

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 22 1988

CLERK SUPREME COURT

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STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

LAWRENCE THOMAS GLADSON,)

Defendant-Appellant.)

LAWRENCE THOMAS GLADSON,)

Applicant-Appellant,)

8-120
86-608

vs.)

STATE OF IOWA,)

Resister-Appellee.)

Appeal from the Iowa District Court for Jasper County
(No. S-466 & 3754), Michael Streit and Luther T. Glanton,
Judges.

Defendant appeals his conviction of one count of
first-degree murder and three counts of first-degree
robbery on direct appeal and postconviction relief.

AFFIRMED.

Dennis L. Eaton and Timothy M. Duffy of Des Moines for
appellant.

Thomas J. Miller, Attorney General; Valencia Voyd McCown, Assistant Attorney General; and Thomas McGrane and Pamela Greenman Dahl, Assistant Attorneys General; and John E. Billingsley, County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

In 1986, Lawrence Thomas Gladson was convicted of one count of first-degree murder and three counts of first-degree robbery. He challenged these convictions by filing both a direct appeal and a petition for postconviction relief. The district court denied postconviction relief, and Gladson filed a second appeal from that ruling. The direct appeal and the postconviction appeal have now been consolidated. Gladson contends the postconviction court erred by excluding certain evidence from the postconviction hearing. He also contends his attorney in the 1986 criminal trial rendered ineffective assistance of counsel in several ways. Our scope of review is for the correction of errors at law except, however, when constitutional issues are raised, our review is of the totality of the circumstances. We affirm.

Lawrence Gladson was one of two people implicated in the 1985 robbery of a Newton Hy-Vee store and in the murder of a police officer who responded to the robbery. In his 1986 trial for murder and robbery, Gladson acknowledged his presence at the scene of the crimes but tried to suggest that his co-defendant, Dennis Lamar, bore primary responsibility for the crimes. Gladson's defense was two-fold. First, he asserted he was unable to form criminal intent at the time of the crimes because he was suffering from posttraumatic stress syndrome resulting from his military service in Vietnam. Second, he tried to rebut

the State's theory that he had fired the fatal shot relying on eyewitnesses who had not seen him fire a shot and on ballistics evidence allegedly suggesting that the fatal shot could not have come from the places where Gladson was located.

I. POSTCONVICTION HEARING

The defendant's first assignment of error goes to the judge's refusal to admit portions of testimony of two witnesses at the postconviction hearing. Postconviction hearings are governed by the rules of civil procedure. Iowa Code § 663A.7 (1985). The district court's decision is reviewed only on error, unless a constitutional issue is involved. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981).

The first witness is the defendant's ballistics expert, Mr. Lucien Haag. The defendant assigns error with respect to Haag's testimony in this fashion: 1) that the court improperly excluded the expert's testimony as to which weapon police officer McPherran was using at the time he was shot, and 2) that the court erred in failing to recognize ballistics reconstruction as a qualified science.

The expert, Haag, repeated testimony admitted at trial about the weapons which were used the night of the shooting. Haag also testified to the angles of shots according to eyewitness testimony and related some of his observations of the crime scene. The important aspect of Haag's testimony with respect to the defendant's theory of the case was to establish the type of weapon which Officer

McPherran was using at the time of his death. The theory is that if McPherran were using his handgun as opposed to his shotgun that, based on Haag's reconstruction of the shooting and the angles of the fatal shot, the defendant could not have fired the fatal shot. The defendant claims on appeal that there was error in not admitting such testimony over a foundation objection. Defendant further claims that the opposing counsel's objection was not timely and thus the testimony should have been admitted.

An objection must be made "at the earliest opportunity after the grounds for objection becomes apparent." State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). If an objection to a question asked of a witness is late and follows the answer, the objecting party must make a motion to strike coupled with an application to have the objection precede the answer or an excuse for tardiness in objection. Id. As the defendant points out, the expert had rendered his opinion as to which weapon Officer McPherran was using prior to opposing counsel's objection. We would note that there was not a motion to strike and application to have the objection precede the answer or an excuse for tardiness. Therefore, we find that the expert's opinion as to this matter became part of the record despite the fact that counsel's objection to the opinion was sustained when it was asked for again. If the court's ruling in sustaining the objection as to the expert opinion in this respect was error, either based on lack of

foundation or error of untimely objection, it was harmless error as the opinion had already become part of the record. Further, defendant mischaracterizes the postconviction judge's ruling by claiming error in failing to recognize ballistics reconstruction as a qualified science. Our review of the record does not indicate such a ruling either explicitly or implicitly.

The defendant's second assignment of error with respect to the postconviction relief hearing was the exclusion of his roommate's conclusion that Gladson was suffering a Vietnam flashback. Leroy Little was Gladson's roommate at the Veteran's Clinic in Knoxville. His testimony was presented at the postconviction relief hearing claiming he should have been presented as a witness at trial. The postconviction court allowed Little to testify to what he observed during Gladson's nightmares. However, Little was not allowed to conclude that Gladson was suffering a Vietnam flashback on the basis that Little did not have any specialized knowledge which would help him to make such a conclusion.

Courts have wide discretion in determining whether a lay opinion is based upon a sufficient foundation. State v. Gartin, 271 N.W.2d 902, 912 (Iowa 1979). We do not find an abuse of discretion in this instance.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Gladson also contends that his attorney in the 1986 criminal trial rendered ineffective assistance in several respects. When the appellate court reviews a claim of ineffective assistance of counsel on direct appeal, it makes an independent evaluation of the totality of the circumstances to determine if the defendant has met his burden to show that counsel failed to perform an essential duty, and that the defendant was prejudiced as a result. State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The applicant-petitioner must prove these elements by a preponderance of the evidence. Pettes v. State, 418 N.W.2d 53, 55 (Iowa 1988).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy was unsuccessful or that another attorney would have prepared and tried the case somewhat differently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Not every error in judgment nor every improvident trial tactic is evidence that counsel was ineffective. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980). The lawyer, at the outset, is presumed to be competent. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome

the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Id.

The ultimate standard is whether under the entire record and totality of the circumstances of counsel's performance was within the range of normal competency. Taylor v. State, 352 N.W.2d at 685.

When addressing the second component of a claim of ineffective assistance of counsel, prejudice, we require the person making the claim to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 697 (1984).

A. Failure to hire a ballistics expert

Gladson complains that his trial attorney failed to present adequate testimony from ballistics experts in an attempt to establish that he did not fire the fatal shot. We find that the testimony of the ballistics expert from

the postconviction hearing does not conclusively establish that Gladson did not kill McPherran. We find this testimony to be somewhat speculative and inconsistent with other testimony from trial so that this claim is insufficient to establish that the result of the trial court would have been different.

Attorney Owens testified that he had decided, as a matter of strategy, to concentrate the jury's attention on the posttraumatic stress syndrome defense. He indicated that he chose to do this because there was strong evidence placing Gladson at the scene of the crime, and the posttraumatic stress syndrome would be a defense to the premeditated, felony-murder, and aiding and abetting theories on the murder charge as well as to the robbery charges. The ballistics defense did not defend against the felony murder or aiding and abetting theories. Selection by an attorney of a primary theory of defense is a tactical matter which will not be disturbed if it appears to have been a conscientious, principled decision within the normal range of competency. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985).

Further, because Gladson was charged with felony-murder and with premeditated murder under an aiding and abetting theory, a "ballistics" defense would not have been very effective. Because of the aiding and abetting nature of the charge, as long as the jury found that Gladson was

participating in a felony, it is immaterial who fired the fatal shot. The defendant has failed to meet his burden on this issue.

B. Failure to Call to Eyewitnesses

Gladson also complains that his trial attorney failed to call two eyewitnesses, Lieutenant Harger and Doug Russell, who would have testified that they did not see Gladson fire any shots. Attorney Owen testified that he did not call these witnesses because it might confuse the jury and shift the focus from his primary defense and because Russell's statements were inconsistent.

The record reveals that while these witnesses did not see Gladson shoot, they also only witnessed part of the gun battle and their vision was partially obscured. Further, Lieutenant Harger's testimony came in when he was called as a witness for the state. Once again, as noted above, because of the nature of the charge, even if Gladson did not fire the fatal shot he could still be found guilty of felony-murder. We fail to find any deficiency in the attorney's performance by not calling these witnesses. We also fail to find any likelihood of prejudice.

C. Dum Dum Bullet Theory

Gladson asserts his trial attorney should have presented more effective rebuttal to the State's evidence that before the crime, Gladson had carved "x's" into his bullets to increase their destructive capacity. Evidence presented in the postconviction hearing indicated that

jurors relied on these alleged carvings to find criminal intent. In arguing that more effective rebuttal was possible, Gladson noted that a criminalist found no "x" on the fatal bullet and found only one bullet with an "x" (too shallow to affect firepower) on bullets seized from Gladson.

State's witness Pam Novak testified at trial that she saw Gladson carve into the tops of bullets with a knife before the crime. The State's expert explained at trial that there was no evidence that the fatal bullet had been "x'd." The testimony was presented to show Gladson's intent. The type of rebuttal which Gladson proposes would have been immaterial. We fail to find ineffectiveness on this issue.

D. Posttraumatic Stress Syndrome

Gladson complains that his trial attorney was ineffective in presenting his defense based on posttraumatic stress syndrome. Gladson asserts his attorney did not effectively examine his own expert on this subject because the attorney did not elicit testimony that Gladson's pre-Vietnam criminal difficulties, including drinking and brawling, were normal in Gladson's social milieu and did not represent pre-Vietnam psychopathology. Gladson also asserts that his attorney should have called additional witnesses on the subject of posttraumatic stress syndrome.

Attorney Owens presented the defense through a combination of cross-examination of the State's witnesses and the testimony of Dr. Erle Fitz, a psychiatrist who treated Gladson and diagnosed him as suffering from posttraumatic stress syndrome prior to the crime which is the subject of this action.

The prosecutor's cross-examination of Dr. Fitz elicited the effect of Gladson's criminal record on the diagnosis. Our review of the record indicates that the same testimony was elicited from Dr. Fitz at the postconviction hearing. Dr. Fitz's testimony at the postconviction hearing reasserts his diagnosis of posttraumatic stress syndrome and again rejects the theory that Gladson has an antisocial personality disorder. The similarity of the doctor's testimony on both occasions indicates that the handling of this witness would not likely affect the outcome.

Gladson also claims that Owen should have called additional witnesses to support the posttraumatic stress syndrome defense. Owens testified that he believed that it was clearly established that Gladson had suffered from posttraumatic stress syndrome to some extent. The question remained as to a causal connection between this disorder and the crime committed.

Charles Zimmerman was a counselor at the Veteran's Center in Knoxville. He is the one who referred Gladson to Dr. Fitz. Owens claims he did not call Zimmerman because his testimony would have been cumulative.

Leroy Little, Gladson's roommate at the Veteran's Center, testified at the postconviction hearing as to nightmares that Gladson had. Since Dr. Fitz testified as to Vietnam flashbacks, Pam and Donald Novak testified that Gladson was upset about Vietnam and Russell Zitek, another State's witness, specifically testified that Gladson had suffered a Vietnam flashback and described it in detail, Owens decided Little's testimony was also cumulative. We do not find Attorney Owens' failure to call Leroy Little to rise to a level of ineffective assistance.

E. Testimony of Dennis Lamar

Finally, Gladson asserts his trial attorney should have asked Gladson's co-defendant, Dennis Lamar, to testify at Gladson's trial. Gladson asserts that Lamar's testimony would have been favorable because Lamar testified at his own trial that the Hy-Vee robbery was solely Lamar's idea, and that Gladson was passed out from intoxication in the car while Lamar was committing the robbery. However, Gladson disregards other aspects of Lamar's testimony. Lamar testified that Gladson awoke in time to fire the fatal shot at the policeman. Lamar's testimony which casts these events as separate was an attempt to avoid being convicted on a felony-murder theory for a shooting that he alleged was actually performed by Gladson. We find that Lamar's testimony may actually have done more harm than good to Gladson's case. Therefore, we fail to find any deficiency in Attorney Owen's not incorporating the co-defendant's testimony.

Our review of the totality of the circumstances reveals that the defendant has failed to meet his burden to show that counsel failed to perform an essential duty, and that he was prejudiced as a result. We further fail to find an abuse of discretion in the postconviction court's exclusion of certain evidence from the hearing.

AFFIRMED.