

IN THE COURT OF APPEALS OF IOWA

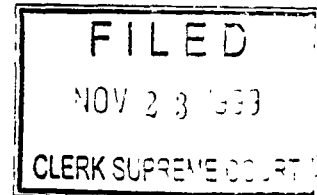
No. 1999-339 (9-592) / 98-1586

Filed November 23, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFF ALLEN SAWVEL,
Defendant-Appellant.



Appeal from the Iowa District Court for Fayette County, James L. Beeghly,
Judge.

Sawvel appeals his convictions for first-degree murder and possession of a
firearm by a felon. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson,
Assistant State Appellate Defender, for appellant.

~~Thomas J. Miller~~, Attorney General, Richard J. Bennett, Assistant Attorney
General, ~~Thomas H. Miller~~, Assistant Attorney General, and W. Wayne Saur, County
Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUTTINK P.J.

I. Background Facts and Proceedings.

Sawvel was charged with first-degree murder and possession of a firearm by a felon following the death of Gehlen Quandt. The State's evidence included eyewitness testimony indicating Sawvel shot Quandt several times with a revolver, kicked him in the head, and cut his throat. Other evidence traced the murder weapon to Sawvel, and D.N.A. testing indicated Quandt's blood was on Sawvel's knife.

Sawvel moved for a change of venue from Fayette County citing newspaper and television reporting of these events. The trial court granted the requested change of venue from Fayette County to Delaware County. The State withdrew its resistance to the motion after reviewing questionnaires returned by potential jurors from Fayette County. In its order granting the requested change of venue, the district court said:

Of the major media providers in Northeast Iowa area KWWL-TV and the Courier newspaper in Waterloo, have provided a significant amount of media coverage. While there are probably a number of viewers and readers in Delaware County, Waterloo media shares the viewer/reader market with similar media sources in Dubuque and Linn Counties. Therefore, the prospects for selecting a fair and impartial jury in Delaware County are much better than Fayette County. Citizens comprising a jury panel from Delaware County will be less likely to have been exposed to extensive media coverage; and will have less intense identification with the victim.

Shortly after jury selection commenced, Sawvel renewed his motion for a change of venue citing the high number of Delaware County jurors dismissed for cause. The district court denied Sawvel's renewed motion.

~~The record also~~ indicates Sawvel was charged with both murder and being a felon in possession of a firearm in the same trial information. Sawvel did not move to sever the latter charge, and evidence of Sawvel's history as a felon was accordingly presented by the State as part of its case in chief.

Sawvel was convicted as charged on both counts. On appeal he contends the district court erred in failing to grant his renewed motion for a change of venue. Sawvel also claims he was denied effective assistance of counsel because counsel failed to file a motion to sever the felon in possession of a firearm count.

II. Change of Venue.

In *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990), the court recited the standards relevant to Sawvel's motion for a change of venue:

Iowa Rule of Criminal Procedure 10(10)(b) provides that upon motion of the defendant, the trial court may transfer venue to another county

[i]f the court is satisfied . . . that such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county

....

This right to a fair trial by impartial jurors has its underpinnings in our state and federal constitutions. *Irvin v. Dowd*, 366 U.S. 717, 721, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755 (1961); *State v. Walters*, 426 N.W.2d 136, 138 (Iowa 1988). Accordingly, we review de novo the ~~record~~ made for purposes of challenging the denial of a motion for change of venue. *State v. Gavin*, 360 N.W.2d 817, 818 (Iowa 1985). Reversal is warranted only where the trial court's decision demonstrates an abuse of discretion. *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989); *Walters*, 426 N.W.2d at 138; *State v. Robinson*, 389 N.W.2d 401, 403 (Iowa 1986).

A defendant relying on jury prejudice as a ground for reversal must show (1) publicity attending the trial that is so pervasive and

~~inflammatory that prejudice must be presumed, or (2) actual prejudice on the part of the jury. *State v. Spargo*, 364 N.W.2d 203, 207 (Iowa 1985).~~

....
To sustain a claim of presumptive prejudice, the defendant must prove that the publicity attending the case was “pervasive and inflammatory.” *Harris*, 436 N.W.2d at 367. Whether publicity rises to the level of being presumptively prejudicial depends on the following factors: the nature, tone, and accuracy of the articles; their timing in relocation to the trial; and the impact of the publicity on the jurors as revealed through voir dire. *Walters*, 426 N.W.2d at 139.

Aside from the court’s earlier findings the record contains nothing more than counsel’s conclusory remarks concerning the nature and extent of pretrial publicity in *Delaware County*. In the absence of such evidence, Sawvel cannot claim presumptive prejudice because he has not met his burden to prove publicity in Delaware County was “pervasive and inflammatory.”

Because Sawvel failed to show presumptive prejudice, the merits of his renewed motion for change of venue turn on evidence of actual prejudice. In making this determination we consider the record made during selection of the jury impaneled in this case. The voir dire record indicates twenty-three prospective jurors were stricken because they were unable to set aside fixed opinions formed as a result of pretrial publicity. The voir dire record also shows the jurors selected, despite prior knowledge of the case, were able to set that knowledge aside and decide the case on the evidence. We conclude, on these facts, Sawvel failed to show actual prejudice and the district court did not abuse its discretion in reaching the same conclusion.

III. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings to allow trial counsel an opportunity to defend the charges. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987).

To demonstrate ineffective assistance of counsel, one must show that “under the entire record and totality of the circumstances” his attorney’s performance was not “within the normal range of competence.” *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show that his lawyer failed to perform an essential duty and that failure resulted in prejudice. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

In order to meet the first test, one must overcome the “strong presumption” that his attorney’s actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel’s error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). It is not necessary to determine whether counsel’s performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Even if Sawvel could show counsel breached an essential duty, he cannot prove the requisite prejudice. As noted earlier, the State’s evidence implicating

Sawvel included testimony from three eyewitnesses who saw Sawvel shoot Gehlen Quandt and slit his throat. There is also evidence Quandt was shot by a gun owned by Sawvel. Moreover, D.N.A. test results indicated Quandt's blood was found on Sawvel's knife. There is no reasonable probability that the jury would reach a different result in the absence of evidence showing Sawvel was a convicted felon.

The judgment of the district court is affirmed.

AFFIRMED.