IN THE COURT OF APPEALS OF IOWA

No. 0-810 / 00-316
Filed February 7, 2001

CLIFFORD J. KINSEL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Applicant appeals from the district court ruling denying his application for postconviction relief. **AFFIRMED.**

Amy L. Evenson of Larson & Evenson, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Clifford Kinsel appeals from the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings. Clifford Kinsel was convicted of second-degree murder by a jury after he drove his pick-up truck down a sidewalk in Waterloo, Iowa and struck and killed Herlie Johnson, Jr. He was sentenced to a term of incarceration not to exceed fifty years.

The incident that led to Kinsel's arrest and conviction occurred during the early morning hours of August 18, 1993. Kinsel was driving his truck in an area of Waterloo known for prostitution. Kinsel solicited a prostitute, Sonya Harmon, to perform sex acts with him. He informed Harmon he had only $14.45 with him. Harmon agreed to perform a sex act and Kinsel parked his truck in a parking lot. Harmon testified she engaged in vaginal intercourse with Kinsel, but stopped before Kinsel ejaculated. She dressed and left. At trial, Kinsel claimed Harmon accepted his money and told him she needed to go to the bathroom prior to engaging in a sex act. Kinsel claimed Harmon then ran away with his money.

Shortly after Kinsel and Harmon parted company, witnesses observed Harmon walking along a street looking nervously over her shoulder. Witnesses then saw Kinsel pull his pick-up into the entrance of a parking lot and block Harmon's path. They also heard Kinsel threaten Harmon by yelling, "Bitch, I'm going to get you." Harmon walked around Kinsel's truck and continued walking down the street.

A short time later, witnesses observed Kinsel driving toward an area where Harmon and Herlie Johnson were standing. Kinsel made a quick U-turn,

jumped the curb, and drove his truck down the sidewalk toward Harmon and Johnson. Harmon jumped from the path of the approaching truck. However, Johnson was struck by the pick-up as it accelerated down the sidewalk. Kinsel made no attempt to swerve or brake his truck. Eyewitnesses and investigators estimated the truck was traveling twenty-five – thirty-five m.p.h. down the sidewalk. Kinsel left the scene without stopping after striking Johnson.

Kinsel appealed his conviction. This court affirmed his conviction in a decision filed February 2, 1996 and reported at *State v. Kinsel,* 545 N.W.2d 885 (Iowa Ct. App. 1996). Kinsel's claim that his trial counsel was ineffective in failing to request a jury instruction on voluntary manslaughter was preserved for a postconviction proceeding.

Kinsel subsequently filed an application for postconviction relief alleging his trial counsel failed to perform an essential duty by failing to request an instruction on voluntary manslaughter. The district court denied the application, concluding Kinsel did not establish his trial counsel was ineffective or show prejudice.

Kinsel appeals. He continues to contend his trial court counsel was ineffective for failing to request a jury instruction on the lesser included offense of voluntary manslaughter.

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 circumstances of 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 *Hinkel v. State*, 290 N.W.2d 28, 39 (Iowa 1980)). Our review is de novo because Kinsel 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. Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdall*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 566 U.S.668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed. 2d 674, 699 (1984)). 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 a 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) (1994)). 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 Ct. App. 1994).

IV. The Merits. Kinsel contends his trial counsel failed to perform an essential duty when they failed to request a jury instruction for the offense of involuntary manslaughter. Attorneys David Correll and Kevin Engels represented

Kinsel at trial. Correll was lead counsel. Correll had twenty-three years of experience at the time of Kinsel's trial, including seven years service as the Black Hawk County attorney. He had prosecuted approximately twenty Class "A" felonies. After entering the private practice in 1983, he continued to practice in the criminal law area and had defended numerous criminal cases, including three or four murder cases before being appointed as Kinsel's attorney. Engels had been in practice approximately five years at the time of Kinsel's trial. Correll's preparation of Kinsel's case included employing a private investigator who had significant prior experience as a police officer, employing an accident re-constructionist, and presenting the case in mock trial fashion to a jury of four prior to trial.

Kinsel's counsel kept him fully informed of their investigation of the case and the legal theories under which a defense might be presented.

Following Herlie Johnson's death, Kinsel told police that a prostitute had taken his money and fled and that he had not intended kill anyone and did not realize that he had done so. The defense strategy was to seek a verdict consistent with Kinsel's story, and his anticipated testimony, that he had not killed Johnson intentionally. Correll hoped for a verdict of involuntary manslaughter based on the theory Kinsel struck Johnson with his truck, in a manner likely to cause death or serious injury, and in doing so unintentionally caused Johnson's death.

The record reveals that Kinsel and his attorneys specifically discussed whether to ask for an additional instruction on voluntary manslaughter. A strategic decision was made to try and avoid a voluntary manslaughter

instruction and to include a homicide by vehicle instruction based on the theory that Kinsel had unintentionally caused Johnson's death by driving his truck in a reckless manner. Although voluntary manslaughter and homicide by vehicle carry the same penalty, Correll considered homicide by vehicle a more plausible verdict because it fit the facts of the case and was consistent with Kinsel's statement and his expected testimony that he had not intended to kill or injure anyone.

A person commits the offense of voluntary manslaughter when that person:

> causes the death of another person, under circumstances which would otherwise be murder, if the person causing the death acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

Iowa Code § 707.4 (1993). By statute, voluntary manslaughter is an included offense under a charge of first or second-degree murder. Iowa Code § 707.4 (1993). Correll requested the trial judge to submit vehicular homicide to the jury instead of voluntary manslaughter because he feared that an instruction on voluntary manslaughter would be, not merely inconsistent with his trial strategy, but harmful to it. The record reveals Correll was concerned that if jurors provisionally rejected first and second degree murder and then read a voluntary manslaughter instruction, they would conclude voluntary manslaughter was inconsistent with the facts of Kinsel's case. He feared the jury might then reinitiate discussions about first and second degree murder without seriously considering a verdict of involuntary manslaughter or homicide by vehicle. Correll

also feared that if jurors read a voluntary manslaughter instruction and began to ask themselves whether Kinsel really had the intent to injure or kill, they might be more apt to find Kinsel guilty using a felony murder theory. Based on our de novo review of the record, we conclude, as the postconviction court did, that counsel's strategy of requesting the court to submit a vehicular homicide instruction in lieu of a voluntary manslaughter instruction was well-reasoned under the facts of this case. We conclude the record falls far short of demonstrating any breach of any essential duty by Kinsel's trial counsel.

The State contends the outcome of Kinsel's trial would not have been different even if the court had instructed on involuntary manslaughter. We agree. The evidence against Kinsel was compelling. Kinsel's own version of events was rejected by the jury. Given the strength of the State's case, it is not probable that the jury would have found the elements of voluntary manslaughter existed, even if given the opportunity to do so. Kinsel suffered no prejudice from the conduct of which he complains.

V. Conclusion. Kinsel has failed to demonstrate either a breach of an essential duty or prejudice with regard to his claim. We affirm the district court's denial of postconviction relief.

AFFIRMED.