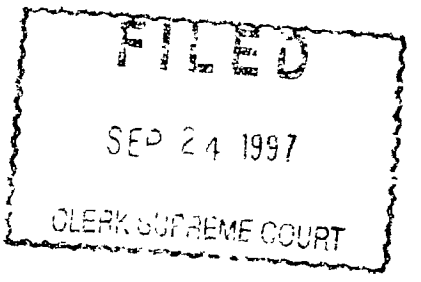
IN THE COURT OF APPEALS OF IOWA 000513

No. 7-366 / 96-1413
Filed September 24, 1997



STATE OF IOWA,
Appellee,

vs.

BURT JAMES SMITH,
Appellant.

Appeal from the Iowa District Court for Marshall County, Victor G. Lathrop (waiver hearing), Associate Juvenile Judge, Carl D. Baker (trial), Judge.

Defendant appeals the judgment and sentence entered upon his convictions of first-degree murder and first-degree robbery in violation of Iowa Code sections 707.2 and 711.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, James DeTaeye, County Attorney, and Thomas H. Miller and Virginia Barchman, Assistant Attorneys General, for appellee.

Heard by Cady, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Burt Smith appeals his conviction for first-degree murder. We affirm.

I. Background Facts and Proceedings.

Smith was convicted of first-degree murder in the October 5, 1994, death of Rebecca Hauser. Because Smith was a juvenile at the time he was charged with this offense, the juvenile court was required to determine whether to retain or waive its jurisdiction over Smith. In the course of the waiver proceedings, Smith presented expert testimony regarding his prospects for rehabilitation if jurisdiction were retained. Dr. Hillard testified that Smith suffered from a conduct disorder and his rehabilitation, although possible, would require fifteen to twenty years. The juvenile court waived its jurisdiction and Smith was tried as an adult.

The State's case against Smith included a highly inculpatory statement Smith gave investigators concerning his part in a robbery resulting in Hauser's death. According to this statement, Smith and three others intended to rob Hauser by using flashing lights to stop her car. The statement also indicates Smith shot and stabbed Hauser as directed to by one of his codefendants.

Smith claimed an inability to form the requisite specific intent to kill Hauser because of his diminished mental capacity. At trial, he offered expert testimony from Dr. Bartollos supporting this assertion. Dr. Bartollos also testified Smith had the capacity to form the specific intent to commit a theft at the time Hauser was killed.

The jury rejected Smith's diminished capacity defense and found him guilty of first-degree murder. As a result, the district court sentenced Smith to life in prison without parole.

On appeal Smith seeks a new trial claiming he was denied effective assistance of counsel. He questions his lawyer's decision to call Drs. Hillard and Bartollos and the adequacy of counsel's examination of these witnesses. Smith also cites counsel's failure to present other evidence of his diminished capacity and the prejudice resulting from counsel's substandard presentation of Smith's diminished capacity defense.

II. Standard of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

III. Ineffective Assistance of Counsel.

Our ultimate concern in claims of ineffective assistance of counsel is the "fundamental fairness of the proceedings whose result is being challenged." *State v. Risdal,* 404 N.W.2d 130, 131 (Iowa 1987)(quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L. Ed. 674, 699 (1984)). To prevail in a claim of ineffective assistance of counsel, one must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. The defendant has the burden

of proof to establish by a preponderance of the evidence that counsel rendered ineffective assistance. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include "an affirmative factual basis demonstrating counsel's inadequacy of representation." *Id.* This burden requires the defendant to overcome the presumption counsel acted within the normal range of competency. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996). To prove the required prejudice, the defendant must show a substantial and actual disadvantage and that there is a reasonable probability the outcome of the proceedings would have been different without counsel's errors. *Id.* We need not determine whether counsel breached an essential duty before considering whether the defendant is able to establish the required prejudice. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). Ordinarily claims of ineffective assistance of counsel are preserved for postconviction proceedings unless the record is sufficient to make the required findings. *State v. Boyles*, 551 N.W.2d 600, 610 (Iowa 1996). Here, we find the record is sufficient for this purpose and proceed to the merits of Smith's ineffective assistance of counsel claims.

Smith's allegations of substandard representation include counsel's performance in the juvenile court waiver proceedings, and the trial. The gist of Smith's complaints is that counsel failed to properly investigate, prepare, select, and present appropriate evidence of Smith's diminished capacity. Although counsel's

essential duties are clearly implicated by these allegations, Smith is unable to establish either their breach or the prejudice necessary to prevail on his claims.

Iowa Code section 232.45, the applicable waiver statute[1], grants the juvenile court discretion to waive its jurisdiction over a child accused of committing a public offense. Waiver is authorized if the child is over fourteen years of age, there is probable cause to support the State's allegation of delinquent conduct, and the State proves "there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction." Iowa Code § 232.45(6); *In the Interest of C.W.R.*, 578 N.W.2d 780, 783 (Iowa 1994). The statutory factors guiding the latter determination include the nature of the delinquent act, the circumstances of the crime, the child's prior juvenile court and rehabilitative experiences, and the rehabilitative and treatment resources available in either juvenile or adult jurisdiction. Iowa Code § 232.45(7).

The waiver record included the brutal details of Hauser's death and Smith's role in it. There is also evidence of Smith's substantial juvenile court experience in Missouri and resulting unsuccessful rehabilitative efforts. Although the record indicates the availability of similar rehabilitative and treatment services in both juvenile and adult jurisdictions, Smith's age, fifteen years, eleven months, minimized the chances of his successful rehabilitation before the expiration of juvenile court jurisdiction at age eighteen. We, based on our review of the record, fail to see any

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[1] Iowa Code § 232.45 (1994), as adopted in 1985, was in effect at the time of this adjudication. We recognize this provision was subsequently amended in 1997; however, on review we apply the law as it was at the time of adjudication.

reasonable probability of a different result than that reached by the juvenile court under these circumstances. Smith was not prejudiced by counsel's alleged professional omissions in the course of the waiver proceedings.

At trial, the State advanced theories of premeditated and felony murder. Under the first theory, the State was required to prove Smith had the specific intent to kill Hauser. Under the second, the State was only required to prove Smith had the intent necessary to commit the underlying forcible felony, robbery. As already noted, Smith called Dr. Bartollos to testify on this issue. He cites the futility of Bartollos' testimony that he lacked the capacity to form the specific intent to kill or could have formed the intent necessary to commit the underlying forcible felony. Smith also claims counsel should have called additional witnesses such as school officials or family member to testify regarding Smith's intellectual and emotional history.

We will not interfere when trial counsel makes a reasonable decision regarding trial strategy or choice of evidence when the chosen course of action does not achieve the desired result. *State v. Wilkens*, 346 N.W.2d 16, 18 (Iowa 1984). Additionally, counsel is not ineffective for failing to call witnesses whose testimony is merely cumulative. *Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984). It has also been said, "[T]he duty to investigate and prepare a defense is not limitless. It does not require counsel to pursue 'every path until it bears fruit or until all conceivable hope withers' . . . ." *Schrier v. State*, 347 N.W.2d 657, 662 (Iowa 1984). After carefully reviewing the record and arguments of counsel, we find Smith has not shown trial counsel

breached any essential duty. As already noted, trial counsel's strategic decisions and choices of evidence are supported by presumption of competence. We find nothing in Smith's arguments that provides sufficient basis to overcome this presumption. It is sufficient to note that Smith overstates the significance of Dr. Bartollos' testimony when this testimony is considered along with other evidence in the case. Moreover, the anticipated testimony of witnesses Smith claims counsel should have called is merely cumulative of facts and circumstances referred to by Drs. Bartollos and Hillard in their testimony.

For all of the foregoing reasons, we find Smith has failed to meet his burden to prove he was denied effective assistance of counsel. The jury convicted Smith based on overwhelming evidence of his guilt, including a written confession. The fundamental of fairness of these proceedings is not subject to reasonable dispute. The judgment of the district court is affirmed.

AFFIRMED.