IN THE COURT OF APPEALS OF IOWA

No. 1-634 / 00-1536
Filed December 28, 2001

FILED
DEC 28 2001
CLERK SUPREME COURT

DAVID FOELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Franklin County, Stephen P. Carroll, Judge.

David Foell appeals following the denial of his postconviction relief application. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Brent Symens, County Attorney, and Thomas H. Miller, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Eisenhauer, JJ.

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SACKETT, C.J.

David Foell was convicted of first-degree murder following the stabbing death of Marian Atkinson. His conviction was affirmed on appeal. *State v. Foell,* 512 N.W.2d 809 (Iowa Ct. App. 1993). Foell sought postconviction relief contending that his trial attorney was ineffective. The district court denied his claims and this appeal follows. We affirm.

Foell was charged after Marian Atkinson, a sixty-nine-year-old widow, was found dead in her home in Sheffield on December 9, 1991. She had been stabbed sixteen times. The next day, Atkinson's grandson, Chris Oltman, was arrested for the murder. During an interview with the Department of Criminal Investigation Oltman identified David Foell, as the person who stabbed Atkinson. Atkinson had offered Foell money to commit the murder. Later that evening, friends told Foell that the police wanted to talk to him. Foell with his parents went to the local police station and ultimately confessed to the stabbing.

Prior to trial Foell filed a motion to suppress these statements arguing the police coerced him into confessing. The district court denied the motion and this ruling was affirmed on appeal. *Id.*

Defendant's trial attorney raised an intoxication defense. The State relied on Foell's confession and the testimony of Oltman's girlfriend, who was granted immunity. The girlfriend had been a party to the plan to murder Atkinson. The jury found Foell guilty of first-degree murder, and the district court sentenced Foell to a mandatory life term of imprisonment.

Foell first contends in this appeal that his trial attorney was ineffective in calling him as a witness to generate sympathy and then arguing to the jury that

he was a tool in Oltman's hands because both the strategy and the argument had no legal basis. Foell also advances his attorney was ineffective in failing to introduce evidence that he suffers from fetal alcohol syndrome and other mental deficiencies contending that this evidence would have resulted in his confession being suppressed and would have shown he did not form the specific intent to kill necessary for the first degree murder conviction.

Foell on direct appeal had also claimed that his trial counsel was not effective in that he did not aggressively argue the motion to suppress and he withdrew the compulsion claim. Both claims were rejected on appeal. This court also said

> Further, we do not believe Foell has shown he was prejudiced from his trial counsel's alleged breach of duty. The evidence of Foell's guilt was overwhelming. The State introduced into evidence Foell's confession and the testimony of Oltman's girlfriend, who was granted immunity. Foell himself testified he intended to kill the victim when he entered her house. He also stated he was fully aware he was killing the victim when he repeatedly stabbed her.

Foell, 512 N.W.2d at 814.

To prevail on a claim of ineffective assistance of counsel Foell must demonstrate both deficient performance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Oetken,* 613 N.W.2d 679, 683 (Iowa 2000); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Both elements must be proven by a preponderance of the evidence. *State v. Ramirez,* 616 N.W.2d 587, 593 (Iowa 2000); *Oetken*, 613 N.W.2d at 683. Yet both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland*, 466 U.S.

at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995); *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

To establish the first prong, Foell must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Artzer*, 609 N.W.2d at 531. We measure the attorney's performance against "prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *State v. Risdal*, 404 N.W.2d 130, 132 (Iowa 1987). There is a presumption that the attorney performed competently. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95; *Oetken*, 613 N.W.2d at 683. The claim is reviewed in light of the totality of the circumstances. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. The inquiry is an individualized fact-based analysis. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416 (2000).

Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *Wissing*, 528 N.W.2d at 564;*Caldwell*, 494 N.W.2d at 214.

Once Foell proves deficient performance, it must also be shown that the error caused prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697; *State v. Westeen*, 591 N.W.2d 203, 211 (Iowa 1999). To sustain this burden, Foell must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698;

see Artzer, 609 N.W.2d at 531; *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Strickland establishes that prejudice exists when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. In making the decision whether there is a reasonable probability that the result of the trial would have been different, the burden of proof is on the defendant to establish this element by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

With these principles in mind we address Foell's first claim that his attorney should not have called him as a witness to generate sympathy and should not have argued to the jury that Foell was only a tool. Foell claims that had the strategy not been used he could have been found guilty of a lesser degree of murder.

Foell's trial attorney stated in his opening statement that Foell was guilty of second-degree murder but not first-degree murder and that Foell was a weapon in Oltman's hands. He told the jury that Oltman planned the murder, got Foell drunk and used him to commit the crime. During trial Foell's attorney elicited testimony Foell was vulnerable to suggestion and easily influenced. He also presented evidence it was Oltman who wanted Atkinson killed because he was of the opinion that he could then live in her house with his girlfriend. In closing

Foell's trial attorney argued Foell was only guilty of second degree murder as it was Oltman who planned the act and Oltman who had a motive.

Even if Foell's trial counsel's performance was deficient as Foell argues, and we need not decide that it was, Foell cannot show he was prejudiced. The argument that Foell was only guilty of second-degree murder was well developed and presented by his trial attorney.

Foell next contends that his trial attorney did not adequately present and develop evidence of Foell's psychological characteristics, which he contends would have supported his suppression motion and resulted in a lesser finding of guilt.

Foell has Native American blood. He was adopted as a child and his adoptive mother testified that his birth mother consumed alcohol during her pregnancy and Foell consequently suffered from fetal alcohol syndrome. Foell's adoptive father sexually abused him and then rewarded Foell for his behavior. Foell was subject to suggestion and functioned at a low intelligence level.

We first address Foell's claim that his attorney should have presented evidence he suffered from the fetal alcohol syndrome. The State argues the only evidence Foell has the syndrome comes from his adoptive mother and she was not a qualified expert. Even if Foell's mother's statement is sufficient to support a finding he suffers from the malady, Foell has failed to show that advancing it at the time of the suppression hearing would have resulted in the suppression of Foell's confession. Similar claims for suppression of confessions have not been successful. *See State v. Rhombert,* 516 N.W.2d 803, 806-807 (Iowa 1994); *State v. Reid*, 394 N.W.2d 399, 401-404 (Iowa 1986); *State v. Conner,* 241

N.W.2d 447, 453-54 (Iowa 1976): *State v. Fetters*, 202 N.W.2d 84, 87-90 (Iowa 1972).

Nor has Foell shown that his attorney did not adequately perform in addressing the issue at trial. Foell's trial attorney did substantial research before trial and found no case where the syndrome had been successfully raised as a defense. The decision not to attempt to introduce such evidence was a strategic decision.

Foell has failed to show that additional evidence as to his psychological characteristics would have changed the results of the trial. As this court found on direct appeal, the evidence of Foell's guilt was overwhelming. *Foell*, 512 N.W.2d at 814.

We have considered Foell's other arguments and find them to be without merit.

AFFIRMED.