IN THE COURT OF APPEALS OF IOWA

No. 7-674 / 96-2244

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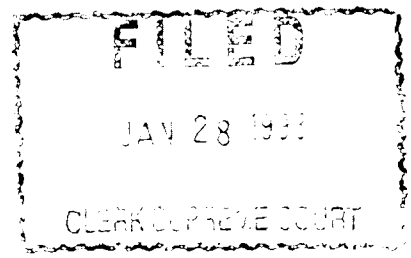
LAODIS HIGHTOWER,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Laodis Hightower appeals the denial of his application for postconviction relief. **AFFIRMED.**

Kellyann M. Lekar of Randall, Griffin, Nelson & Hawbaker, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

SACKETT, J.

Applicant-appellant Laodis Hightower was convicted of first-degree burglary in violation of Iowa Code section 713.3 (1989) after he broke the window in the home of his girlfriend's grandmother, entered the home carrying a Crossman CO_2 pellet pistol, retrieved his daughter, and left with her. The conviction was affirmed by this court in an unpublished opinion, *State v. Hightower*, 494 N.W.2d 728 (Iowa 1992). Hightower filed a petition for postconviction relief contending both his trial counsel and his appellate counsel were ineffective in representing him because they failed to challenge whether the Crossman CO_2 pellet pistol was a dangerous weapon. He contended the State did not present substantial evidence the pistol in question was a dangerous weapon, and trial counsel failed to properly handle evidence that could lead the jury to conclude it was. The trial court denied the petition finding counsel had performed reasonably. This appeal follows.

We make an evaluation based on the totality of the circumstances. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). This is equivalent to a de novo review. *See Foster v. State*, 378 N.W.2d 713, 716 (Iowa App. 1985). To establish a claim of ineffective assistance of counsel, Hightower carries the burden to prove by a preponderance of the evidence (1) his attorney failed to perform an essential duty and (2) he suffered prejudice. *See Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

To convict Hightower, the State was required to show, among other things, that when he broke into the home, he possessed a dangerous weapon. Hightower contends

at trial his attorney (1) did not question the State's expert, Dr. Thomas Bennett, then State medical examiner, concerning the particular pistol used in this case; (2) did not present evidence such as was developed at the postconviction hearing that the pistol Hightower used could not fire pellets with sufficient energy to cause death; and (3) failed to see that the dangerous weapon issue was correctly presented to the jury.

At Hightower's criminal trial, the State sought to prove the CO_2 pistol was a dangerous weapon through the testimony of two experts, Dr. Bennett and Sergeant Terry Blank of the Waterloo Police Department. Sergeant Blank testified Hightower's pistol could kill someone if it were loaded with a fresh gas cartridge. Dr. Bennett testified a CO_2 pistol can cause death.[1]

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[1] Dr. Bennett's testimony, in relevant part, was:

Q. And can you describe what type of injuries you have examined. A. The majority of the injuries I have seen from the pellet pistols of the CO2 pellets there have been a few of them. Most of them have not been fatal injuries. . . . [I]n these cases they have involved penetrating the skin. Damaged some of the soft tissues. . . . [W]hen anything strikes the body, the hardest substance in the human body for any projectile whether pellet or bullet is skin. Because skin is so elastic. So a lot of the signs we see are in the skin. . . . Once the projectile gets through the skin, there is a lot of soft tissue and bony injury because the pellet travels much easier through other tissues.

Q. Doctor, have you ever come across a case either in your discussions with other pathologists or your education where any other types of injuries have resulted from a CO2 or pellet pistol? A. Yes.

Q. Can you describe what type of injuries those are. A. [M]ost of the injuries that I have observed personally were nonfatal injuries. There was one case that I consulted with where an individual did die of a pellet injury. It was a penetrating. That is, the pellet entered the body and did not pass all the way through. But the pellet injury to the eye, the pellet passed just above the eyeball, went into the top of the eyelid and went through the roof of the eye socket. This is about the thinnest part of your skull. It went through the eye socket and went into the base of the brain and damaged enough blood vessels

At Hightower's postconviction hearing, Dr. Bennett testified he did not know if a particular CO_2 pistol would cause death because there are variations in the force with which pellets can be fired.[2]

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through the fracturing of the bone or the metal itself but there was fatal hemorrhage about the brain. Fatal bleeding about the brain and the person did die There have been fatal cases of these. Can kill.

Q Doctor, based on your experience and training, do you have an opinion as to a reasonable medical certainty as to whether or not a CO2 pellet pistol can cause death? A Yes

Q. What is that opinion? A. My opinion clearly is a CO2 pellet pistol can produce death.

Q. And in what manner could that death occur? A. The death in this case was ruled a homicide The individual who was shot through the eye and did die of the hemorrhage about the brain. It was ruled a homicide.

[2] Dr. Bennett testified in relevant part:

Q. So if I understand the substance of your testimony in essence is this, Doctor, that you are familiar with a case where a gun unknown fired a pellet causing death, force unknown? A. Through the use of a pellet that passed through the soft tissues and the roof of the eye socket. That's correct.

Q We don't know the force of the pellet? We don't know the kind of gun that discharged and we don't know the force of impact? A. I don't believe those studies about the force were done nor do I recall saying that was the force of the weapon. I don't recall what the weapon was. That's correct.

Q. And do you have any understanding of the vast differences in power that different types of air powered guns can produce? A. I know that there are differences in the force; but you are getting way out of my realm of any expertise at all.

Q. Way out of your league? A. Oh, you are sure. I would not ever say I am a firearms expert.

Q So you would have no way of knowing whether or not one particular air gun or CO2 gun could or could not, was or was not capable of causing death? A. I would not because of the variation in the force those pellets can be fired with and so on. There is too much variability for me to offer an opinion.

Q. All you can say is you are familiar that a pellet in one case that caused a death? A. Pellets, yes, can cause death.

Hightower's claim here is his trial attorney should have elicited at trial the postconviction hearing testimony from Dr. Bennett concerning the force necessary to rupture a human eye and his lack of expertise and his lack of familiarity with the gun in question. There is merit to Hightower's arguments. The testimony developed at the postconviction hearing illustrated Dr. Bennett had no expertise to and could not determine the particular gun used here could cause death, though the testimony he gave at trial could lead to a contrary inference.

Hightower also contends his trial attorney failed to conduct sufficient research and find available evidence the pellet gun Hightower had was not a dangerous weapon.

At the postconviction hearing, Hightower presented the testimony of David Mundhenke, a person familiar with CO_2 powered pellet pistols. Mundhenke testified a pellet gun would not penetrate a human eyeball and enter the brain to cause death unless it had 3.2 joules of energy. He tested the pistol used here and found its highest rating to be 2.6 and the average 2.1.[3]

Q. No different than a statement for example that automobiles can exceed 200 miles an hour. Doesn't mean that all automobiles can exceed 200 miles an hour? A. That's correct.

[3] Mundhenke testified:

Q. Were you able to determine the energy output of that air pistol [referring to the one in question here]? A. Yes.

Q. What was the output? A. The average was 2.1.

Q. Could you explain . . . what you did in arriving at that figure? A. We shot several groups of six shots each, averaging each group, and then each of those groups was averaged together.

Trial counsel testified at the postconviction hearing he asked one ballistic expert whether the CO_2 pellet pistol is a dangerous weapon and was told the expert did not know how to test the proposition. He further testified the expert from Wisconsin said under Wisconsin law it was a dangerous weapon. Trial counsel said he considered the primary focus of the defense to center on the fact defendant went in the house to retrieve his daughter. His secondary focus was on the dangerous weapon issue. On Hightower's behalf at the postconviction hearing, a lawyer with experience in criminal defense in the Waterloo area testified an attorney had an obligation to explore all defenses, and if evidence were available at the time of trial that a pellet pistol must discharge 3.2 joules of energy to inflict a human's death, trial counsel was ineffective for not presenting it.

Additionally, Hightower complains his trial attorney failed to object to the jury instruction on dangerous weapons, failed to question whether the State had met its burden of showing the pellet gun is a dangerous weapon, and failed to request an instruction requiring the jury to determine whether the State proved the pellet gun used was capable of causing death.

. . . .

Q. And of all of those, the average was 2.1? A. Yes, of all those groups.

Q Does that mean, by necessity, that there was some over 2.1? A. Yes.

Q. Do you recall what the highest was that you recorded for joules of energy? A. 2.6, I believe.

Q. And what was the lowest? A. I believe it was 1.3.

The court instructed the jury a dangerous weapon:

> [I]s any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

Iowa Code section 702.7 defines a "dangerous weapon" as:

> A "dangerous weapon" is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which is was designed. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, or knife having a blade exceeding five inches.

Iowa Code § 702.7.

A weapon need not fall within the enumerated list of dangerous weapons if it fulfills the test of the first sentence of section 702.7, that is, (1) it is an instrument or device designed primarily for use in inflicting death or injury upon a human being or animal; and (2) it is capable of inflicting death upon a human when used as designed. *State v. Tusing*, 344 N.W.2d 253, 254 (Iowa 1984). It is not enough under the statute that it be capable of inflicting injury. *Id.* That determination will turn on the design and construction of the particular pistol. The actual intent of the user is not the issue in deciding whether an instrument or device is "dangerous" under the definition in the first sentence of section 702.7 *Id.* at 255.

The instruction, when considered in its entirety, instructed the jurors that to convict Hightower the State had to prove at the time he broke in he was armed with a pellet gun capable of inflicting death. This adequately instructed the jury of the need to focus on the particular weapon. We agree with Hightower, had the record been developed at trial on the force with which the gun could shoot pellets, an interrogatory asking the jury to decide if the gun were a dangerous weapon would have been appropriate.

Hightower has shown at his postconviction hearing the questions he now has concerning the pellet gun could have been more completely developed. Our inquiry does not end here. The test is whether trial counsel's performance was within the normal range of competency. *See Fryer v. State*, 325 N.W.2d 400, 412-13 (Iowa 1982); *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). There is a presumption trial counsel was effective. *Fryer*, 325 N.W.2d at 412-13. Hightower bears the burden of showing his trial and appellate attorneys were not competent. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The trial court's findings centered on the manner in which trial counsel attempted to advance his primary argument. We agree with the trial court Hightower's trial counsel followed a reasonable course despite his lack of success.

The trial court found trial counsel was effective in his strategy and appellate counsel was effective in not challenging the effectiveness of trial counsel on appeal. The court found, while recognizing Dr. Bennett did not have much experience with

pellet guns, the State raised a jury question on the issue of whether a pellet gun was a dangerous weapon and trial counsel was not ineffective in not challenging or rebutting his testimony.

We agree and affirm.

AFFIRMED.