IN THE COURT OF APPEALS OF IOWA

No. 2-115 / 90-1837

FILED
MAY 28 1992
CLERK SUPREME COURT

MICHAEL LAVERNE MARIT,

Appellant,

vs.

664

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

The appellant appeals a judgment of the district court denying his application for postconviction relief on the grounds of ineffective assistance of counsel. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

FACTS

Appellant, Michael Marit, and a co-defendant, Mark Sauls, were jointly charged by trial information with first-degree murder and fourth-degree theft. A jury convicted the men on both counts. The Iowa Supreme Court subsequently reversed the convictions on the ground that the joint trial was unfair as each defendant claimed innocence and accused the other. See State v. Sauls, 356 N.W.2d 516 (Iowa 1984). The State subsequently retried the two men in separate, but simultaneous, trials. Marit was ultimately convicted of first-degree murder, and Sauls was convicted of second-degree murder.

Marit appealed the conviction. This court affirmed Marit's conviction, reserving his right to raise issues of ineffective assistance in a postconviction relief action. Saul's conviction was affirmed by the supreme court. See State v. Sauls, 391 N.W.2d 239 (Iowa 1986). Marit subsequently filed the present action for postconviction relief.

Marit claims the trial court erred in including the felony-murder rule in the marshalling instruction for second-degree murder. He argues the felony-murder rule applies only to first-degree murder. See Iowa Code § 707.2(2) (1991). Marit maintains the judge attempted to incorporate the joint criminal conduct rule into the instruction on second-degree murder.

Marit asserts his trial attorney rendered ineffective assistance by failing to attack the marshalling instruction on second-degree murder. Following an evidentiary hearing, the district court denied the application and upheld the conviction. Marit has appealed. We affirm.

SCOPE OF REVIEW

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980) (citation omitted). 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. (citations omitted).

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted, to the extent 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, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984); see Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989); State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. 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." Id. 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). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

ANALYSIS

The district court held Marit did not receive ineffective assistance of counsel where his attorney did not draw attention to the marshalling instruction for second-degree murder.

The appellee correctly states that postconviction proceedings are inappropriate for the presentation of issues which have not been properly preserved. Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981). Although appellant's trial counsel did not raise the claim which appellant now presents, he is not barred from seeking its review on postconviction. We find ineffectiveness of

counsel is "sufficient reason" for not having raised the issue earlier. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984) (citation omitted).

I. Breach of Essential Duty.

The trial court instructed the jury it could find Marit guilty of second-degree murder on a finding of facts that could only constitute first-degree felony murder. The second-degree murder jury instruction (Jury Instruction #30) read as follows:

> Before defendant, Michael Laverne Marit, can be found guilty of the crime of Murder in the Second Degree . . . the State must establish by the evidence beyond a reasonable doubt each of the following three numbered propositions:
>
> 1. That on or about December 13, 1982, in Scott County, Iowa, this defendant did unlawfully stab, or did aid and abet another in the unlawful stabbing of Steven Wayne Estabrook, Sr.;
>
> or
>
> That this defendant did act in consort (sic) with and **knowingly participate in the commission of a forcible felony with another**, that on or about December 13, 1982, in Scott County, Iowa, Steven Wayne Estabrook, Sr., was unlawfully stabbed, and that such stabbing could reasonably have been expected to be done in the furtherance of the commission of that offense.
>
> 2. That Steven Wayne Estabrook, Sr., died as a result of being so stabbed.
>
> 3. That the stabbing was done with malice aforethought.
>
> * * * *

(emphasis added).

The Iowa Code defines first-degree felony murder as the killing of another person while participating in a forcible felony. Iowa Code §707.2(2) (1992). The trial court instructed the jury that if it found Marit knowingly participated in the commission of a forcible felony during which Steven Estabrook was stabbed to death, then it should find Marit guilty of second-degree murder. There is virtually little, if any, distinction between the definition of first-degree felony murder and the second-degree murder jury instruction the trial court used.

Appellant concedes the jury should not have been allowed to consider Marit's guilt of second-degree murder under the challenged instruction. Nevertheless, appellant contends the instruction did not go far enough and that his attorney was ineffective in not attacking it.

Appellant's claim rests on the fact that the first-degree felony murder instruction (Jury Instruction #29) included the words "by another" which the second-degree murder instruction (Jury Instruction #30) did not contain. The pertinent part of the first-degree felony murder instruction read as follows:

> 3. That the stabbing by this defendant or another was done with malice aforethought, willfully, deliberately, premeditatedly and with specific intent to kill Steven Wayne Estabrook, Sr.;
>
> or
>
> That such stabbing of Steven Wayne Estabrook, Sr., was done with malice aforethought by this defendant while participating in the forcible felony of Robbery;
>
> or

> That such stabbing of Steven Wayne Estabrook, Sr., was done with malice aforethought by another while participating in the forcible felony Robbery and that this defendant did aid and abet the other in participating in the forcible felony Robbery.
>
> * * * *

(emphasis added).

Appellant maintains that if the jury found Sauls was the stabber, and if it found Marit was participating with Sauls in a forcible felony, then the instructions told the jury more explicitly to find first-degree murder than second-degree murder. We reject this contention. Marit was not entitled to a second-degree "felony" murder instruction. In fact, the law does not recognize second-degree "felony" murder.

We believe felony murder applies only under first-degree murder. If the state proved Sauls murdered Estabrook in the course of robbing him and that Marit participated in the robbery, then Marit was guilty of first-degree felony murder. We hold Marit was not entitled to the second-degree "felony" murder instruction. We further find Marit was not prejudiced by the court's omission of the words "by another".

Furthermore, the second-degree murder instruction was more favorable to Marit than the first-degree murder instruction. The second-degree murder instruction did not specify who the stabber had to be. Consequently, the second-degree murder instruction allowed a lesser verdict even if Marit was found to be the principal. This is so

for if a defendant acts in concert with another and participates in a forcible felony during which either he or another person stabs the victim to death with malice, he is guilty of first-degree felony murder. State v. Ragland, 420 N.W.2d 791, 793 (1988). The challenged instruction allowed the jury to convict Marit of second-degree murder based upon facts and elements comprising first-degree felony murder.

We hold Marit's counsel did not fail to perform an essential duty. Therefore, Marit is not entitled to postconviction relief.

II. Prejudice.

In Part I., we held Marit's attorney did not fail to perform an essential duty. Therefore, technically we do not need to address the second prong of prejudice. Nevertheless, we hold Marit has failed to show prejudice resulted. We are unable to find to a reasonable probability that, but for the error in the second-degree murder instruction, Marit would not have been convicted.

CONCLUSION

We are unable to conclude Marit's trial counsel provided ineffective assistance in failing to call attention to the second-degree "felony" murder instruction.

After considering all issues presented, we affirm the district court's denial of postconviction relief.

Costs of this appeal are assessed to the appellant.

AFFIRMED.