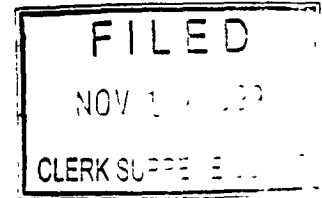


IN THE COURT OF APPEALS OF IOWA

No. 9-565 / 98-975
Filed November 10, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

TOBY MICHAEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II
(motions) and Robert J. Blink (trial and sentencing), Judges.

Michael appeals the judgment and sentence entered upon the court finding him
guilty of first-degree murder and two counts of attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for
appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

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HUITINK, P.J.***I. Background Facts and Proceedings.***

On September 5, 1997, Michael was formally charged with first-degree murder and two counts of attempted murder. On September 22, 1997, Michael's defense counsel filed an application for psychiatric evaluation for insanity or diminished responsibility, a notice of the defense of intoxication, and an application for psychological evaluation of defendant. On December 16, 1997, the district court appointed Michael new counsel. His new counsel filed a notice of intent to rely on the defense of self-defense and filed notice withdrawing the insanity defense and reaffirming the defense of intoxication and diminished capacity.

The district court found Michael guilty of first-degree murder and two counts of attempted murder as charged. He was sentenced to a mandatory term of life imprisonment on the murder conviction and consecutive indeterminate twenty-five-year terms of incarceration on each of the two convictions for attempted murder.

On appeal Michael contends counsel was ineffective in pursuing an intoxication defense and counsel was ineffective in failing to warn him that statements he made to a psychiatrist during an evaluation for purposes of a diminished responsibility defense could be disclosed at trial.

II. Standard of Review.

We review Michael's ineffective assistance of counsel claim *de novo*. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994).

III. Ineffective Assistance of Counsel.

Michael contends his trial counsel were ineffective in (1) presenting an intoxication/diminished capacity defense against his wishes and (2) misadvising him as to the consequences of pursuing the diminished capacity defense.

Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to respond. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate Michael's claim without counsel's explanation. We therefore preserve Michael's ineffective assistance of counsel claim for postconviction proceedings.

The judgment of the district court is affirmed.

AFFIRMED.