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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 482

ROBERT LEWIS WILLIAMS,)
Petitioner-Appellant,) Filed December 30, 1981
vs.)
CALVIN AUGER,) 1-331
Respondent-Appellee.) 56496

Appeal from Wapello District Court - Phillip R. Collett, Judge.

Petitioner appeals from trial court's dismissal of his petition for postconviction relief which challenged his 1975 conviction for second degree murder asserting that the postconviction court erred in failing to find 1) that the sentence of thirty years' imprisonment constituted cruel and unusual punishment, and 2) that he was denied effective assistance of counsel during the proceedings leading to his conviction and sentence. AFFIRMED.

Alfredo G. Parrish, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle Wilna Fleming, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner, Robert Lewis Williams, appeals from trial court's dismissal of his petition for postconviction relief which challenged his 1975 conviction for second degree murder. On appeal he asserts that the postconviction court erred in failing to find 1) that the sentence of thirty years imprisonment constituted cruel and unusual punishment and 2) that he was denied effective assistance of counsel during the proceedings leading to his conviction and sentence. We affirm.

On January 28, 1974, petitioner was charged with the crime of murder in the second degree in violation of section 690.3, The Code 1973. At the time of his arrest he was 15 years old. Upon the State's petition, the case was transferred from juvenile court to district court for disposition. The case against petitioner's codefendant, age 14, also was transferred to district court to proceed on the murder charge, however, pursuant to a plea bargaining agreement in which the codefendant agreed to testify against the petitioner, he pled guilty to manslaughter. Petitioner thereafter pled guilty to an open charge of murder, and a hearing was held to determine the degree of guilt. Petitioner was found guilty of murder in the second degree and sentenced to a term of imprisonment not to exceed 30 years pursuant to section 690.3, The Code 1973.[1] His codefendant was sentenced to eight years at the boys' training school in Eldora.

On December 5, 1978, petitioner filed his petition for postconviction relief alleging, inter alia, the grounds now urged on appeal. In its findings of fact and conclusions of law filed on June 30, 1980, the postconviction court dismissed the petition. This appeal followed.

I. Scope of Review. Generally, our review of a criminal action is for correction of errors only, not de novo. Iowa R. App. P. 4. However, where a constitutional issue is raised, we make an independent determination of the facts relevant to that specific issue. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Cruel and Unusual Punishment. Petitioner argues that the thirty year sentence he received was excessive. His analysis is two-fold: first, he asserts that this court should exercise its power under section 814.20, The Code, to reduce the sentence imposed; second, he argues that the sentence is so disproportionately severe that it is violative of the United states Constitution's eighth amendment prohibition against cruel and unusual punishment.

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[1] Section 690.3, The Code 1973, provided for punishment by imprisonment for a term of ten years to life.

A. Section 814.20. "Before exercising our power and authority to reduce the punishment imposed as too severe, code section 793.18 [(now section 814.20)], we must carefully consider whether there has been an abuse of discretion." State v. DeRaad, 164 N.W.2d 108, 112 (Iowa 1969). In determining the proper sentence, we consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character and propensities, and chance of his reform. Id. at 113. "The punishment should fit both the crime and the individual." Id. We thus must apply these criteria to the facts of this case. The nature of the offense, second degree murder, was serious. There is substantial evidence to support trial court's finding that petitioner initiated the events which led to the victim's death by knocking the victim down and pouncing on her, causing internal injuries. The evidence further showed that the petitioner choked the victim with his bare hands. Petitioner ordered his accomplice to assist him in strangling the victim and after her death, dragged her into the kitchen by himself and further abused the victim's body. Trial court was confronted with conflicting reports as to defendant's character, propensities and chances of reform. In light of this record, we cannot say that trial court abused its discretion in sentencing the petitioner. We thus find no error by the postconviction court on its review of trial court's discretion.

B. Eighth Amendment. "Generally, a sentence resulting from a prosecution 'within statutorially prescribed penalty does not constitute cruel and unusual punishment' unless it is grossly disproportionate to the offense." State v. Kyle, 271 N.W.2d 689, 693 (Iowa 1978), quoting State v. Waterman, 217 N.W.2d 621, 624 (Iowa 1974). The criteria for assessing whether a sentence imposed is cruel and unusual is well established:

> A punishment is "excessive" and unconstitutional if it 1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime.

Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 2865, 53 L. Ed. 2d 982, 989 (1977) (plurality opinion). See also State v. Bousman, 278 N.W.2d 15, 17 (Iowa 1979). We find no support for a contention that a sentence of thirty years for murder makes no measurable contribution to acceptable goals of punishment and is nothing more than purposeless and needless imposition of pain and suffering. Nor do we believe that it is grossly out of proportion to the severity of the crime. A seventy-five year sentence

was held not excessive for a conviction of second degree murder in State v. DeRaad, 164 N.W.2d 108 (Iowa 1969). In that case, the defendant was 51 years old and had been convicted of four previous felonies. Additionally, extensive sentences have been imposed on juveniles for less severe offenses. See State v. Banks, 213 N.W.2d 843 (Iowa 1973), where a 16 year old was sentenced to twenty years in the men's reformatory for assault with intent to commit rape.

Petitioner further argues that the disparity between his sentence and the sentence received by his codefendant is so shocking as to constitute cruel and unusual punishment. First, we note that petitioner makes no argument concerning violation of the equal protection clause of the fourteenth amendment of the United States Constitution. His arguments to the postconviction court and this court were confined to his assertion that the sentence constituted cruel and unusual punishment. We conclude, therefore, that it is unnecessary to analyze further this aspect of petitioner's argument. The controlling fact is that petitioner and his accomplice were convicted of different crimes which carried different penalties: petitioner for second degree murder, with a sentence of ten years to life, and his accomplice for manslaughter, with a term not to exceed eight years. Since we find trial court had articulable and reasonable reasons for its exercise of discretion in the term imposed and cannot say the sentence was arbitrary or shocking to this court's sense of justice, we concur in the postconviction court's judgment on this issue.

III. Ineffective Assistance of Counsel. Petitioner's final complaint is that he was denied effective assistance of counsel during the proceedings leading to his guilty plea and sentence. We find no merit in petitioner's claim.

The test for ineffective assistance claims is well established. The complaining party must prove by a preponderance of the evidence that the representation provided by his counsel was not within the range of normal competency and that he was substantially prejudiced thereby. State v. Rand, 268 N.W.2d 642, 649 (Iowa 1978); Long v. Brewer, 253 N.W.2d 549, 558 (Iowa 1977). Here petitioner alleges that his counsel's representation was below the range of normal competency because: 1) counsel undertook no formal discovery; 2) counsel failed to resist petitioner's codefendant's plea bargain; 3) counsel failed to investigate, adequately prepare, or ask for expert witnesses; and 4) counsel failed to appeal from the order transfering the case from juvenile court. We find petitioner has failed to prove by a preponderance of the evidence that defense counsel's actions fell below the range of normal competency.

First, petitioner has not specified what formal discovery methods should have been used in this case and what prejudice resulted from counsel's failure to do so. His argument that trial counsel should have had an independent scientific analysis of the physical evidence undertaken likewise fails to show in what respect the failure to do so prejudiced the petitioner. Petitioner's argument that counsel's representation was ineffective because of his failure to resist the coparticipant's plea bargain is unpersuasive; again, petitioner does not indicate what steps his trial counsel could have taken to resist the plea bargain arrangements, if any, and does not cite what prejudice may have resulted thereby. Allegations regarding counsel's failure to investigate or adequately prepare are likewise without merit; petitioner has not indicated what defense, if any, was omitted through ignorance of the facts or law. Finally, we find no evidence of incompetency in trial counsel's decision to enter into a plea bargaining arrangement rather than try the case and appeal the juvenile court's transfer order. The case against the petitioner was strong, and the possibility of his receiving a more severe sentence was great. Moreover, petitioner was given the advantage of having other criminal proceedings dropped in exchange for his plea. On this record, we find no basis for concluding that petitioner was denied effective assitance of counsel.

Finding no error by the postconviction court, we affirm its judgment in dismissing the petition.

AFFIRMED.