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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DONALD EUGENE IRVIN,	)	
Petitioner-Appellant,	)	Filed January 29, 1985
vs.	)	4-521 84-263
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County - Rodney J. Ryan, Judge.

Petitioner appeals from the denial of his application for postconviction relief asserting that he received ineffective assistance from his trial counsel. AFFIRMED.

Charles Harrington, Appellate Defender and Raymond E. Rogers, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General and Rebecca L. Claypool, Assistant Attorney General, for respondent-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Petitioner, Donald Eugene Irvin, appeals from a denial of his application for postconviction relief which asserted ineffective assistance of counsel.

Irvin was charged with first degree murder and first degree robbery. A jury found Irvin guilty of voluntary manslaughter and robbery in the first degree and that Irvin was armed with a firearm during the commission of the offenses. Irvin was sentenced and did not take a direct appeal from the judgment or sentence.

Some two years later petitioner filed an application for postconviction relief, claiming that his trial counsel failed to provide effective assistance in various respects.

The district court denied the petition. Irvin has appealed claiming the district court erred in failing to find that his trial attorney's failure to investigate and call certain witnesses violated his constitional right to effective assistance of counsel.

A claim of ineffective assistance of counsel is a constitutional claim, as the right to counsel is guaranteed by the Sixth Amendment. See Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982). Therefore, we make an independent evaluation of the totality of the circumstances. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). This is equivalent to a de novo review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

The petitioner has the burden to prove, by a preponderance of the evidence, his claim of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). The test is whether "under all the circumstances counsel's performance was within the range of normal competency." Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

"[W]hen a defendant relies on a specific act or omission to prove such a claim of ineffective assistance of counsel, two conditions must be demonstrated:

It must be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984)(quoting from Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)).

A defendant must show that in the absence of unprofessional errors by trial counsel there is a reasonable probability that the results of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. ___, ___, 80 L.Ed.2d 674, 698 (1984).

Irvin claims that he was not adequately represented by his trial attorney because the attorney failed to adequately investigage the cause and call certain witnesses who could have substantiated Irvin's defense of diminished responsibility. At the time of the commission of the crime Irvin entered a bar carrying a gun and demanding money. Upon receiving a sack of money from the bartender, Irvin attempted to leave the bar but was prevented from doing so by two customers. Irvin shot one of the customers in the chest which resulted in the customer's death. Irvin did not contest the fact that he was present at the bar, that he had a gun, that he demanded money, or that he shot the customer. Irvin chose to rely on the defense of diminished responsibility. The only defense witness was an expert, Dr. Hector Cavallin, who testified that Irvin was not sane on the day in question and did not have the requisite ability to form a specific intent to commit a theft. Dr. Cavallin is a psychiatrist, presently living in Des Moines, who received his formal psychiatric training in Kansas. Dr. Cavallin was asked to do a psychological examination of Donald Irvin wherein he used an initial report from another psychiatrist, Dr. Garfield, and his own observations to arrive at his conclusions. Dr. Cavallin testified that he attributed Irvin's diminished capacity to intoxication, personal disorders, brain damage and immediate distress attributable to the fact that his home had been broken into that morning and he had had a fight with his former wife.

In rebuttal, the State presented two psychologists who each testified that in their opinion Irvin was able to formulate a specific intent. The bartender and two bar patrons testified that Irvin acted normal during the robbery and showed no signs of intoxication. Two police officers, who observed the petitioner after his arrest, testified he did not appear to be intoxicated or under the influence of drugs.

Irvin claims that his father-in-law and stepson would have testified to abnormal behavior exhibited by Irvin on the day of the crime. At the postconviction relief hearing Irvin's father-in-law testified that when he saw Irvin at breakfast on the day of the crime Irvin appeared shakey and looked like he was on a drunk or on pills. The stepson did not testify at the postconviction relief hearing.

The record does not support a finding that Irvin's trial counsel breached an essential duty by not calling Irvin's father-in-law or stepson as defense witnesses, nor that any prejudice resulted because these witnesses were not called. We cannot determine that the outcome of the trial would have been different had the jury heard testimony regarding Irvin's shakey condition at breakfast when the crime was committed at 8 o'clock in the evening. The State produced five credible witnesses who testified as to their observations of Irvin at a time close to the time the robbery took place. Three of the witnesses were present at the scene and two observed him shortly thereafter.

Dr. Cavallin, who testified in the defendant's behalf, had strong credentials. His testimony supporting his conclusion that Irvin's capacity was diminished at the time of the crime was well reasoned and positive. We will not determine that two witnesses who saw Irvin sometime prior to the crime, were related to Irvin by marriage and made only casual observations would in any way have strengthened the strong testimony in Irvin's behalf given by Dr. Cavallin. In fact their statements may have detracted the jury's attention from the testimony of the well

qualified expert. The failure to call these witnesses did not render defense counsel ineffective. We affirm the decision of the trial court denying Irvin's petition for postconviction relief.

AFFIRMED.