IN THE COURT OF APPEALS OF IOWA

000315

No. 8-037 / 97-857

FILED
MAR 27 1998
CLERK SUPREME COURT

ERIC QUERREY,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Lucas County, Gary G. Kimes, Judge.

Eric Querrey appeals the denial of his application for postconviction relief which challenged his conviction for first-degree murder. **AFFIRMED.**

Monty W. Franklin, Humeston, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Paul Goldsmith, County Attorney, for appellee.

Considered en banc. Streit, J., takes no part.

PER CURIAM

Eric Querrey appeals the district court's denial of his application for postconviction relief. Querrey contends he was denied effective assistance of trial counsel. We affirm on appeal.

Querrey was charged with first-degree murder for the shooting death of Stacey Halferty in April 1991. Querrey was a juvenile at the time of the crime, but was tried as an adult. Prior to the trial, the prosecutor offered to allow Querrey to plead guilty to second-degree murder. Querrey refused to admit guilt and turned down the offer.

During the trial, Querrey's attorneys discussed entering an *Alford* plea[1], which would not have involved an admission of guilt. Querrey indicated he would agree to enter an *Alford* plea to second-degree murder. This was communicated to the prosecutor, who refused to accept an *Alford* plea. The trial proceeded, and Querrey was convicted of first-degree murder. We affirmed the conviction on appeal. *State v. Querrey,* No. 92-0076 (Iowa App. Sept. 2, 1993).

Querrey filed an application for postconviction relief, claiming he received ineffective assistance of trial counsel. The district court denied his request for postconviction relief. Querrey now appeals.

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[1] In the case of *North Carolina v. Alford,* 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 171 (1970), the United States Supreme Court set forth a procedure whereby a defendant can enter a plea of guilty without actually admitting guilt.

To establish a claim of ineffective assistance of counsel, Querrey must show (1) his attorney failed to perform an essential duty; and (2) prejudice resulted to the extent it deprived him a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996). Representation by counsel is presumed competent, and Querrey has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Id.*

Querrey contends he received ineffective assistance because his trial counsel failed to adequately explain an *Alford* plea prior to the trial. He states he would have considered entering an *Alford* plea to second-degree murder prior to the trial if he had understood it did not involve an admission of guilt. Querrey believes there was a better chance the prosecutor would have accepted the plea if it had been offered before the trial commenced.

Querrey testified that prior to trial his attorneys did discuss an *Alford* plea with him:

> Q. What did they tell you about that?
> A. I'm not quite sure. They just said, you know, that there was maybe a chance -- they didn't know for sure. If I could go in, you know, and take the second degree without actually admitting that I did it.

We determine Querrey has failed to show he received ineffective assistance of trial counsel. Querrey has not shown the prosecutor was ever willing to accept an *Alford* plea to second-degree murder. In addition, there was no evidence such a plea

agreement, if made, would have been acceptable to the court. For this reason, Querrey has failed to show he was prejudiced by the conduct of his trial counsel.

We affirm the decision of the district court denying Querrey's application for postconviction relief. Costs of this appeal are assessed to Querrey.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I dissent. The question is whether Querrey's trial attorney was incompetent in failing to advise his client prior to trial that Querrey could plead guilty to second-degree murder without admitting guilt. Querrey had rejected the prosecutor's offer of a plea to second-degree murder because he would have to admit he shot the victim on purpose and he was unwilling to make the statement because he contended it was not truthful.

A plea of guilty without an admission of guilt is recognized. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *see also Farley v. Glanton*, 280 N.W.2d 411, 416 (Iowa 1979). It is commonly referred to as an *Alford* plea.

The record reflects that information about an *Alford* plea was only made available to Querrey after the trial had commenced and Querrey's trial attorney determined it was going well for the prosecution. At that time, his trial attorney again went over his story with him and determined Querrey could not recite a factual basis for a plea to second-degree murder. After Querrey was told during trial he could plead to second-degree murder without making up a story about shooting the victim, he agreed to enter an *Alford* plea to second-degree murder. The offer was made to the prosecutor, who at that juncture rejected it.

I believe Querrey's trial attorney was not effective in failing to advise him he could enter an *Alford* plea at the time the plea bargain was initially offered and the

attorney learned Querrey would not plead guilty because he could not truthfully admit he shot the victim on purpose.

Querrey was twenty-six days beyond his fifteenth birthday when he allegedly shot and killed Stacey Halferty. Querrey was below average in his academic progress. He was a freshman at an Iowa high school.

Querrey was examined extensively by a psychologist, John Garfield, who found Querrey compliant and cooperative. He found Querrey's behavior controlled and found him to be nonaggressive, nonassaultive, and nonoppositional. Considering Querrey's age and lack of life experiences, he would have no knowledge of the availability of an *Alford* plea.

A careful review of the State's case showed at the time the plea offer was first made Querrey faced the possibility of being convicted of first-degree murder and the probability of at least being convicted for second-degree murder. My reading of the trial attorney's notes further convinces me Querrey would have considered the plea earlier had he been advised of the entry of an *Alford* plea.

The next question is whether, but for the trial attorney's failure, the result would have been different. I recognize there is no evidence the prosecutor would have accepted the *Alford* plea prior to the commencement of trial; there also is no evidence the prosecutor would not have. However, the notes of Querrey's trial attorney relate that at the time the *Alford* plea was finally offered the trial was going well for the State. The notes further indicate this fact motivated Querrey's trial

attorney to push very hard to get Querrey to plead. This record convinces me Querrey has shown, but for the failure to advise him of the availability of an *Alford* plea, there is a reasonable probability the outcome would have been different and he would have been allowed to plead to second-degree murder. Querrey should be granted the requested new trial.