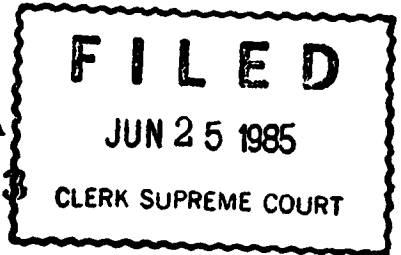


IN THE COURT OF APPEALS OF IOWA

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RASPBERRY (NMN) WILLIAMS,)

Petitioner-Appellant,)

vs.)

WARDEN, FORT MADISON)
PENITENTIARY, FORT MADISON, IOWA,)

Respondent-Appellee.

Filed June 25, 1985

5-196
84-264

Appeal from the Iowa District Court for Black Hawk County - L. D. Lybbert,
Judge.

Petitioner appeals from the district court's denial of his application for
postconviction relief claiming that he was denied effective assistance of counsel
at his trial, on appeal, and at his prior postconviction proceedings. AFFIRMED.

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney
General, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

Petitioner appeals from the district court's denial of his application for postconviction relief claiming that he was denied effective assistance of counsel. We affirm.

In 1974 Raspberry Williams was charged with first-degree murder. He was represented by two attorneys at trial. Evidence at trial showed that the petitioner approached the victim at a pool hall and requested that he pay money owed him. After the victim did not pay, petitioner waited outside. There was testimony to indicate that when the victim went outside, petitioner came toward him with his gun drawn. Petitioner demanded his money and the victim produced a bill which he started to hand to petitioner. The victim pulled the bill back and petitioner shot the victim because he thought he was reaching for his gun. Other evidence presented at trial refuted petitioner's self defense testimony.

As an alternative to petitioner's claim of self defense, defense counsel argued to the jury that petitioner's actions were inconsistent with a theory that he carefully deliberated how he was going to kill the victim.

One of the court's jury instructions stated that "a murder perpetrated deliberately, premeditatedly and willfully, that is, with a specific intent to kill, constitutes murder in the first degree." The marshalling instruction for first-degree murder stated that the State had to prove that petitioner's action was "done by him with malice aforethought and deliberately, premeditatedly and willfully that is with a specific intent . . . to kill." In the second-degree murder marshalling instruction, the court indicated that second-degree murder is an unlawful killing, "not done deliberately, with premeditation, or with a specific intent." Another jury instruction defined the terms "to premeditate," "to deliberate," and "willful"; the court defined "willful" as "intentional or by fixed design or purpose or with a specific intent to kill."

Defense counsel did not object to the instruction defining first-degree

murder or object to the first-degree murder marshalling instruction. The jury found petitioner guilty of first-degree murder and the conviction was affirmed on appeal. State v. Williams, 243 N.W.2d 658 (Iowa 1976). Williams subsequently filed two applications for postconviction relief, both of which were dismissed.

In petitioner's present application for postconviction relief, he asserted that he was denied due process and equal protection rights because the jury was misinstructed concerning the elements of murder in the first degree. Specifically, he argued that the language used by the trial court equated the elements of premeditation, deliberation, and willfulness with the element of specific intent to kill. Petitioner further asserted that he was denied effective assistance of counsel in that this matter was not raised at his trial, on appeal, or in his prior postconviction proceedings. Because of this, Williams claimed he had a sufficient reason for failing to adequately raise the issue in a prior proceeding. See Iowa Code § 633A.8 (1985).

In its decision and judgment, the district court held that under the facts and circumstances of the case, any error in the jury instruction was harmless. The court based its holding, in part, on "the abundance of evidence produced at trial that petitioner had the required specific intent to kill the victim in addition to committing the act deliberately, premeditatedly, and willfully." The court accordingly denied the application for postconviction relief. Williams had appealed from this determination.

- When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland v. Washington, ____ U.S. ____, ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Applying these principles in the present case, we conclude that Williams had effective representation. Even assuming counsel had a duty to object to the instruction at trial or raise the issue in a prior proceeding, petitioner has failed to show the prejudice necessary to warrant a new trial. As the postconviction court indicated, the record contains overwhelming evidence of the elements of premeditation, deliberation, and specific intent to kill. Thus, any confusion resulting from the instructions would appropriately be characterized as harmless error; the result of the proceeding would have been the same even if the alleged errors had not occurred. Accordingly, the denial of postconviction relief is affirmed.

AFFIRMED.