

IN THE COURT OF APPEALS OF IOWA

No. 1999-477 (9-734) / 98-2174
Filed January 12, 2000

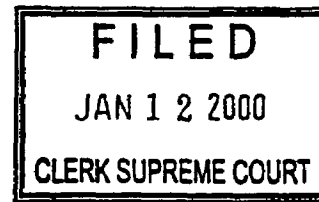
DAVID JEROME HART,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Clinton County, Mark Cleve, Judge.

David Jerome Hart appeals the district court's denial of his postconviction relief application. **AFFIRMED.**

Paul E. Pfeffer of Paul E. Pfeffer Law Office, Clinton, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer, and Miller, JJ.

ZIMMER, J.

David Jerome Hart appeals from the district court's denial of his application for postconviction relief alleging ineffective assistance of trial counsel. We affirm.

I. Background Facts and Proceedings. On October 23, 1992, Hart invited Michael James and James' girlfriend to spend the night at his apartment in Clinton, Iowa. The following morning, Hart discovered money missing and decided his overnight guests were responsible for the theft. In retaliation, Hart beat James and his companion with a baseball bat. James sustained facial lacerations, a scalp hematoma, a fractured lower fibula, and severe soft tissue injuries to his lower extremities. A dagger-sized splinter from the bat lodged in James' right arm. James and his girlfriend fled after the beating and James' girlfriend called the police. When officers arrived, they found James collapsed on the sidewalk near Hart's apartment and they transported him to a local hospital.

Police officers interviewed Hart at the scene. He admitted he had beaten James with a baseball bat, claiming James had stolen money from him. Hart described his actions as 'street justice.' An eyewitness corroborated Hart's admissions.

Meanwhile, around 11:00 a.m., an emergency room doctor examined James, whose condition appeared stable. A short time later, James was examined by Dr. Dale Wulf and Dr. Xerxes Colah. Despite the severity of the injuries, Dr. Wulf felt James' condition was quite good and no symptoms appeared life-threatening. Dr. Colah, an orthopedic surgeon, thought James was stable enough to be taken to surgery

for removal of the splinter from his arm. Because other patients at the hospital required immediate attention, James was given fluids, antibiotics, and oxygen and held in the emergency room to await surgery.

In the middle of the afternoon, James began exhibiting increasing agitation, mental confusion, and difficulty breathing. Additional tests, including a chest x-ray, were ordered. All three physicians who had treated James suspected he was suffering from some neurological disorder. As a result, James was transported by helicopter to the University of Iowa Hospitals in Iowa City where appropriate specialists, including neurosurgeons, were available.

After arriving in Iowa City, James underwent a procedure known as a fasciotomy on both legs and one arm. The operation was performed to relieve pressure on the nerves and arteries in his appendages caused by severe soft tissue swelling. James died shortly after 4:00 a.m. the following morning. An autopsy was performed by Dr. Daniel Vandersteen, a resident in pathology. The autopsy did not immediately reveal a cause of death; however, later microscopic analysis showed that James died from adult respiratory distress syndrome secondary to fat embolism syndrome caused by the soft tissue injuries he sustained when he was beaten.

Several physician witnesses gave testimony at trial concerning the cause and mechanism of fat embolism and adult respiratory distress syndromes. After trauma to large bones or surgery, microscopic globules (or emboli) of liquefied fat can enter the blood stream. Circulation of the blood carries the emboli to the lungs and other organs where they lodge in capillaries. Obstruction of the capillaries in the lungs can

interfere with the absorption of oxygen and produce adult respiratory distress syndrome. If too many capillaries are obstructed by emboli, the patient cannot get enough oxygen to survive. Agitation, mental confusion and difficult breathing are symptoms of fat embolism syndrome. Testimony indicated that not much can be done for a patient who develops this syndrome.

David Jerome Hart was found guilty of second-degree murder on April 8, 1993, following a jury trial. The district court sentenced him to a term of imprisonment not to exceed fifty years. The judgment and sentence were affirmed on direct appeal by this court in an unreported opinion, *State v. Hart*, No. 93-0901 (Iowa App. November 28, 1994). In the opinion, this court denied Hart's challenge to the sufficiency of the evidence supporting his conviction and determined he was not prejudiced by his trial counsel's failure to object to certain exhibits. A majority of the court stated the record supported submission of an intervening cause instruction based on the possibility that medical misdiagnosis could have caused James' death. However, Hart's claim his trial counsel was ineffective for failing to request an intervening cause instruction was preserved for postconviction relief. A dissenting opinion concluded there was no basis for such an instruction and would have resolved that issue adversely to Hart on direct appeal.

After his appeal was denied, Hart filed an application for postconviction relief, claiming his trial attorney was ineffective for failing to ask for a jury instruction on intervening and superseding cause. He contended his attorney should have argued

medical malpractice, in the form of the failure to diagnose fat embolism syndrome, was a superseding cause of James' death.

John Wolf, an attorney with over thirty years of experience in the criminal defense field, represented Hart at trial. The record reveals Wolf conducted extensive pre-trial research into the medical issues in this case. His preparation led him to conclude there was no medical evidence available to support an intervening cause instruction at trial. Following a thorough review of all of the medical evidence presented at trial, the district court agreed with defense counsel's assessment and denied Hart's application for postconviction relief. The court concluded there was not sufficient evidence to support an instruction on intervening cause based on misdiagnosis of fat embolism syndrome or inappropriate medical care, defense counsel's decision not to ask for an instruction on intervening cause did not constitute a failure of duty, and Hart suffered no prejudice from the lack of the instruction. The postconviction court also addressed the issue of whether "that portion of the opinion in the appeal of this case which addresses the sufficiency of evidence to support an intervening cause instruction constitutes the law of the case and thus [is] binding on this court." The district court concluded the discussion regarding the evidentiary support for an intervening cause instruction was dictum and therefore did not constitute binding law of the case. Hart appeals.

II. Scope of Review. Generally, an appeal from the denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997) (citations omitted). However, if the applicant raises

constitutional issues, we review “in light of the totality of the circumstances and the record upon which the postconviction court’s ruling was made.” *Id.* (quoting *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994)). This is equivalent to a de novo review. *Id.* (citing *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980)). Our review is de novo because Hart alleges a denial of his constitutional right to effective assistance of counsel. *See Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995) (citations omitted).

III. Ineffective Assistance of Counsel. To establish an ineffective assistance of counsel claim, the applicant must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *Irving*, 533 N.W.2d at 540. In proving the first prong, the postconviction applicant faces a strong presumption that the performance of counsel falls within the wide range of reasonable professional assistance. *See State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S.Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-94 (1984)). We will not second-guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The second prong of the test is satisfied if a reasonable probability exists that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Davis v. State*, 520 N.W.2d 319, 321 (Iowa App. 1994).

A. Law of the Case. Before addressing the merits of Hart’s ineffective assistance claim, we must consider an issue related to Hart’s direct appeal. Hart relies heavily on language in this court’s opinion in his direct appeal, in particular a statement that there was sufficient evidence at trial to support an instruction on

intervening cause. Although Hart does not specifically contend this statement constitutes the law of the case, his arguments imply that it was binding on the postconviction court.

The law of the case doctrine provides that when an appellate court determines an issue of law necessary to a decision in a prior appeal, that decision is controlling as to that issue in all further proceedings below and on appeal. *See Feller v. Scott County Civil Serv. Comm'n*, 482 N.W.2d 154, 158 (Iowa 1992) (citations omitted). However, the doctrine applies only to so much of the prior decision as was essential to determining the particular issue before the court. *Id.* at 159 (citations omitted). The doctrine does not apply to expressions of opinion on matters the disposition of which was not required, i.e., to dicta. *Id.*

After reviewing the law of the case doctrine, the postconviction court concluded the statement in question was dictum and not binding in later proceedings. We agree. In the context of this case, the question of the evidentiary support for an intervening cause instruction was not essential to the determination of any issue being adjudicated on direct appeal. The district court properly concluded “such sufficiency of the evidence question is subsumed in the issue of whether trial defense counsel rendered ineffective assistance in failing to request such an instruction.” The postconviction court was correct in concluding this discussion in our prior opinion was not binding in later proceedings.

B. The Merits. Hart contends his trial counsel rendered ineffective assistance in failing to request an intervening cause instruction at trial. Hart does not specify

which of the available instructions on superseding cause should have been requested.

We assume for purposes of this appeal that Hart argues for the instruction applicable

to criminal cases. *See* Iowa Uniform Criminal Jury Instruction 700.11 and comment.

The trial court would have had to decide whether to give the following instruction:

If you find that, in the treatment of the wounds, another was negligent to the extent that such negligence was the sole cause of death, then the acts of the defendant did not result in the death of Michael James.

Id.; *see also State v. Murray*, 512 N.W.2d 547, 550 (Iowa 1994) (“ordinarily negligent treatment or neglect of an injury will not excuse a wrong done unless the treatment or neglect was the sole cause of death”); *State v. Hubka*, 480 N.W.2d 867, 869 (Iowa 1992) (stating a defendant cannot escape criminal responsibility for homicide merely because factors other than his acts contributed to death, provided such other factors were not the sole proximate cause of death) (citations omitted).

A district court is not required to instruct on an issue that has no evidentiary support in the record. *State v. Pledka*, 555 N.W.2d 202, 214 (Iowa 1996) (citation omitted). We find no evidence in the record that medical negligence was the sole cause of death and thus no evidence to support a superseding cause instruction. *See Davis*, 520 N.W.2d at 322 (where cause of death is normal consequence of medical condition caused by wounds inflicted by a defendant, giving jury instruction regarding superseding cause would be erroneous). Hart’s trial counsel testified at the postconviction hearing that he had wanted to argue James’ death had been the result of inadequate medical care. He conducted an extensive pre-trial investigation and researched the medical issues in this case. He deposed the Clinton physicians who

treated James, as well as two of the physicians from the University of Iowa Hospitals. He also arranged for a consultation and file review by a friend who was a retired surgeon. Wolf could not find any physician who would say that James' death was the result of improper medical treatment or that James could have been saved if his doctors had done something differently. Wolf concluded that once the beating had taken place, the fatal damage had been done and no medical intervention would have prevented death. He thought it would be frivolous to ask for an instruction on superseding cause without medical evidence. The postconviction court agreed with defense counsel's assessment that the trial record did not support giving an intervening cause instruction based upon medical malpractice. We agree with the district court's conclusion.

Hart's trial counsel had no duty to submit a meritless request for an instruction. *See Brewer v. State*, 444 N.W.2d 77, 85 (Iowa 1989) (counsel need not urge every possible instruction to display competency); *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (counsel not ineffective for failing to pursue meritless issue); *State v. Ceasar*, 585 N.W.2d 192, 195 (Iowa 1998). The record does not disclose evidence of medical negligence. No witness would testify that James would have survived if his physicians had done something differently or that anyone other than Hart did anything which contributed to James' death. We also conclude Hart suffered no prejudice from his counsel's failure to ask for an instruction which the court could not give. *See Davis*, 520 N.W.2d at 322; *see also State v. Martens*, 569 N.W.2d 482, 487

(Iowa 1997) (finding no prejudice resulted from counsel's failure to request jury instruction that had no legal basis).

IV. Conclusion. We have considered all claims raised by Hart in support of his application for postconviction relief. We affirm the district court's denial of postconviction relief.

AFFIRMED.

Miller, J., concurs; Sackett, C.J. specially concurs.

SACKETT, C.J. (specially concurs)

I too would affirm. I concur with the result reached by the majority. I disagree on one issue. I would find the law of the case of *State v. Hart*, No. 93-0901 slip op. at 6 (Iowa Ct. App. November 29, 1996) is that there is evidence to support the submission of the instruction on intervening cause. In *State v. Hart*, we stated:

The evidence supported the submission of an intervening cause instruction. We cannot, however, determine on this record defendant's attorney was not competent in failing to request the instruction. We reserve this issue for postconviction relief.

State v. Hart, No. 93-0901 slip op. at 6. That finding was essential to our decision to reserve for postconviction proceeding the issue of defense counsel's ineffective representation in failing to request the instruction.

I concur with the majority because Hart does not contend on appeal that we should apply the law of the case.