated Rich at the Mental Health Institute five years prior to trial, diagnosed Rich as having a schizoid personality. Dr. Bealka testified that initially Rich exhibited antisocial behavior, was emotionally aloof, and had difficulty entering into personal relationships. Dr. Bealka, however, testified that when Rich was discharged he had made significant improvement. Dr. Bealka also stated, and most important, that even a diagnosis of schizoid personality would not necessarily prevent a person from knowing the difference from right and wrong and that such person would be able to comprehend the nature and quality of his acts.

Loren Iverson, a clinical psychologist, testified that he knew Rich while he was attending elementary school, but had little contact with him after Rich began junior high. Iverson expressed dissatisfaction with Oakdale's methods of evaluation, but testified he had not ever diagnosed Rich. Nevertheless, Iverson stated he would have diagnosed Rich as a schizophrenic.

John Focht, Rich's elementary school principal, and Emma Jorgenson, a special education consultant, also testified at the postconviction hearing as

to Rich's behavior in his early years. Focht testified that Rich did not appear to have well-developed social skills and did not get along very well with his teachers or fellow students. Focht testified that he did not believe Rich was in touch with reality. Jorgenson testified that Rich was irritable and easily upset and that often he would not be able to face his classmates because he was afraid of their "picking on him." Jorgensen, however, had little contact with Rich after the fourth grade because she was no longer involved in the special education program.

Dr. Thomas Sannito, a psychologist in private practice, examined Rich's hospitalization reports from the Mental Health Institute and the Black Hawk Mental Health Center. Dr. Sannito opined from these reports that Rich's diagnosis as a schizoid personality was correct. Dr. Sannito testified "there would be a definite probability" that Rich was not in touch with reality on the night of the alleged crime. Dr. Sannito admitted, however, that he had not personally interviewed Rich as was his usual practice in forming opinions.

Having examined individually the testimony of each of the witnesses on whom Rich alleged he would have relied, we conclude nothing in such testimony created a sufficient probability that had Stone called such witnesses to testify, the outcome would have been different, especially in light of Rich's clear and detailed testimony at trial. Much of this testimony was based on observations made of Rich during his early childhood and adolescence, and none of the witnesses had personally interviewed Rich for quite some time. While such testimony was certainly admissible in bearing upon Rich's past mental condition, we do not believe that such testimony would have been sufficient to rebut the conclusions reached by the Oakdale report, which was based on a two-month treatment immediately following the alleged offense. We therefore hold that trial counsel's

performance in the investigation and preparation of Rich's defense did not constitute ineffective assistance of counsel.

Rich additionally contends that trial counsel was ineffective because at trial Stone called Russ Delinger and Rich's mother to testify on his behalf. Rich and trial counsel intended to pursue an intoxication defense at trial. Stone testified that Rich insisted that he call Delinger and his mother as witnesses after Stone had discussed at length with Rich about potential defenses and witnesses. At trial, Rich testified concerning his marijuana and alcohol consumption on the evening of the alleged offense. Rich testified that he was feeling high and that after drinking two quarts of beer he felt like he was floating but that his arms felt heavy.

Delinger testified that he had smoked marijuana with Rich on the evening in question, but stated that while Rich may have been a little high, he noted nothing unusual in Rich's behavior. Mrs. Rich testified that she hadn't noticed anything unusual when Rich returned home before going to work, but later thought that "he did seem a little unnatural." Mrs. Rich also testified that she did not pay much attention to him because she was on the phone.

We do not believe that Stone's decision to call these witnesses was a breach of duty, nor did it prejudice his defense. Stone acquiesced to Rich's insistence that these witnesses be called. There is no indication in the record that Stone was unaware of the substance of Delinger's and Mrs. Rich's testimony. The examination of these witnesses at trial was limited to the time period in question, and Delinger's testimony corroborated Rich's claim that he had been using drugs. We also note that Rich testified that it was only after he had consumed two quarts of beer that he felt extremely intoxicated. Neither Delinger nor Mrs. Rich were witnesses to the subsequent events. Accordingly, trial counsel was not ineffective in calling them as witnesses.

Rich next asserts that Stone was ineffective for failing to request an instruction on specific intent. Rich concedes that the present case did not fail to include the element of specific intent in the marshalling instructions on kidnapping and robbery. Rich also concedes that a form of the Uniform Jury Instructions on specific intent was submitted to the jury. Rich, however, contends that the instructions did not properly inform the jury as to how they were supposed to apply the partial defense of voluntary intoxication to the elements of the crime charged.

When considering jury instructions, we must view them as a set, rather than each individual instruction as separate from the other. State v. Jeffries, 313 N.W.2d 508, 509 (Iowa 1981). Upon our review of the entire set of instructions given to the jury in the present case, we conclude that the submitted jury instructions adequately instructed the jury on the elements of the crime charged.

Instruction No. 11, the marshalling instruction on first-degree kidnapping, included two propositions on specific intent:

You must find the defendant not guilty of kidnapping in the First Degree; unless you find the State has proved . . . the following elements:

1) That . . . defendant intentionally confined or removed Cynthia Reynolds from a corridor in the mall . . . with the intent to subject her to sexual abuse.

2) That the defendant did so knowing he did not have the consent of Cynthia Reynolds.

3) That as a result of the confinement or removal, Cynthia Reynolds was intentionally subject to sexual abuse. (emphasis added)

Contrary to Rich's contention, we find that Instruction No. 11 emphasizes to the jury that the intent to commit sexual abuse must be coupled with an intent to confine or remove the victim. The instruction submitted is unlike that provided in State v. Goff, 342 N.W.2d 830, 836 (Iowa 1983), wherein the kidnapping instruc-

tion completely failed to instruct that the kidnapping charged required intent to use the victim as a shield or hostage.

Instruction No. 10 defined to the jury the offense of kidnapping:

The law provides that a person commits kidnapping when, knowing he has neither the authority nor the consent of a person, confines or removes such person from one place to another other than the confinement or removal incidental to the commitment of another crime. (emphasis added)

Confinement was further defined in Instruction No. 14 $\frac{1}{2}$. Furthermore, Instruction No. 10 provides that "Kidnapping in the 1st degree occurs when, as a consequence of the kidnapping, the person is intentionally subjected to sexual abuse." Failure to include cautionary language on specific intent was unnecessary and did not render the incidental movement defense less effective.

Rich's main argument centers around the intent instruction and whether it coalesced with the instructions on the intoxication defense. Instruction No. 28, a specific intent instruction, was submitted to the jury as follows:

Where intent is an essential element of the offenses or degrees of the offenses charged, it must be proved beyond a reasonable doubt. Intent is a mental state, emotion, or condition of the mind with a design, resolve, or determination that the doing of an act shall be with a certain purpose. As such, intent is seldom, if ever, capable of direct and positive proof. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observation.

In determining the intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his voluntary acts. Such an inference, if you make such an inference, is merely a circumstance to be considered along with all the other circumstances in the case bearing on the issue of intent in determining whether the state has proved intent beyond a reasonable doubt.

Rich contends that because the first paragraph of the uniform instruction relating back to the marshalling instructions reference to intent was omitted, the jury

was not properly informed as to how they were to apply this instruction, particularly in reference to the instruction on the intoxication defense. We find no merit in such claim.

We initially note that the court instructed the jury that the law is not embodied in one instruction but rather in all the instructions as a whole. Moreover, Instruction No. 30, setting forth the principles of the intoxication defense, specifically states that "intoxication may be shown where it is relevant to the person's specific intent or knowledge at the time of the act charged." Additionally, Instruction No. 30 provides that "[i]n considering the question of the defendant's intoxication, it should be considered along with all the evidence in the case which bears on the question of intent which is explained in Instruction No. 28 and knowledge which is explained in Instruction No. 14." (emphasis added). Though perhaps not a model of clarity, we find that the instructions submitted to the jury properly advised them as to the element of specific intent and that the jury was properly advised of the nature of the crimes charged. Thus, Stone's failure to request instructions on specific intent did not amount to ineffective assistance of counsel.

Because of our holding today that trial counsel's performance in the investigation and preparation of Rich's defense did not constitute ineffective assistance of counsel and that the issues not pursued were lacking in merit, we find no basis for a favorable consideration of Rich's additional claim that these issues should have been pursued on his direct appeal. Hall, 360 N.W.2d at 839.

We do find, however, and the State concedes, that the trial court erred in sentencing Rich on one count of kidnapping in the first degree and sexual abuse in the third degree. Rich was sentenced to life imprisonment on the kidnapping charge and ten years on the sexual abuse charge. The sexual abuse charge, however, is a lesser-included offense of the kidnapping charge. Lamphere v.

State, 348 N.W.2d 212, 218 (Iowa 1984). Therefore, the separate sentence for sexual abuse in the third degree is in violation of Iowa Code section 701.9 (1985). We must therefore nullify the judgment and sentence for third-degree sexual abuse. Lamphere, 348 N.W.2d at 218; State v. Davis, 328 N.W.2d 301, 308 (Iowa 1982). To this extent, the postconviction judgment is modified and the case remanded to district court for appropriate implementing orders.

AFFIRMED AS MODIFIED; REMANDED WITH DIRECTION.