IN THE COURT OF APPEALS OF IOWA

No. 7-304 / 96-1262
Filed September 24, 1997

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CLERK SUPREME COURT

CHRISTOPHER JOHN OLTMAN,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Franklin County, Bryan H. McKinley, Judge.

Christopher Oltman appeals the district court's ruling dismissing his application for postconviction relief. **AFFIRMED.**

Christopher C. Foy of Leslie, Collins & Foy, Waverly, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Brent Symens, County Attorney, and James Drew, Special Prosecutor, for appellee.

Considered by Sackett, P.J., and Huitink, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HUITINK, J.

Christopher John Oltman appeals the district court's denial of his claim for postconviction relief. We affirm.

I. Background Facts and Proceedings.

In June 1992, a jury convicted Oltman of aiding and abetting the first-degree murder of his grandmother, Marian Atkinson, based on the following evidence: comments Oltman made concerning his desire to have Atkinson dead to David Foell, the person convicted of murdering Atkinson; promising $2000 to someone who would kill Atkinson; driving Foell to Atkinson's home and insuring the garage door, through which Foell later entered, was unlocked; telling Foell the location of certain knives in Atkinson's home; and driving Foell to Atkinson's house a second time when Foell committed the murder.

The court gave the jury instructions on first-degree and second-degree murder. Oltman's counsel did not request an instruction on involuntary manslaughter or object to the omission of such an instruction. The court sentenced Oltman to life in prison.

In February 1993, Oltman appealed his conviction. The supreme court found Oltman's appeal was frivolous and dismissed it pursuant to Iowa Rule of Appellate Procedure 104, stating Oltman should bring ineffective assistance of counsel claims in a postconviction relief action.

Oltman filed an amended application for postconviction review in September 1994, alleging ineffective assistance of trial counsel as the sole grounds for relief.

The district court denied Oltman's application, finding he was not denied effective assistance of trial counsel.

Oltman appeals the court's ruling, arguing the court erred in finding his counsel was not ineffective in failing to request or object to the omission of an involuntary manslaughter jury instruction.

II. Scope of Review.

The scope of review on appeal from a petition for postconviction relief is for errors of law. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). However, we review a claim of ineffective assistance of counsel de novo. *Steinkuehler v. State*, 507 N.W.2d 716, 719 (Iowa App. 1993).

III. Preservation of Error.

The State concedes Oltman preserved error for review by resisting the court's rule 104 dismissal of his direct appeal; however, the state argues Oltman waived the issue by failing to include a statement of preservation of error in his appellate brief. We disagree. On direct appeal, the supreme court specifically stated Oltman should bring any claims for ineffective assistance of counsel in postconviction proceedings. Oltman raised the issue in his *pro se* application for postconviction relief, his later-amended application by counsel, and his appellate reply brief. Accordingly, we find Oltman has preserved the issue of ineffective assistance of counsel for review.

IV. Ineffective Assistance of Counsel.

The district court denied Oltman's claim of ineffective assistance of trial counsel. We agree.

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceedings 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. 674, 699 (1984)). To prevail on a claim of ineffective assistance of counsel, one must show (1) his attorney failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The burden of proof is on the applicant to overcome the presumption counsel acted within the normal range of competency. *Bettis v. State,*547 N.W.2d 635, 637 (Iowa App. 1996). We need not determine whether counsel breached an essential duty before considering whether the defendant is able to establish the required prejudice. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). To prove prejudice, the applicant must show he suffered a substantial and actual disadvantage, and there is a reasonable probability the outcome of the proceeding would have been different without counsel's errors. *Id.*

We find Oltman failed to prove the second prong, prejudice, from counsel's failure to request or object to the omission of an instruction on involuntary manslaughter. When the court gives jury instructions on an offense and a lesser-included offense, and the jury returns a guilty verdict on the greater offense, the

defendant is not prejudiced by the court's failure to give jury instructions on any additional lesser-included offenses. *State v. Nowlin*, 244 N.W.2d 591, 596 (Iowa 1976); *State v. Drosos*, 114 N.W.2d 526, 533, 253 Iowa 1152, 1164-65 (Iowa 1962). Here, the court gave jury instructions on first-degree murder and second-degree murder, a lesser-included offense. The jury found Oltman guilty of first-degree murder, the greater offense. Therefore, Oltman was not prejudiced by the court's failure to instruct the jury on the additional lesser-included offense of involuntary manslaughter. In addition, our review of the record shows there was sufficient evidence in the record to convict Oltman of aiding and abetting the first-degree murder of Atkinson. Oltman has not shown he suffered prejudice because of counsel's omissions. Accordingly, we reject Oltman's ineffective assistance of counsel claim.

We affirm the decision of the district court in its entirety and assess costs of this appeal to Oltman.

AFFIRMED.