IN THE COURT OF APPEALS OF IOWA

FILED
DEC 18 1985
CLERK SUPREME COURT

STEVEN JAY CLARK,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed December 18, 1985

5-476
85-195

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Appeal from the Iowa District Court for Polk County - Anthony Critelli and Gene L. Needles, Judges.

The Petitioner appeals from the district court's denial of postconviction relief. **AFFIRMED.**

Patricia M. Hulting, Des Moines, for the petitioner-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, and Catherine Thune, Assistant Polk County Attorney, for respondent-appellee.

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

SACKETT, J.

Petitioner Clark appeals from a postconviction relief denial contending his trial counsel in his first-degree murder trial rendered ineffective assistance of counsel. He argues that his trial counsel failed to object to the following jury instructions:

1. Instruction No. 14, a part of Uniform Instruction No. 215 on specific intent, which was not cross-referenced to either the marshalling instruction for murder No. 15 nor the instruction on robbery No. 16, nor specifically stated to what elements of the crimes that the issue of specific intent applied;

2. Instruction 15, the marshalling instruction on Murder in the First Degree, which did not include as an element of first degree murder that the action of the Defendant was done with specific intent to kill;

3. Instruction No. 16, the instruction on the robbery being the underlying felony for felony murder, which incorrectly referred to the death of the victim as resulting from a shooting rather than from a murder;

4. Instruction No. 25, the instruction on aiding and abetting, which failed to refer to the specific intent elements of first degree murder or robbery as required when a person is accused of aiding and abetting the commission of a specific intent crime.

The state claims that Clark is barred from claiming ineffective assistance of counsel on postconviction relief and refers us to Washington v. Scurr, 304 N.W.2d 231 (Iowa 1981). In that case, the petitioner was barred from raising ineffective assistance on postconviction review where appellate counsel on direct appeal was different from trial counsel. Id. at 235. In Washington the court found there was no "sufficient reason" why appellate counsel (not claimed to be ineffective) failed to raise the ineffective assistance of counsel claim on direct appeal. Id.

The ineffective assistance of trial counsel claim is being raised for the first time in this postconviction proceeding. The applicant for postconviction relief must show sufficient reason for failing to challenge the alleged errors

in the trial court and on direct appeal, and that actual prejudice resulted. Polly v State, 355 N.W.2d 849, 856 (Iowa 1984).

A stipulation of the facts entered into by the parties on this postconviction relief indicates that Clark's trial counsel and appellate counsel were two different attorneys from two different offices. Clark only claims that his trial counsel was ineffective.

Clark has failed to carry his burden of showing sufficient reason why his claim of ineffective assistance of trial counsel was not raised on direct appeal. Clark has not raised any new facts nor made any new evidentiary record on postconviction.

> Where no new facts are asserted in claiming ineffective assistance of counsel, and appellate counsel, apparently effective, was different from trial counsel, we do not find sufficient reason for failing to raise the ineffective assistance of counsel claim on direct appeal.

Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

However, we shall address the issue presented by Clark on this postconviction to prevent duplication of time and effort should Clark in the future file another postconviction relief alleging trial and appellate counsel ineffectiveness.

To establish the claim of ineffective assistance of counsel, Clark must establish that his counsel's performance did not fall within the range of normal competency by showing: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kyle v. State, 364 N.W.2d 558, 562 (Iowa 1985)(citing Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). Clark has the burden to prove both of these elements by a

preponderance of the evidence. Taylor v. State, 352 N.W.2d 683, 685 (Iowa1984).

We recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Kyle v. State, 364 N.W.2d at 562. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. Sims v. State, 295 N.W.2d at 423. To show prejudice, Clark must show that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). We now turn to look at the instructions Clark claims that defense counsel should have objected to.

Clark argues that Instruction No. 15 was erroneous since it did not include specific intent as an element of murder in the first degree. Instructions are to be read and considered together and related to each other, not piecemeal or in artificial isolation. State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1976). Instruction No. 12 states:

> Among the essential elements of Murder in the First Degree are deliberation, premeditation, and a specific intent to kill.
>
> If a person, with opportunity to deliberate, intentionally uses a dangerous weapon against another and death results, you may, but are not required to, infer, in the absence of evidence to the contrary, that such weapon was used with malice, deliberation, premeditation and a specific intent to kill.
>
> A pistol is a dangerous weapon.
>
> This inference is not conclusive, but may be considered by you with all the evidence in determining whether or not the killing charged, if done by the defendant, was done with deliberation, premeditation, and a specific intent to kill. [emphasis added].

Instruction No. 14 gives the definition of specific intent:

> Where intent is an essential element of the offense charged, it must be proved beyond a reasonable doubt.

intent is seldom, if ever, capable of direct and positive proof. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts provided by the evidence, in accordance with common experience and observation.

Then Instruction No. 15 provides:

You will first determine whether the defendant is guilty of Murder in the First Degree, bearing in mind the definition of Murder in the First Degree heretofore given you in these instructions

In this instruction one of the propositions required to be proved by the State is in the alternative. You are instructed that where such proposition is stated in the alternative, the State will have met its burden of proof if it proves by the evidence beyond a reasonable doubt either of such alternatives.

Before the defendant can be found guilty of the crime of Murder in the First Degree as charged in the Information, the State must establish by the evidence beyond a reasonable doubt each of the following propositions:

1. That on or about the 31st day of January, 1981, in the County of Polk and State of Iowa, the defendant did unlawfully shoot Lance Trevelen or did aid and abet another person who unlawfully shot Lance Trevelen.

2. That Lance Trevelen died as a result of being shot.

3. That said action of the defendant was done with malice aforethought.

4. That such action of the defendant was willful, deliberate, and premeditated;

or

that such action of the defendant was done during the perpetration of or during an attempt to perpetrate the crime of Robbery upon the person of Lance Trevelen.

5. That the discharge of the gun was not an accident and was done with the concurrence of the will of the defendant.

If you find that the State has proven by the evidence beyond a reasonable doubt each and all of the elements then you will find the defendant guilty of Murder in the First Degree. But if the State has failed to prove beyond a reasonable doubt one or more of the elements, then you must find the defendant not guilty of Murder in the First Degree.

The giving of the separate instruction (No. 12) in which the jury was correctly informed that specific intent is an element of murder in the first degree leads us to conclude that Clark was not prejudiced by trial counsel's failure to object to Instruction No. 15. See State v. Miles, 344 N.W.2d 231, 235 (Iowa 1984); State v. Blackford, 335 N.W.2d 173, 178 (Iowa 1983). The jury would have been hard pressed not to find specific intent to kill since they did find the Clark's action to be willful, deliberate, and premeditated. Clark has shown no prejudice.

Clark contends Instruction No. 14 on intent should have been cross-referenced to Instruction No. 15 or 16, it was not denominated as an instruction on specific intent, and it failed to state what elements of either offense, first degree murder or robbery, the issue of specific intent applied. The state refers us to State v. Doughty, 359 N.W.2d 439 (Iowa 1984), which we find particularly applicable to this case when that court stated:

> We find no merit in the argument that the court erred in failing to state in its instructions that the "intent to subject the [victim to] sexual abuse," for kidnapping under section 710.1(3) must be a "specific" rather than a general intent. The jury was correctly instructed that it must find an intent to commit sexual abuse. Such intent is specific, regardless of how it was characterized by the court; and it was not necessary that the statutory language be supplemented by insertion of the word "specific." While the court could have avoided this argument by simply acceding to the defendant's request in this regard, it was not error to refuse to do so.

Id. at 441. Even if the instruction was erroneous, we find Clark has not demonstrated the requisite prejudice.

Clark's next contention is that Instruction No. 16 was erroneous because it referred to the death of the victim as resulting from a "shooting" rather than a "murder." Instruction No. 16 states in part:

> One of the alternative propositions as set out in paragraph 4 of Instruction No. 15 which the State must prove by the evidence beyond a reasonable doubt is that at the time the defendant shot Lance Trevelen or aided and abetted another person who shot Lance Trevelen it was done during an attempt to perpetrate the crime of Robbery.

As previously set out, Instruction No. 15 was the marshalling instruction whereas Instruction No. 16 was merely a companion instruction. The state argues, and we agree, that the jurors had to find under Instruction No. 15 that the "shooting" was done with malice aforethought before Clark could have been found guilty of felony murder. Again, even if the instruction was erroneous, Clark has failed to demonstrate the requisite prejudice.

Lastly, Clark claims that Instruction No. 25 on aiding and abetting was in error because it failed to properly instruct on the specific elements of first degree murder or robbery as required when a defendant is accused of aiding in a specific intent crime. Assuming the instruction was erroneous, Clark still has not shown that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different.

We affirm the district court's denial of postconviction relief.

AFFIRMED.