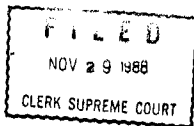


IN THE COURT OF APPEALS OF IOWA

MARK HARRINGTON,)
Petitioner-Appellant,)
vs.)
STATE OF IOWA,)
Respondent-Appellee.)



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8-197
87-693

Appeal from the Iowa District Court for Woodbury County
(93857), Dewie J. Gaul, Judge.

Defendant appeals the denial of his application for
postconviction relief after a jury found him guilty of
second-degree murder and willful injury. **AFFIRMED.**

Timothy T. Jarman of Baron, Sar, Wenell, Lohr & Jarman,
Sioux City, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark J.
Zbieroski, Assistant Attorney General, for
respondent-appellee.

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

SCHLEGEL, J.

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Defendant appeals the denial of his application for postconviction relief after a jury found him guilty of second-degree murder and willful injury. Defendant contends that the district court erred in denying his motion to disqualify the judges of the Third Judicial District from hearing his postconviction action because all but one of the judges had served with or under Chief Judge James P. Kelley, whose alleged misconduct was a major element of the defendant's action. He also contends that he was prejudiced during his criminal trial by judicial misconduct, prosecutorial misconduct, and ineffective assistance of counsel.

Proceedings for postconviction review are special proceedings treated as an action at law triable to the court, and ordinarily in such proceedings our review is not de novo. In this case, however, constitutional issues have been raised, and we therefore make an independent evaluation of the totality of the circumstances. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). The burden of proof in postconviction relief actions such as these is upon the petitioner, who is required to establish the facts by a preponderance of the evidence. We affirm the trial court.

Following a guilty verdict in a jury trial, defendant Mark Harrington was sentenced for imprisonment for twenty-five years for second-degree murder and ten years

for willful injury. He applied for postconviction relief pursuant to Iowa Code chapter 663A, but this relief was denied. We consider Harrington's claims in the order presented.

I. Harrington first claims that the trial court erred in failing to disqualify the judges of the Third Judicial District from hearing this postconviction relief action.

On January 6, 1987, Harrington filed a "Motion to Disqualify the Judges of the Third Judicial District." In support of this motion Harrington alleged that, since the presiding judge at the underlying trial was the Honorable James P. Kelley, and since Judge Kelley was being accused of judicial misconduct, all judges from that district should be disqualified from hearing his application for relief. Harrington further argued that recusal was necessary because of the natural relationship between judges of the same district who serve with and under the chief judge. The court overruled Harrington's motion. The court, noting that Judge Kelley had been retired for almost two years, stated that, according to Iowa case law, the ordinary results of business and social relations are not the type of situation which gives rise to reasonable questioning of a judge's impartiality. See State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976).

We agree with the trial court's ruling. Nothing in this record indicates that this judge or any other judges

of the Third Judicial District were in any way personally biased or prejudiced against the defendant. The burden is upon an affiant to establish the basis for disqualification upon claimed personal bias by allegations of fact, not conclusions or frivolous assertions. See Smith, 242 at 324.

We see no merit to this claim.

II. Harrington next claims that the trial court erred in failing to find that he was prejudiced during the underlying criminal trial by judicial misconduct. He urges that the presiding judge, Chief Judge James P. Kelley, showed impatience and bias against the defendant and indifference to his rights.

A fair trial in a fair tribunal is a basic requirement of constitutional due process. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942, 946 (1955). A presiding judge should not only be fair and impartial, he must conduct himself in the trial to constantly manifest those qualities. A trial judge should project "that atmosphere of austerity which should especially dominate a criminal trial and which is indispensable for an appropriate sense of responsibility on the part of court, counsel and jury." State v. Larmond, 244 N.W.2d 233, 235-36 (Iowa 1976) (citing Offutt v. United States, 348 U.S. 11, 17, 75 S. Ct. 11, 15, 99 L.Ed. 11, 18 (1954)).

Harrington includes in his brief the following facts in support of his claim:

1. During pretrial proceedings on May 28, 1982, the court "grudgingly" allowed oral argument from the defendant's attorney while encouraging him to be brief. Furthermore, Harrington claims, the court interrupted the defendant's attorney on numerous occasions and, in at least two instances, the court appeared to "belittle or challenge the seriousness" of defense counsel's arguments.

2. During jury voir dire, the court interrupted the defense counsel's questioning of prospective jurors on numerous occasions. Harrington further claims that "[a]t one point, the court's interruption bordered on ridicule of the defense counsel," and the court specifically restricted the defendant's right to examine jurors.

3 During the course of one witness's testimony, the court interrupted an objection by the defense counsel before he completed the objection and allowed the prosecutor to continue to lead the witness. Harrington also claims that the court improperly restricted that same witness's cross-examination and made a comment to the attorneys in front of the jury that he was no longer taking notes in regard to the cross-examination.

4. Harrington further claims that the trial judge further showed his predisposition against the defense by initially sustaining an objection that the court

later admitted was improper, refused defense counsel's attempt to resolve a matter of law during a witness's testimony, continued to improperly allow the prosecution to ask leading questions of a witness, failed to give a ruling in response to defense counsel's objection, allowed improper questioning for the purpose of time economy, refused to allow the showing of a videotape and initially sustained a motion in limine by the State to keep out a note written by the defendant but later allowed the note to be utilized in evidence by the State.

5. Harrington also complains of the "body expressions" by the judge during the trial, which included closing his eyes, "laying" back in his chair, and failing, on occasion, to take notes during the defense's case.

On the record before us, we cannot say that the trial court's actions amounted to reversible error. In so holding, we take note of the language of the Iowa Supreme Court in State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980) which stated:

The presiding judge is not a mere functionary present only to preserve order and lend ceremonial dignity to the proceedings. We have previously said that the judge's role is not restricted to the functions of an umpire or referee in a contest between opposing parties or counsel. We have declared that a trial judge has the duty to control and conduct its court in an orderly, dignified and proper manner. State v. Harris, 222 N.W.2d 462, 465 (Iowa 1974); Schroedl v. McTague, 169 N.W.2d 860, 867 (Iowa 1969). In fulfilling its role, occasions will arise when a trial judge is constrained to intervene on its

own volition to protect a witness from abusive treatment or unnecessary humiliation, to stay the pursuit of a patently irrelevant line of inquiry--particularly when it may obfuscate the issues and mislead the jury, to act to avert unnecessary repetition, to require that the proceedings move forward without undue delay and to take reasonable measures to insure that the evidence is intelligibly presented to the jury.

We believe, in the case at bar, that the trial court's actions were, for the most part, reasonable to facilitate the orderly presentation of evidence and creation of a comprehensible record. See Cuevas, 288 N.W.2d at 531.

While we do not condone those instances of the court's behavior that indicated some impatience and lack of interest, we note that at the postconviction hearing, the defense counsel himself failed to admit that such behavior indicated a biased attitude towards the defendant:

Q: And you mentioned that you felt his tone indicated some--would it be correct to say a biased attitude against the defendant or against this case?

A: I hesitate to say that it indicated a biased attitude towards Mr. Harrington, because I tried several cases in front of Judge Kelley--I mean, I must honestly say that Judge Kelley had a manner about him that indicated a lack of patience.

Furthermore, defense counsel offered an explanation as to the judge's apparent lack of interest and its effect on the jury:

I, let's say, have tried so many cases with Judge Kelley that it was not uncommon for him to close his eyes, because he had--he had an eye problem, that he would rest his eyes and appear to be going to sleep. And I could remember even in this trial many occasions wondering whether or not the jury would get an adverse message concerning that when I had some witnesses on.

I can only tell you that having talked to the jurors after trial, it was my impression that they were not happy with the way the defense was treated. And it was also my impression--and again this is only my impression--that the jurors, as a result, gave us the benefit of the doubt on a lot of those witnesses.

So it might have even somewhat worked to our advantage. . . .

We affirm the trial court's ruling on this issue.

III. Harrington further contends that the trial court erred in failing to find that prosecutorial misconduct prevented him from obtaining a fair trial. In order to prevail on this issue, Harrington must show both the misconduct and the prejudice caused by it. State v. Ruble, 372 N.W.2d 216, 218 (Iowa 1985). The record is devoid of such evidence. The trial court found, and we agree, that the record fails to show the prosecution's conduct amounted to intimidation or "prepping" of witnesses.

IV. Harrington finally contends that he was denied effective assistance of counsel on the following grounds: 1) a conflict of interest existed because his trial attorney had at one time represented the parents of the murder victim in a civil matter; 2) the trial counsel was, at the time of trial, a candidate for Chief Public Defender and the presiding judge had a part in the selection process; 3) trial counsel was intimidated by the judge; and 4) appellate counsel failed to raise the issues of jury misconduct, prejudicial photographs, judicial misconduct

and ineffective assistance of trial counsel' on direct appeal.

In order to establish ineffective assistance of counsel, a criminal defendant must demonstrate by a preponderance of the evidence that 1) counsel failed to perform an essential duty, and 2) the defendant was prejudiced by that failure. Mott v. State, 407 N.W.2d 581, 582 (Iowa 1987). The ultimate test is whether under the entire record and totality of circumstances counsel's performance was within the normal range of competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The defendant has failed to meet his burden. Other than generalized allegations, defendant fails to demonstrate that he was prejudiced in any way by either the trial or appellate counsel's actions or inactions.

Upon our review of the totality of the circumstances as evidenced by the entire record, we find no abuse of judicial discretion on the part of the trial court in refusing defendant's application for postconviction relief. The ruling and judgment of the trial court is therefore affirmed.

AFFIRMED.