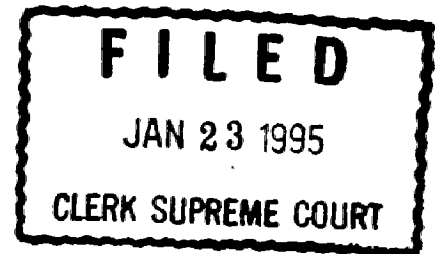


IN THE COURT OF APPEALS OF IOWA

No. 4-510 / 93-1902



MITCHELL JAMES RONEK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jackson County,
David H. Sivright, Jr., Judge.

Mitchell James Ronek appeals the district court's
ruling denying his application for postconviction relief.

AFFIRMED.

Randy J. Hohenadel, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, and Phillip Tabor, County
Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HAYDEN, P.J.

In 1984 Mitchell James Ronek was charged with first-degree murder in violation of Iowa Code section 707.2(2) (1983). The charges alleged Ronek and Brent Donatsch killed Tom Goodwin while participating in the forcible felony of second-degree robbery.

At the trial Ronek did not deny he had killed Goodwin. Ronek presented a defense of diminished responsibility due to intoxication. His counsel called pathologist Dr. Regis Weland as an expert witness. Dr. Weland testified to the characteristics of the stages of intoxication. He stated a person is unable to perform intentional acts at higher levels of intoxication. Furthermore, at higher levels of intoxication, a person is less likely to remember events which occurred. Defense counsel asked Dr. Weland a hypothetical question about the effects of alcohol on a 250-pound person who consumed thirty-nine bottles of beer in a time span of four and a half hours. Dr. Weland answered such a person would have a blood level of 625 milligrams of alcohol and at 500 milligrams of alcohol most people are unconscious.

The State presented evidence to show twenty-eight cans of beer had been consumed by three people on the night in question. The State questioned Dr. Weland concerning defendant's supposed level of intoxication if he had consumed nine cans of beer over six hours. Dr. Weland answered behavior was not generally affected at this

level. The State also asked Dr. Weland to review statements Ronek had previously made concerning the night in question. Dr. Weland testified Ronek had fairly good memory, which is not usually characteristic of someone who is intoxicated.

Defense counsel also called Dr. Thomas Sannito, a psychologist, as an expert witness. Dr. Sannito testified Ronek had a psychopathic personality with explosive and hysterical features. He stated if Ronek had been drinking heavily, he would not have had the mental capacity to entertain malice. Dr. Sannito stated alcohol would cause Ronek to lose control and would diminish his judgmental capacity. He stated he did not know if Ronek could form the specific intent to commit robbery if he were intoxicated.

No witness testified about the actual amount of alcohol Ronek consumed on the day of the murder; however, there was testimony Ronek had been drinking alcohol on the day in question.

The jury found Ronek guilty of first-degree murder, and he was sentenced to life in prison. Ronek appealed. His conviction was affirmed by the Iowa Supreme Court in State v. Ronek, 389 N.W.2d 384 (Iowa 1986).

In July 1989 Ronek filed an application for postconviction relief. He alleged he was denied effective assistance of trial counsel because of the manner in which his defense of intoxication was presented. After a hearing

on the application, the district court found the defense of intoxication was fully explained to the jury. The court concluded Ronek failed to show his counsel had breached their duty to perform an essential duty or to show he was prejudiced by counsels' performance. The court denied the application for postconviction relief. Ronek appeals.

Where a postconviction applicant asserts violations of constitutional safeguards, such as the right to counsel, an appellate court makes its own evaluation of the totality of the circumstances in a de novo review. Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991). We will assume Ronek has sufficiently preserved his postconviction claims for our consideration.

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent that it denied defendant a fair trial. Caldwell v. State, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence counsel was ineffective. Jones, 479 N.W.2d at 272.

Concerning deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount

to ineffective assistance of counsel. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, applicant must show counsel's failure worked to his substantial and actual disadvantage to the end there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Brewer, 444 N.W.2d at 83.

Ronek does not contest the selection of the intoxication defense but argues he received ineffective assistance of counsel due to the manner in which the defense was presented. He claims errors by defense counsel precluded the issue of his intoxication from being properly considered by the jury. Specifically, he claims counsel rendered ineffective assistance by (1) failing to call him to testify concerning the amount of alcohol he consumed on the night of the murder; (2) failing to call Donatsch to testify concerning the amount of alcohol Ronek drank; and (3) asking an improper hypothetical question which was not based on the facts in the case.

I. Defense counsel advised Ronek not to testify. This advice was based on a pretrial ruling which determined certain statements Ronek had made when arrested in Texas could not be presented by the State in its case in chief but could be used for cross-examination. Ronek asserts other, similar statements had already been admitted into evidence, and thus admission of the Texas statements would

not have been prejudicial. We find defense counsel's advice, which sought to preclude the introduction of additional incriminating statements, was a reasonable trial strategy.

Furthermore, a record was made in judge's chambers concerning whether Ronek would testify. From our review of this record, we find Ronek made an informed and voluntary decision not to take the witness stand. We conclude Ronek has failed to show ineffective assistance of counsel on this ground.

II. On the issue of whether defense counsel should have called Donatsch to testify, we note Ronek did not call Donatsch as a witness at the postconviction hearing, and no record was made regarding his inability to do so. The failure to call Donatsch at the postconviction hearing renders speculative what his testimony would have been. See Gordon v. State, 480 N.W.2d 265, 268 (Iowa App. 1991). Because we cannot determine what Donatsch's testimony would have been, we are unable to conclude the testimony would have made a difference at trial. Ronek has failed to show he was prejudiced by counsel's failure to call Donatsch as a witness.

III. Ronek contends defense counsel asked an improper hypothetical question which assumed facts which were not in evidence. Defense counsel asked Dr. Weland what the level of intoxication would be if a person who weighed 250 pounds drank thirty-nine cans of beer over a four-and-one-half-

hour period. As noted above, no evidence was presented to show the actual amount of alcohol consumed by Ronek. Ronek claims defense counsel's use of such a high number of cans of beer prejudiced his case because Dr. Weland responded to the hypothetical question by stating the person would likely be unconscious.

At the postconviction hearing, Ronek testified he had consumed twenty cans of beer over a six-hour period on the night of the murder. Defense counsel testified he could not remember where he got the numbers he used in the hypothetical, but thought they might have come from Ronek.

We conclude Ronek has failed to show he was prejudiced by the hypothetical question used by defense counsel. He has not shown what Dr. Weland's response would be to a hypothetical question involving a person who drank twenty cans of beer over a six-hour period. Because it is speculative what Dr. Weland would have answered to such a question, we are unable to conclude the testimony would have made a difference to the outcome of the trial.

Furthermore, as the supreme court noted in the direct appeal, the evidence against Ronek was overwhelming. Ronek, 389 N.W.2d at 386. While in jail, Ronek wrote a five-page narrative description of the killing, which he signed. Id. at 384. Ronek allowed his cellmate to read this narrative and also orally admitted to the cellmate he had committed the murder. Id. The supreme court determined these communications were admissible into evidence. Id. at 387.

In addition to being an admission he had participated in the murder, the five-page narrative served to show Ronek had a detailed memory of the night in question. The State presented testimony to show at higher levels of intoxication a person is less likely to remember events which occurred. Ronek has failed to show his intoxication defense was unsuccessful due to faulty presentation by defense counsel, and not because of his own pretrial statements which showed he was not intoxicated.

We determine Ronek has failed to show he was denied his constitutional right to the effective assistance of counsel. We affirm the decision of the district court denying his application for postconviction relief. Costs of this appeal are assessed to Mitchell Ronek.

AFFIRMED.