FILED
JUN 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 25, 1986
vs.	)	6-01 84-1047
JOSEPH B. KRAUS,	)	
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Scott County (No. 114358) - James R. Havercamp, Trial Judge, and C. H. Pelton, Postconviction Judge.

Defendant appeals both his conviction for second-degree murder in violation of Iowa Code sections 707.1 and 707.3 and a subsequent denial of postconviction relief, asserting that he was denied effective assistance of trial counsel. **AFFIRMED BY OPERATION OF LAW.**

Charles Harrington, Chief Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and James D. Hoffman, Assistant County Attorney, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ., but considered en banc.

On this appeal the judges of this court have evenly divided on the result they would reach. Judges Donielson, Hayden, and Sackett would affirm; Chief Judge Oxberger, and Judges Snell and Schlegel would reverse. Accordingly, the decision of the trial court is affirmed by operation of law.

Judge Donielson would affirm for the following reasons:

The first error alleged by defendant involves defense counsel's alleged misunderstanding that second-degree murder requires specific intent to kill, which is actually only an element of first-degree murder.

It is pure speculation that defense counsel misunderstood the elements of second-degree murder before trial. The only evidence in the record regarding defense counsel's uncertainty of the legal elements was during cross-examination at the postconviction hearing. Testimony indicates that before the plea proceeding counsel discussed the elements of the various offenses with the defendant and prepared a written statement explaining the options available to defendant, which was reviewed and signed by the defendant, and prior to trial, counsel continued to meet with the defendant regularly and he reviewed the elements of the crime charged, relevant Code sections, minutes of testimony, and depositions of witnesses with the defendant. It is not disputed that counsel repeatedly advised the defendant the offered plea agreement was beneficial and he would be risking conviction of a higher crime by proceeding to trial. Even if counsel misunderstood the elements at this time, it does not, by definition, follow that counsel's pretrial advice was similarly flawed.

Assuming, arguendo, that counsel failed to perform an essential duty, the requisite prejudice is not present. Before trial, counsel rendered the following advice to defendant:

> As far as a jury trial on Second Degree, I repeatedly told Joe to me there was no rhyme or reason to expose himself to the murder II, the Voluntary, which was up -- not

> more than ten, the Involuntary, which was our best hope in my judgment, why go to trial with those exposures when we already had in our office an offer up to the point of even trial, of Involuntary Manslaughter. I asked Joe how can you justify in your own mind rolling the dice with the best hope in my judgment of a jury decision of Involuntary, and that's outside, in my judgment, outside chance, but with the same type of chance in catching Second Degree. I said there's no comparison, Joe, not more than 50 years to not more than five. I even — we drew times on a piece of paper. I said look at 50 years. I said in my observation anybody, if they are sentenced to that, is going to do 12, 15 years, I'm guessing. Ten years, probably three years out of it. Again, involuntary, not more than five, maybe 12, 15, 16 months. I said, "Joe, we've got no big decision here as far as I'm concerned. Considering all the circumstances, a loaded weapon, in my judgment there was no element of any self-defense under all the circumstances." Joe advised me that he alone was going to make this decision on a jury trial, and he so advised me that that's what he wanted to do.

Despite such accurate professional advice, the defendant, nonetheless, decided to stand trial. Defense counsel never guaranteed the jury would not find him guilty of second-degree murder. Defendant chose to "roll the dice" and now he must face the consequences of his decision.

Criminal defendants should have little intrinsic interest in the legal elements of a crime; such persons should, however, have a great deal of interest in the penalties associated with such crimes and their likelihood of conviction for various crimes. The bottom line for a criminal defendant is not an esoteric evaluation of legal definitions, but a pragmatic assessment of the penalties to be served if convicted of a charge.

This defendant was properly advised of the hierarchy of crimes (second-degree murder, voluntary manslaughter, and involuntary manslaughter) and defendant does not claim any misadvice was provided by counsel as to the penalties associated with such crimes. Counsel provided defendant with his opinion of the likelihood of conviction on the various crimes, but gave no ironclad guaran-

tees. Counsel told defendant a voluntary manslaughter conviction was "probable" and involuntary manslaughter was the "very best we could do." Defendant indicated independence and a willingness to make his own decision despite counsel's repeated recommendation to plead guilty to involuntary manslaughter.

Notwithstanding counsel's alleged misunderstanding of specific intent to kill, I find no evidence which leads me to believe this defendant would have made a different choice even had the element not been misunderstood. Even though counsel accurately laid out the possible penalties and made his well-reasoned recommendation to defendant, he still chose to stand trial. I simply do not find sufficient evidence of prejudice exists to convince me that had the asserted error not been made, defendant's decision to stand trial would have been any different.

Counsel did not tell defendant that if he stood trial he could do no worse than involuntary manslaughter. Defendant knew he could be convicted of second-degree murder. If defendant felt he was innocent of any wrongdoing, he would not have pled guilty to involuntary manslaughter in any event. If defendant felt a jury might find some culpability in his behavior, he might have pled guilty or still chosen a jury trial. Counsel's advice regarding the penalties and counsel's strong recommendation to plead guilty to involuntary manslaughter were sufficient to fairly apprise defendant of his options and he, nevertheless, chose to stand trial. Assuming counsel had thought a conviction for second-degree murder was more likely, I do not think defendant has proven his decision would have been different because counsel informed him a conviction for the higher offense of voluntary manslaughter was probable and defendant still did not opt for the safer route of pleading to involuntary manslaughter. Thus, when properly faced with a choice between the probable conviction of a higher crime

and the remote possibility of conviction of a lower crime or acquittal, he still chose a jury trial.

The defendant argues that his position is strengthened by the court's description of second-degree murder as a "willful killing" and statement that such a charge "probably doesn't fit" the circumstances of defendant's case. It is undisputed that defendant relied on this erroneous advice in opting to go to trial rather than accepting the plea agreement. My response to this argument is that it was counsel's effectiveness, not the comments of the trial court at the plea proceeding, which are subject to review on this appeal. Any possible confusion at the plea proceeding was adequately explained and mitigated by trial.

For these reasons, I would affirm the decision of the postconviction court.

Judge Snell would reverse for the following reasons:

Defendant was originally charged by trial information with involuntary manslaughter. On December 16, 1983, defendant and the State had reached a plea agreement whereby defendant would plead guilty to involuntary manslaughter (for which the maximum sentence is five years) and the State would not file a charge of second-degree murder against defendant. The guilty plea proceeding was held before Judge Margaret S. Briles. After defendant reported what had occurred on the day in question, the court asked defendant's counsel why this case was not going to trial. The following colloquy then occurred:

> THE COURT: Is there some reason why we aren't trying it?
>
> MR. DOYLE: In my judgment, from the — all the minutes, and talking with some of the parties that were present — at least in my judgment — the initial charge was to be second degree murder
>
> THE COURT: Well
>
> MR. DOYLE: — and . . .
>
> THE COURT: — you and I would agree that probably doesn't fit.
>
> MR. DOYLE: Well, I'm just saying, that was what we were told initially. And if not that, at least voluntary manslaughter. . . . That in my judgment, the exposure he faced, relative to involuntary manslaughter. . .
>
> * * * *
>
> THE COURT: Do you understand the punishment isn't going to be any worse if you have your trial and lost? They have charged you now with involuntary manslaughter; they can't amend that and charge you with something more.
>
> MR. DOYLE: On that point, Your Honor, I might bring up, so there is no misunderstanding — I think Elaine can check this with her file — when the County Attorney contacted me after I was appointed, they — James Hoffman advised me they were going to file, at that point, a second degree murder charge. . . . Thereafter — oh, two to three weeks later possibly — James advised me if Joseph wanted

to consider a lesser charge and enter a plea of guilty to a lesser, they then would file that lesser, based upon a plea. Which Joseph and I discussed for several weeks now; is that correct, Joe?

THE DEFENDANT: Yes.

* * * *

THE COURT: Well, I don't know about misleading the Court, I don't find any record, and the — the Information is the Information, the law states they can't amend it. I suppose they could dismiss it and file another charge —

MR. DOYLE: I want you to be fully aware what we had been discussing before.

THE COURT: Well, there can't be any worse punishment, however, if you demand a trial on this charge. Are you telling me Mr. Hoffman is saying if he demands a trial, he'll file another charge.

MR. DOYLE: I can quote Mr. Hoffman — and I think we can call him right now — that that's what he would do, Your Honor.

THE COURT: Well, I'm not sure that it's ethical or proper or lawful for me to take a plea under that kind of coercion from the County Attorney.

MR. DOYLE: Okay. I think we've got possibly — or I've got Joe confused enough now, so I think in his best interests, we should probably curtail the proceedings now, and maybe he and I will have to review it and just go to trial.

THE COURT: I don't know. I'm not trying to force anybody to trial, I'm simply saying that I've got a charge here, if he's pleading guilty to it because if he doesn't plead guilty to it they'll file a murder charge against him, then I need to know it.

Is that why you're pleading guilty to involuntary manslaughter, because it's the least charge?

THE DEFENDANT: Yeah.

THE COURT: One of the reasons you're pleading guilty is because you're afraid that if you don't, the County Attorney will file a second degree murder charge like the original complaint, is that it?

THE DEFENDANT: I feel that's pretty much what I deserve.

THE COURT: All right. That's what I need to hear from you.

He can handle himself very well, Mr. Doyle.

MR. DOYLE: I understand that, Your Honor.

THE COURT: That clears up the only thing that was worrying the Court in this case. I also think this fits. I do. But I do want to make sure that you — make sure you know you can fight the thing out in open court, I want to make sure that you don't have to plead guilty (sic), you can have your trial; do you understand that?

(Defendant nods head.)

MR. DOYLE: I think maybe now the Court has enlightened us more, I think in fairness not only to him, but to me, I'm in an awkward position now in the record, I think we should probably, in the best interests, go to trial. Because I'm sure you have a lot of questions and doubts now, after the Judge spelled this out, don't you?

THE COURT: Mr. Doyle, you can do whatever you want to do, because you're provoked with the Judge—

MR. DOYLE: No, no—

THE COURT: I'm not convinced that what you just said is in your client's best interests. Would you please let me get through the plea?

MR. DOYLE: All right.

THE COURT: Okay. Now, let's back off a little bit. This isn't a technicality — okay, you know, I need to know now how you feel, and if you understand what I'm saying, and I'd just as soon, counsel -- when we're through, if you don't want your client to plead, I won't take a plea, but I'd just as soon that you'd stay out of it and let me have my conversation with your client, which is what the law requires.

Mr. Kraus, if I understand what you just now told me, that the reason you want to plead guilty to this is you think it's just about right, and what you deserve; is that about what you told me?

THE DEFENDANT: I don't feel I deserve, you know --

THE COURT: You don't think you deserve it at all?

THE DEFENDANT: Not going to prison for five years.

> THE COURT: Okay. Well, I didn't understand you to say that. So would you like to think this over some more, before we go any further? You don't have to do this now; do you want to think it over a little more?
>
> THE DEFENDANT: Well, the way -- if I plead guilty to this right now, then I'm going to get five years, the way I understand.
>
> THE COURT: That's right, that's what I told you.
>
> THE DEFENDANT: If I go to trial, they could higher the charges then?
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> THE COURT: Whether they will file another case and dismiss this one, I don't know, but that is what they could do. They can't, as I put it, amend this one, they would have to dismiss this case and start a new case and charge you with murder in the second degree, which is -- it's now a fifty year charge. I don't know if they could prove murder in the second degree or not. That's a willful killing.
>
> THE DEFENDANT: I'd like to talk about it with my lawyer first.
>
> * * * *

After the termination of the plea proceeding, the State dismissed the original information and refiled an information charging defendant with second-degree murder. The State and defendant agreed, however, that his option to plead to involuntary manslaughter would remain open until trial.

Between the aborted plea proceeding and the trial date, Doyle met with defendant several times and told him that if he went to trial, there was "an outside chance" he would be convicted of second-degree murder. He told defendant a jury would "probably" convict him of voluntary manslaughter and the "very best we could hope for" would be an involuntary manslaughter verdict. Doyle also admitted that he informed defendant that the State would have to prove that defendant specifically intended to kill his uncle to obtain a second-degree murder conviction. Doyle testified during the postconviction hearing as follows:

> Q. Would you agree that intent was a necessary element of Second Degree Murder? A. Certainly.

> Q. What kind of intent did you tell Mr. Krause the State was going to have to prove to find him guilty of that? A. What kind of intent?
>
> Q. Intent to kill the victim? A. Yes.
>
> Q. You told him he had to intentionally kill the victim? A. Right. And then the argument there would be whether he did as far as other testimony or Joe in his own mind that he didn't intend to kill him.
>
> Q. Okay. So you told him that he had to specifically intend to kill his uncle in order to be found guilty of Second Degree Murder? A. That's one of the elements, yeah.

Doyle repeatedly advised defendant to accept the still open plea agreement, however, defendant opted to go to trial on the second-degree murder charge.

According to Iowa case law, it is well established that "[F]irst degree murder is distinguished from second degree murder in that an element of first degree murder is specific intent to kill, while this element is not required in second degree murder." State v. Reese, 259 N.W.2d 771, 778 (Iowa 1977); State v. Smith, 242 N.W.2d 320, 326 (Iowa 1976); State v. Leedom, 247 Iowa 911, 916, 76 N.W.2d 773, 776 (1956); State v. Miller, 359 N.W.2d 508, 511 (Iowa Ct. App. 1984). Second-degree murder does require proof of malice aforethought. "While malice aforethought is the specific state of mind necessary to convict of murder, it is far different from the specific intent which is a necessary element of murder in the first degree. It may be express or implied from the acts and conduct of defendant." State v. Gramenz, Iowa 126 N.W.2d 285, 290 (1964). Malice aforethought is commonly defined as:

> [a] fixed purpose or design to do some physical harm to another which exists prior to the act committed. It need not exist for any particular length of time and requires only such deliberation as would make a person appreciate and understand the nature of the act and its consequences, as distinguished from an act done in the heat of passion.

State v. Higginbotham, 351 N.W.2d 513, 515 (Iowa 1984) (quoting State v. Sharpe, 304 N.W.2d 220, 226 (Iowa 1981)).

Second-degree murder may include the situation where intention to kill is present but deliberation and premeditation do not exist to support a first-degree murder conviction. However, the malice required to support a second-degree murder conviction may also be found in conduct which evidences a willful and wanton disregard for human life where no specific intent to kill exists. Miller, 359 N.W.2d at 509, 511 (wherein the midst of an argument defendant obtained a gun and later defendant fired the gun and killed victim, not necessary to show defendant intended to kill victim to prove second-degree murder); Yeager and Carlson, Iowa Practice Criminal Law and Procedure, §§ 135, 143 (1979); W. LaFave and A. Scott, Jr., Criminal Law, § 73 at 568 (1972).

In the case at bar, attorney Doyle clearly misinformed defendant regarding the intent element of second-degree murder. Apparently because of attorney Doyle's misconception of this element of the charge against his client, he informed defendant that only an "outside chance" existed for a second-degree murder conviction. This misadvice was further strengthened by the court's description of second-degree murder as a "willful killing" and statement that such a charge "probably doesn't fit" the circumstances of defendant's case. It is undisputed that defendant relied on this erroneous advice in opting to go to trial rather than accepting the plea agreement.

Defendant's claim of ineffective assistance on this ground does not involve trial tactics, strategies, or other judgment calls that we do not ordinarily second guess. See Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). Rather, it concerns counsel's misadvice resulting from his unfamiliarity with and failure to research the law applicable to the charge against his client.

It is without question that neither the court nor defense counsel is free to misinform a defendant regarding the collateral consequences of a guilty plea and the practicable alternatives. Meier, 337 N.W.2d at 207; Stovall v.

State, 340 N.W.2d 265, 267 (Iowa 1983) (defendant is entitled to rely on statements made by the court, and if the court makes a material misstatement defendant's decision to plead is not intelligently and voluntarily made.) Such misstatements can "destroy a defendant's opportunity to make a knowing and intelligent choice." Meier, 337 N.W.2d at 207. I find this language to be equally applicable where defendant is misinformed regarding the material elements of the crime with which he is charged.

Doyle's lack of knowledge of the intent element of second-degree murder places him below the "range of normal competency" in his representation of defendant. As the State asserts, a defendant is obligated to make the ultimate decision as to whether he should plead guilty or proceed to trial. However, such a decision must represent an informed, intelligent, and self-determined choice among feasible alternatives. In this case, defendant's choice could not be an informed one because he relied upon counsel's erroneous advice regarding the intent element of second-degree murder, and therefore could not effectively weigh the risk he faced in opting to forego the plea agreement and proceed to trial.

Regardless of how many times Doyle encouraged defendant to accept the plea rather than risk the "outside chance" of a second-degree murder verdict at trial, this could not outweigh the fact that defendant believed that in order to be convicted of murder, the State would have to prove that he intended to kill his uncle. The importance to defendant of the intent elements of the various degrees of murder is obvious from the record. Due to Doyle's misadvice, defendant was confident that because he never, in fact, intended to kill his uncle, he could not be convicted of murder. This element was of substantial importance to defendant because his unwaivering defense throughout the proceedings was that the shooting was accidental.

I would conclude that Doyle's misstatement regarding the intent element of second-degree murder greatly prejudiced defendant, and so constituted ineffective assistance of counsel. The due process deprivation occurred when defendant was "unable to make an intelligent and informed choice from among his alternative courses of action." Meier, 337 N.W.2d at 208 (quoting Rinehart v. Brewer, 561 F.2d 126, 132 (8th Cir. 1977).