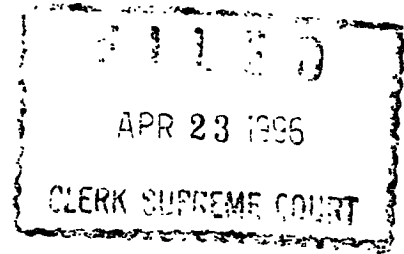


IN THE COURT OF APPEALS OF IOWA

No. 6-020 / 95-0244



SHAWN DEAN FOSTER,

Appellant.

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Linn County, Paul J. Kilburg, Judge.

Appeal from order denying application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Annette L. Hitchcock, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Scott Peterson, Assistant County
Attorney, for appellee.

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

HUITINK, J.

Appellant, Shawn Foster, appeals the order of the district court denying his application for postconviction relief. Foster was convicted of arson in the first degree. He claims his trial counsel were ineffective in failing to file a notice of an intoxication defense and in failing to submit a proposed jury instruction on the defense of intoxication. We affirm.

Foster caused a fire in a residence in November 1990. It was not disputed he had been drinking heavily earlier in the evening and set the fire by using a lighter to ignite the spray from a can of hair spray. Foster was charged with first-degree arson. He was represented by attorney Klausner for approximately six to seven months. After attorney Klausner began working in a different office, Foster was represented by attorney Grinde.

Foster raised his claims of ineffective assistance in his direct appeal. In an unpublished decision this court affirmed Foster's conviction and preserved his claims of ineffective assistance for postconviction proceedings.

I. Ineffective Assistance of Counsel - Standard of Review.

When a defendant asserts a violation of a constitutional right, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence 1) counsel failed to perform an essential duty and 2) prejudice resulted. *Id.*

"This two-pronged test requires, first, a defendant overcome the strong presumption that counsel was competent. Second, defendant must prove that counsel's error worked to the defendant's actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different." *Id.* (citation omitted).

Since attorneys Klausner and Grinde independently represented Foster in distinct pre-trial and trial settings, we separately address Foster's claims against them.

II. Attorney Klausner.

Foster claims Klausner was ineffective in failing to file a notice of intent to rely on an intoxication defense. Iowa R. Crim. P. 10(11)(c).¹ A defendant's intoxication is not a complete defense to a crime; it is relevant, however, "in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or in proving any element of the public offense with which the person is charged." Iowa Code § 701.5 (1991). Voluntary intoxication may negate criminal intent if such intent is an element of the crime charged. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986). However, intoxication may not reduce a charge when the crime does not require a specific intent. *Id.*

¹ In his brief Foster also references the defense of diminished capacity, although he does not elaborate on the application of this defense to the facts of this case. The State argues, and we agree, that when the evidence shows the mental condition at issue was caused by voluntary intoxication, the intoxication defense is alone sufficient and the additional defense of diminished capacity is not necessary. See *State v. Aguilar*, 325 N.W.2d 100, 103 (Iowa 1982).

Klausner offered two valid reasons for not filing a notice of intent to rely upon an intoxication defense. First, counsel believed first-degree arson might not be a specific intent crime, and absent a requirement of specific intent Foster would not have been entitled to rely on an intoxication defense. The relevant statutory provision provides --

Arson is arson in the first degree when the property which the defendant intends to destroy or damage, or which the defendant knowingly endangers, is property in which the presence of one or more persons can be reasonably anticipated, or the arson results in the death of a fire fighter, whether paid or volunteer.

Iowa Code § 712.2 (1991).

There appears to be no published appellate decision conclusively determining whether the crime of first-degree arson under this statute is a specific or general intent crime. Klausner's uncertainty as to whether this was a specific intent crime stemmed from the existence of a published decision which held a prior version of Iowa's arson statute was a general intent crime. *See Veverka v. Cash*, 318 N.W.2d 447, 451 (Iowa 1982).

An attorney does not breach an essential duty and is not ineffective for failing to predict **what the law will become** or for failing to follow a certain course of conduct where there has not been a definitive ruling on a subject. *See generally State v. Hepperle*, 530 N.W.2d 735, 740 (Iowa 1995). While a persuasive argument may be

made in support of the proposition first-degree arson is a specific intent crime, there remains no controlling precedent binding counsel to pursue such a position.

Even if it were assumed first-degree arson is a specific intent crime, Klausner was concerned the factual record might not have supported an intoxication defense. While it was undisputed Foster had consumed a large quantity of alcohol and appeared intoxicated on the night in question, his detailed recollection of the events, and his own conduct before and after the fire, were sufficient to negate any inference he lacked the ability to form the specific intent necessary to commit arson. Counsel is not required to pursue a defense unless it is supported by both the facts of the case and the applicable law. Given the uncertainty regarding whether first-degree arson was a specific intent crime and counsel's legitimate concern about the strength of the factual basis underlying a defense of intoxication, it was not a breach of an essential duty not to pursue the defense.

III. Attorney Grinde.

Foster claims Grinde was also ineffective for failing to file a notice of intent to rely on the defense of intoxication. After Klausner moved to another office, Grinde assumed representation of Foster's case. This occurred six or seven months after the trial information had been filed.

Grinde breached no duty in failing to file a notice of a defense of intoxication. First, Grinde, like Klausner, recognized the law was uncertain as to whether first-degree

arson was a specific intent crime, and he was surprised when he was ultimately successful in getting the court to instruct the jury first-degree arson was a specific intent crime. However, given the legal uncertainty on this issue, counsel was not ineffective in declining to file a pretrial notice of the defense of intoxication. Furthermore, the forty-day time period for filing such a notice, Iowa R. Crim. P. 10(4), had lapsed long before Grinde took over the case. The record does not reflect good cause which would warrant the allowance of any exceptions to the deadline. Counsel cannot be faulted for not filing what would otherwise be an untimely notice.

Foster claims Grinde was ineffective in failing to submit proposed jury instructions on the defense of intoxication after such evidence was admitted at trial. The record reveals the trial judge allowed considerable evidence and argument regarding Foster's state of intoxication. While an instruction on the intoxication defense was not submitted with Grinde's proposed jury instructions, he did request such an instruction, off the record, before the case was submitted and prior to the drafting of the final instructions. The court denied this request. While a recorded request and ruling is preferable, counsel does appear to have requested an instruction on the defense and cannot be deemed ineffective merely because the court denied the request.

AFFIRMED.