

IN THE COURT OF APPEALS OF IOWA

No. 2-339 / 91-1379

FILED

SEP 29 1992

CLERK SUPREME COURT

JERRY DEAN BROUGHTON,

Appellant,

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vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Lucas County,
Darrell J. Goodhue, Judge.

The applicant, Jerry Dean Broughton, appeals the district court's denial of his application for postconviction relief challenging his conviction of first-degree murder. **AFFIRMED.**

Monty W. Franklin, Humeston, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, and Paul M Goldsmith, County Attorney, for appellee.

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

SCHLEGEL, J.

The applicant, Jerry Dean Broughton, appeals the district court's denial of his application for postconviction relief challenging his conviction of first-degree murder. Broughton contends he was denied effective assistance of trial counsel by counsel's failure to object to certain evidence as inadmissible evidence of other crimes or bad acts, by counsel's failure to obtain an alcohol evaluation or to present expert testimony explaining the effects of alcohol, and by counsel's presentation of witness testimony which supported the State's case. In addition, Broughton claims he was denied effective assistance of appellate counsel by appellate counsel's failure to raise these issues on direct appeal.

Broughton was convicted of first-degree murder in connection with a shotgun killing resulting from a robbery committed by Michael Followill, Dennis Broughton and Jerry Broughton. Broughton's first conviction for this offense was reversed and remanded for a new trial. See State v. Broughton, 425 N.W.2d 48 (Iowa 1988). Upon remand Broughton was convicted of first-degree murder following a jury trial, and he was sentenced to life imprisonment. He appealed his second conviction and assigned two errors, ineffective assistance of counsel and admission of irrelevant evidence. The supreme court affirmed Broughton's conviction in State v. Broughton, 450 N.W.2d 874 (Iowa 1990).

Broughton filed an application for postconviction relief on December 18, 1990, pursuant to Iowa Code chapter 663A challenging the first-degree murder conviction. The district court denied Broughton's application in an order filed August 16, 1991. Broughton has filed this appeal.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In order for the applicant to prevail, the record must indicate: (1) counsel failed to perform an essential duty and (2) prejudice resulted

therefrom. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

In light of the State's specific adverse evidence linking Broughton to the robbery and murder of the victim, Broughton's trial counsel's defense strategy was to attack the credibility of the alleged accomplices and submit evidence indicating Followill had killed the victim. Specifically, the defense strategy sought to show: (1) Followill and Dennis Broughton were the only persons involved in the crimes; (2) Jerry was outside the home in which the victim was murdered and was not involved in the robbery or murder; (3) Followill was the shooter; and (4) Dennis and Followill were attempting to incriminate Jerry as the "trigger man." Additionally, trial counsel invoked the defenses of alibi and diminished capacity by intoxication.

By attempting to raise a reasonable doubt that Broughton had knowledge of or was involved in the murder and robbery, trial counsel believed the jury might acquit Broughton by concluding he was not the shooter and had not aided and abetted the other two men in the crimes. In the alternative, trial counsel thought this evidence might lead the jury to convict Broughton of a lesser charge since this evidence tended to indicate Broughton was not the shooter. The jury was instructed upon the lesser-included offenses of second-degree murder, voluntary manslaughter, involuntary manslaughter, and aiding and abetting.

Selection of the theory or theories of defense is a tactical decision for trial counsel, subject to attack only if wholly unreasonable and the cause of prejudice such that there is a reasonable probability of a different outcome if counsel had made a different choice. See Schrier v. State, 347 N.W.2d 657, 663 (Iowa 1984). This rule also applies when the theories chosen are inconsistent or result in some tension between them. State v. Losee, 354 N.W.2d 239, 243-44 (Iowa 1984). Counsel's selection of a reasonable defense theory will not be found to be incompetent merely because it was unsuccessful. See State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984).

Broughton contends he was denied effective assistance of trial counsel by counsel's failure to object to Followill's testimony that he, Dennis, and Jerry had committed prior crimes on a regular basis and had done so prior to the murder on that same day. At the postconviction relief hearing, trial counsel testified he chose not to object to this evidence because it illustrated the questionable characters of Followill and Dennis, indicating the two men were capable of murdering the victim. We recognize the counsel's allowance of this evidence also tended to implicate Broughton. However, counsel's decision was consistent with his defense strategy of attacking the credibility of the alleged accomplices and offering evidence which indicated Followill had killed the victim.

Broughton also complains of counsel's failure to object to prosecution witness Alice Followill's testimony that Broughton had once threatened to kill her and her husband and that she took the threat seriously because she believed Broughton had killed someone in the past. Trial counsel testified at the postconviction relief hearing he allowed this evidence to be presented so other evidence could then be submitted to discredit Alice's testimony. In addition, counsel stated an objection would have emphasized the testimony to the jury. The supreme court has recognized such a reason for not objecting to evidence may be a legitimate tactical decision. See State v. Williams, 334 N.W.2d 742, 745 (Iowa 1983).

Next, Broughton contends his counsel's presentation of the testimony of David Gullig and Katherine Lundy supported the State's case. Gullig's deposition testimony supports the defense theory that although all three men were involved in the incident, Jerry stood outside the victim's home while the other two men robbed the victim and while Followill murdered the victim. Similarly, Lundy testified Dennis had informed her that Followill "came out of the house with the shotgun and he handed the shotgun to [applicant] and [applicant] wiped it off and threw it away." This evidence further supports counsel's defense theory. Moreover, the record indicates trial counsel warned Broughton of the potential negative impact of this evidence upon the defense theories and Broughton wanted to present the testimony of Gullig and Lundy.

Having reviewed the record, we find the remainder of Broughton's claims without merit as well. The record fails to support Broughton's ineffective assistance of trial counsel claim and, therefore, necessarily fails to demonstrate ineffective assistance of appellate counsel. Trial counsel's actions and inactions were the result of reasonable tactical or strategic decisions within the scope of normal competency. Furthermore, the record is absent a reasonable probability of a different outcome if counsel had made different decisions regarding strategy. This is especially true in light of the State's evidence which included an audio-taped conversation between Dennis and Jerry Broughton in which Jerry admitted shooting the victim.

Accordingly, we affirm the district court's denial of Jerry's application for postconviction relief.

AFFIRMED.