IN THE COURT OF APPEALS OF IOWA

No. 4-445 / 93-1894

FILED
MAR 30 1995
CLERK SUPREME COURT

DEREK DELBERT LAGRANGE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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

Derek Lagrange challenges the order denying his application for postconviction relief. **AFFIRMED.**

Alfredo Parrish and Robert P. Montgomery of Parrish, Kruidenier, Moss & Dunn, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, Denver D. Dillard, County Attorney, and Scott Peterson, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., Sackett, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

MCCARTNEY, S.J.

Derek Lagrange was convicted, following a jury trial, of first-degree burglary and sentenced to up to twenty-five years. Viewing the evidence in the light most favorable to the State, Lagrange entered the home of his girlfriend armed with a shotgun with the intent to kill her. Lagrange claimed he intended to kill himself in front of his girlfriend. This event took place two days prior to Lagrange's eighteenth birthday; however, he was charged and convicted as an adult. On direct appeal, the court of appeals affirmed, preserving his ineffective assistance of counsel claims. State v. Lagrange, No. 91-39 (Iowa App. June 25, 1992).

Lagrange filed an application for postconviction relief raising several issues regarding ineffective assistance of counsel. He asserted that his trial counsel neglected to file a motion to transfer the case to juvenile court or otherwise inform him he had the right to file such a motion.

He also claimed his counsel gave an improper closing argument. This claim is largely based upon counsel's statements indicating Lagrange's crime "was of gross proportion" and that only a person who was "mentally impaired" would commit such a crime. He argued this contradicted the argument that he lacked the intent to assault his girlfriend when he entered the home. He also claimed his counsel inappropriately drew attention to the

fact his psychiatrist testified Lagrange knew right from wrong when he committed the crime and and that he understood the nature of his acts.

Additionally, Lagrange claimed his counsel failed to adequately investigate and present the defense of diminished capacity and insanity. This argument focused on Lagrange's psychiatrist's testimony on direct examination that, as mentioned above, Lagrange knew right from wrong and the nature of his acts. Lagrange claimed his counsel ineffectively interviewed and examined the expert, resulting in the adverse testimony.

The trial court rejected each of these claims. It determined that a motion to transfer the case to juvenile court would have been useless. It otherwise found trial counsel's actions did not prejudice Lagrange. Lagrange appeals.

We affirm.

Postconviction relief proceedings are civil actions at law, and normally we review the same on error. Kane v. State, 436 N.W.2d 624 (Iowa 1989).

Here, however, Lagrange, the applicant, asserts violations of certain constitutional safeguards and, as a consequence, our review is de novo as we view the totality of the circumstances. Kane, 436 N.W.2d at 626.

To establish the claim of ineffective assistance of counsel, the applicant has the burden to show by a preponderance of the evidence that such assistance was

ineffective, and that such ineffective assistance resulted in no counsel at all, a violation of constitutional right to counsel. Counsel is presumed competent and the applicant must also show that such ineffective assistance deprived him of a fair trial. Kane, 436 N.W.2d at 627.

In considering the question of a deprivation of a fair trial, we determine if there is a reasonable probability that a different result would have occurred but for such ineffective assistance. Taylor v. State, 352 N.W.2d 683 (Iowa 1984).

With these standards in mind, we turn to the contentions asserted by the applicant.

Code section 803.1(4), Iowa Code, provides that an adult who is alleged to have committed a crime while a minor may be charged as an adult in the first instance. Lagrange was an adult, having attained his majority when he was charged in district court as an adult. A minor, however, must be charged in the first instance in juvenile court under Iowa Code section 232.8(1a) but may be transferred to district court to be tried as an adult if, after hearing, the juvenile court determines, taking into account the various criteria found in Iowa Code section 232.45, that such transfer should be effected. Iowa Code section 232.8(3).

An adult charged in district court for a crime purportedly committed while he was a minor may however petition for removal to juvenile court, but it is not mandatory. Iowa Code § 803.1(4) and 803.5.

We agree with the district court that Lagrange failed to sustain by a preponderance of the evidence any prejudice to him resulting from the failure of his trial counsel to seek removal from district court to juvenile court. In passing on this issue, we take into account the substantial evidence adduced at the postconviction relief hearing that such a motion to remove Lagrange from district court to juvenile court would have been fruitless had it been filed. The serious nature of this offense and the fact that Lagrange was two days shy of his eighteenth birthday when the offense was committed all militate against his removal to juvenile court. The opportunities for rehabilitation were severely limited because if tried as a juvenile and found guilty in juvenile court, Lagrange would have been released upon attaining the age of nineteen years. Iowa Code § 232.53(2).

In Jasper v. State, 477 N.W.2d 852 (1991) the seventeen-year-old defendant was charged in juvenile court with sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3. His trial counsel advised the juvenile defendant to waive juvenile court jurisdiction in order to be tried in district court as an adult. This affirmative conduct by counsel was held in Jasper not to be ineffective, and, in any event, our supreme court held that "we do not believe that had there been a transfer hearing [in juvenile court], the result of the proceeding would have been any different." Jasper, 477 N.W.2d at 855. This

affirmative conduct by counsel was held not to be incompetent, and, in any event, the second prong of the test was not met inasmuch as the court held that there was no prejudice to the defendant since in all probability had there been a transfer hearing rather than a waiver, the defendant would have been transferred to district court to be tried as an adult.

We do not find nor are we cited to any authority that the requirement of due process necessitates the exercise by trial counsel of the option to have Lagrange tried as a juvenile. Cases cited by the applicant wherein a juvenile offender has been tried as an adult are inapposite for those cases involve a transfer to adult court in the first instance without an appropriate hearing in juvenile court.

We hold that the applicant has not sustained his burden of showing prejudice under these circumstances.

The applicant further asserts that he received ineffective assistance from his trial counsel when counsel called a psychiatrist to testify on behalf of the defendant. Defendant at trial asserted the defenses of insanity or diminished responsibility and those issues were submitted to the jury.

Before considering the further assertions of the applicant that his counsel was ineffective, we note that improvident trial strategy or miscalculated tactics or mistakes in judgment by counsel do not necessarily amount to ineffective assistance. Kane 436 N.W.2d at p. 627.

At a pretrial deposition, the psychiatrist testified that on the day of the incident, applicant suffered from a mental condition "that involved a substantial disorder of thought." The psychiatrist further testified that Lagrange understood the nature of the acts but did not understand the quality of the acts, and trial counsel believed the foregoing was sufficient to raise the issues of insanity or diminished responsibility which issues were submitted to the jury. The psychiatrist had treated Lagrange for some time prior to the burglary. While this testimony was not as strong as desired by the applicant, nevertheless it was sufficient to trigger the submission of the issues of insanity or diminished responsibility which the jury chose to ignore.

The psychiatrist did assist the defendant by his testimony that Lagrange did not have the intent to commit an assault, and again the jury chose to ignore such testimony. We are satisfied that the actions of trial counsel in using this witness did not represent ineffective assistance of counsel. The witness was helpful in certain regards as we have noted.

It is not ineffective assistance of counsel in the event a defense witness fails to testify as reasonably expected. State v Losee, 354 N.W.2d 239 (Iowa 1984).

The applicant further asserts that portions of the closing argument of his counsel at trial represented ineffective assistance. Trial counsel again argued that

Lagrange was mentally impaired and that the crime "was of such gross proportion" that it showed such impairment. This was consistent with the claims made throughout the trial that Lagrange did not have the requisite intent to commit an assault and that he was mentally impaired because of diminished responsibility. Given the uncontroverted evidence of the breaking into the home of his girlfriend by the applicant while carrying a loaded shotgun, it is apparent trial counsel was, by argument, promoting the defenses asserted. We do not believe it appropriate to second-guess trial counsel in his efforts to convince the jury that the applicant suffered from diminished responsibility.

In similar fashion, we cannot fault trial counsel for arguing in closing to the jury that the applicant had no intent to assault his girlfriend but intended to take his own life. The applicant now argues that this conceded the element of intent to commit assault.

Assault is defined in § 708.1, Iowa Code and clearly indicated that assault must be directed at another person. Commission of burglary in the first degree requires such an assault, Code section 713.1, Iowa Code. An argument that applicant intended to take his own life would therefore not concede the element of intent to commit an assault.

Where as here, trial counsel is faced with bizarre conduct and uncontroverted facts, his efforts to explain applicant's behavior in terms of a deviant mental condition

such as a wish or intent to commit suicide, is understandable. Again we do not believe it appropriate to second guess trial counsel. Such argument reaches to the submitted issues of insanity or diminished responsibility.

We agree with the trial court that these efforts by counsel were made to show "defendant in a disoriented state of mind."

Based upon the foregoing, we affirm the findings and conclusions of the trial court in denying postconviction relief.

AFFIRMED.

Hayden, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (concurring specially)

I concur specially in the result without opinion.