IN THE COURT OF APPEALS OF IOWA

No. 2-331 / 91-929

FILED
SEP 29 1992
CLERK SUPREME COURT

DONNA J. SIMMONS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Donna Simmons appeals from the district court's denial of her application for postconviction relief challenging her conviction of first-degree kidnapping. **AFFIRMED.**

Francis Hoyt, Jr., West Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, Melodee Hanes, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

Donna Simmons was convicted of aiding and abetting Larry Siemer in the confinement and torture of Simmons' seven-year-old son, Tracey, in violation of Iowa Code sections 710.1 and 710.2. She was sentenced to life imprisonment. The supreme court affirmed her conviction. See State v. Simmons, 454 N.W.2d 866 (Iowa 1990).

Simmons filed an application for postconviction relief. She claims she was denied effective assistance of counsel when her lawyer failed to present evidence during trial concerning her mental condition.

Prior to trial, counsel Peter Berger timely filed notice of diminished capacity on behalf of Simmons. He arranged for Simmons to be examined by Shahe Zenian, an experienced clinical psychologist. Zenian examined Simmons at length and determined she was competent to stand trial. However, he concluded her personality disorder so distorted real life events that she could not have formulated the specific intent required for conviction of kidnapping. The State then arranged for Simmons to be evaluated by David Cowan, a clinical social worker. His conclusions contradicted Zenian's in all material areas. During her consultations with Cowan and Zenian Simmons made admissions indicating her presence and participation in the abuse of Tracey. She also told Cowan her attorney had directed her to give minimal information during the consultation even

though he had directed her to be entirely truthful. Berger, jointly with Simmons, decided against presenting this evidence.

Simmons also contends the imposition of a life sentence without the possibility of parole is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

The district court denied her application and Simmons appeals.

Scope of Review

Established principles govern our review of Simmons' sixth amendment claim her 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).

I. Ineffective Assistance of Counsel

In order to prevail on a claim of ineffective assistance of counsel, a 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." Risdal, 404 N.W.2d at 131-32. The reviewing court may look at either prong of the test to dispose of an ineffective assistance of counsel claim. State v. Nebinger, 412 N.W.2d 180, 192 (Iowa App. 1987). If the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components. White v. State, 380 N.W.2d 1, 3 (Iowa App. 1985).

In proving the first prong of this test, Simmons must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). When counsel makes a reasonable decision concerning strategy, regardless of the success or failure of such strategy, this court will not interfere. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

Simmons contends she was denied ineffective assistance of counsel when her lawyer failed to present evidence concerning her mental condition at trial. She claims presentation of diminished capacity defense would have substantially reduced the likelihood of her conviction.

The record is replete with evidence and testimony of Mr. Berger's thorough and deliberate consideration of Simmons' mental condition for the purpose of a diminished capacity defense. He filed timely notice of diminished capacity defense. He arranged for Simmons to be evaluated by Shahe Zenian, an experienced clinical psychologist. Zenian testified Berger had frequently and at length consulted with him regarding Simmons mental condition. Berger provided information to Zenian regarding the State's case for Zenian to discuss with Simmons. Zenian described Berger as "conscientious". Berger testified he spent more than thirty hours exploring psychiatric issues, including reading related journals and manuals.

The record also clearly reflects Berger's extensive consultations with Simmons regarding use of a diminished capacity defense. Berger testified he, collectively with Simmons, decided not to use evidence of mental condition for several key reasons.

First, he testified he was concerned about the impact Simmons' statements to Cowan would have on the jury. He testified he was concerned the jury would believe she was trying to hide something since she falsely told Cowan she was prohibited from giving information to him.

In addition, Berger testified he was reluctant to have either Zenian or Cowan testify since Simmons made admissions to both of them indicating her presence and

participation in the abuse of Tracey. He further testified he consulted with Zenian and Simmons throughout the decision-making process. He testified the decision regarding presenting evidence of Simmons mental condition was made jointly between he and Simmons. No evidence was presented to dispute his testimony.

We find Berger did not fail to perform any essential duty to Simmons. His representation of Simmons was well within the reasonable range of representation. We affirm the trial court's ruling denying Simmons postconviction relief and hold Simmons was not denied effective assistance of counsel.

II. Life Sentence

Simmons also contends life imprisonment for First Degree Kidnapping is a violation of the eighth amendment's prohibition against cruel and unusual punishment. The State argues Simmons failed to present this issue on direct appeal and cannot now litigate it in these proceedings.

Issues not raised on direct appeal are waived, absent a showing of cause and actual prejudice. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). The burden is on the defendant to show both cause and actual prejudice. Id. at 855.

It does not appear Simmons satisfied this burden. However, we note we have previously rejected an eighth amendment challenge to the life imprisonment sentence for

First Degree Kidnapping. Bear v. State, 417 N.W.2d 467, 474-75 (Iowa App. 1987).

We affirm the trial court's ruling denying Simmons postconviction relief based on the severity of the sentence she received for First Degree Kidnapping.

AFFIRMED.