

FILED

AUG 23 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

9-259 / 87-1604

STATE OF IOWA,

Appellee,

vs.

TAMRA LYNN BRIDGEWATER,

Appellant.

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Appeal from the Iowa District Court for Lee County,
Harlan W. Bainter, Judge.

The defendant appeals from her conviction, following a
jury trial, of attempt to commit murder. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sarah J. Coats,
Assistant Attorney General, and David Sallen, Lee County
Public Defender, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ.

OXBERGER, C.J.

The defendant Tamra Lynn Bridgewater (Tammy) appeals her conviction by a jury trial of attempt to commit murder. She contends that the trial court erred by denying her request for change of counsel; that she was denied effective assistance of counsel; and that the trial court erred by allowing a police officer to testify about outdated standards of intoxication. Our review is for the correction of errors at law except with respect to the constitutional issue of ineffective assistance of counsel where our review is of the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986). We affirm.

I. Change of Counsel Request

In a letter to the court postmarked September 10, 1987, defendant requested a change of counsel asserting a lack of confidence in David Sallen, her court-appointed attorney. District Court Judge Harlan Bainter responded on September 14, 1987, stating that the public defender appointed to represent her is a competent attorney with many years of experience in trying criminal cases; that as an indigent she was not entitled to the lawyer of her choice; and that with the trial only a week away it would be impossible for a new attorney to prepare the case adequately. Bridgewater argues that the trial court erred by failing to hold a hearing on her pretrial request for new counsel.

The court is required to hold a hearing when a defendant makes a substantial complaint about his or her counsel and further must appoint substitute counsel if the defendant demonstrates sufficient cause. State v. Hutchison, 341 N.W.2d 33, 41 (Iowa 1983). Bridgewater's complaints appear to be centered around her confusion with the criminal process and lack of confidence in her counsel. We do not view her complaints about her counsel to be substantial. Further, we feel sufficient cause did not exist for the trial court to appoint substitute counsel.

The trial court's decision to refuse Bridgewater's request for new counsel was an exercise of discretion. The question is whether the court abused that discretion. In order for the court's decision to be an abuse of discretion, the decision "must have been unreasonable in light of the attendant circumstances -- the discretion must have been exercised for reasons clearly untenable or to an extent clearly unreasonable" State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978). See also State v. Bragg, 388 N.W.2d 187, 188 (Iowa App. 1986).

The court's rejection of Bridgewater's request for new counsel was based on Attorney Sallen's ability to competently represent her. Additionally, the time constraints due to trial being scheduled less than a week from the court's receipt of Bridgewater's request made it

difficult to appoint another attorney and for that attorney to be adequately prepared for trial. We find the court's decision denying defendant's request to be reasonable considering the circumstances.

II. Ineffective Assistance of Counsel

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a

fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 697 (1984).

**A. Failure to present justification or
mistake of fact defenses**

Bridgewater complains that her trial attorney failed to present the justification or mistake of fact defenses. She asserts that her attorney's rejection of two pieces of evidence that underpin her proposed defenses support her claim of ineffective assistance of counsel. The evidence rejected by defendant's counsel was evidence of a scratch to defendant's stomach made by the victim, Jesse Hoenig, some time before she stabbed him with a fishing knife. In addition, there was evidence that Jesse had previously knocked out the headlight of a vehicle that the defendant was in and had pushed the defendant around. Bridgewater asserts that this evidence is consistent with her intoxication defense and, further, that it would support her proposed defenses. We find the defenses to be unsupported by the evidence.

Attorney Sallen testified that he had decided, as a matter of strategy, to not raise all possible defenses, but to concentrate the jury's attention on the intoxication defense. He indicated that he felt this was the strongest defense considering Tammy's statements to witnesses after the stabbing that she intended to kill Jesse. Furthermore, Attorney Sallen testified that the reason he didn't further develop Tammy's testimony about the scratch to her stomach was that it was contrary to Jesse's testimony that they desired the jury to believe. In addition, Tammy's uncertainty concerning when and what actually happened weighed in his decision not to pursue her testimony. Selection by an attorney of a primary theory of defense is a tactical matter which will not be disturbed if it appears to have been a conscientious, principled decision within the normal range of competency. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985). Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987).

We find that Attorney Sallen's decision to solely pursue an intoxication defense to be a reasonable strategical decision. Whether the strategy was good or bad, it was a factor that is not so unreasonable that it shows ineffectiveness. We find that the defendant has failed to meet the burden on this issue.

**B. Failure to properly object to highly
prejudicial evidence.**

Bridgewater also complains that her trial attorney failed to object to prosecutor's questions regarding the blood alcohol levels necessary in the 1970s for a presumption that one is driving under the influence. At trial, the defense presented an intoxication defense. To establish intoxication as a defense in a criminal trial the intoxication will amount to an excuse for a crime only when the person's mental capacity is affected so as to prevent that person from forming the necessary criminal intent. State v. Watts, 223 N.W.2d 234, 239 (Iowa 1974).

On cross-examination defense counsel asked the following questions of police Sergeant Frost:

Q. Now, that is .159 milligrams percent alcohol in the blood then? A. That's correct.

Q. What is the legal limit? A. .10

Q. And so this would be at least 59 hundredths above the legal limit of intoxication, wouldn't it? A. That's correct.

Q. So technically at the time that she was being interviewed by you, she was intoxicated? A. Yes, sir.

On redirect examination, the prosecutor asked Sergeant Frost the following questions:

Q. Sergeant Frost, this .100 milligrams percent alcohol that Mr. Sallen was speaking of, that is merely a statutory minimum under Iowa law where a person could be presumed to be intoxicated while operating a motor vehicle, isn't that correct? A. That's correct.

Q. In your experience, what, 22 years as a sergeant with the Fort Madison Police Department, or 6 years as a sergeant and other years as an officer, has that limit of presumption by the legislature gone down? A. Yes, it has.

Q. And do you recall in, let's say, the 1970's what was the presumption limit that a person could be presumed to be intoxicated while driving for purposes of the Iowa drunken driving statute at that time? A. .15.

Q. In regard to Miss Bridgewater's test which was .159, how does that compare with some of the OWI arrests you have had over the years? I have had them as high as 340 to 60, and 159 as it stands now.

The questions asked by the prosecutor were in response to issues raised by defense counsel on cross-examination. We do not find an abuse of discretion by the trial court in permitting these questions.

Furthermore, based on all of the evidence presented at trial, we do not find that the result of the proceeding would have been different if Attorney Sallen would have properly objected to the outdated standards of intoxication. Evidence at trial indicated that to all parties who observed defendant at the scene of the stabbing, except defendant's mother, she exhibited no signs of intoxication. The defendant appeared to have no problem talking, standing, walking or putting on her jeans. Additionally, there was no detection of alcohol on her breath. However, defendant's blood alcohol level after the stabbing tested at .159 grams/100 milliliters. There was no prejudice amounting to a denial of defendant's due process right to a fair trial. We find that defendant has failed to meet the burden on this issue.

III. Trial court erred in allowing
police officer's testimony

To preserve error in the trial court as to the introduction of evidence, objections to the evidence must be made at the earliest time after the grounds for objection become apparent. If the objection to a question is laid and follows the answer, then a motion to strike, coupled with an application to have the objection precede the answer and an excuse for tardiness, must be made. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). Without proper objection, the issue is not properly before this court. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978). Defendant acknowledges that an objection was not timely made. Therefore, since defendant failed to properly object to the evidence of blood alcohol standards of the 1970s, it is not properly before this court.

We find no grounds for abuse of discretion in the trial court for refusing to grant defendant's request for change of counsel. Further, we find no grounds for a claim of ineffective counsel or error by the trial court in allowing testimony concerning blood level alcohol standards of the 1970s.

AFFIRMED.