IN THE COURT OF APPEALS OF IOWA

No. 2-394 / 91-1572

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CLERK SUPREME COURT

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RAYMOND ANTHONY BECKER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Carroll County, Ronald H. Schechtman, Judge.

The applicant, Raymond Anthony Becker, appeals a judgment of the district court denying his application for postconviction relief. **AFFIRMED.**

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Hoyt & Copeland, P.C., Jefferson, for applicant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Barry T. Bruner, County Attorney, for resister.

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

SCHLEGEL, J.

The applicant, Raymond Anthony Becker, appeals the district court's judgment denying his application for postconviction relief. Becker argues (1) he was denied his right to effective assistance of counsel and (2) the trial court erred in finding he had waived his right to raise the issue of ineffective assistance of counsel at the trial level by failing to raise the issue on appeal.

On January 9, 1989, Becker was charged by trial information with two counts of attempted murder resulting from the shooting of his wife and daughter. Joseph Halbur was appointed by the district court to be Becker's attorney. On June 22, 1989, the State filed an amended and substituted trial information, adding a third count, terrorism. Prior to trial, Becker filed an application to receive inpatient alcoholism treatment, which was denied. Trial was set for July 5, 1989.

Prior to trial, Becker signed and filed a written "Waiver of Right to Jury Trial" under Iowa Rule of Criminal Procedure 16. Becker agreed to allow the State to offer all police reports, statements, depositions, and medical reports into evidence without objection. In return, the State agreed to reduce the charges against Becker to one count of attempted murder and one count of terrorism.

At trial, the State introduced the evidence as agreed in the written waiver. Halbur, Becker's attorney, read a statement to the court, and Becker testified in his own

behalf. The trial court subsequently found Becker guilty of both attempted murder and terrorism and denied Becker's second application for inpatient treatment on the grounds Becker had been convicted of a felonious assault. The court sentenced Becker to an indeterminate term not to exceed twenty-five years on the attempted murder charge and a term not to exceed five years on the terrorism charge.

Becker filed a notice of appeal. The assistant appellate defender who had been appointed to represent Becker on appeal filed a motion to withdraw pursuant to Iowa Rule of Appellate Procedure 104. Becker failed to file a response, and the supreme court subsequently dismissed the appeal as frivolous after conducting an independent review. Becker then filed the present application for postconviction relief, arguing he had received ineffective assistance of trial and appellate counsel. The trial court denied the application, and Becker now appeals.

Becker argues his trial counsel was ineffective because counsel led him to believe that if he pleaded guilty, the trial court might sentence Becker to a twenty-five year term without a mandatory minimum. Becker also contends he agreed to waive his right to a jury trial on trial counsel's advice that, if he pleaded guilty, the State would not resist a second application for inpatient treatment for alcoholism. Becker argues trial counsel told him if the State did not resist, the trial court would

grant the application. Becker further alleges trial counsel told him that, following his conviction and treatment, a good possibility existed that either he would serve no additional time or his sentence would be substantially reduced. On appeal, Becker argues Iowa Code section 811.1(1) (1989) prohibits the possibility he could have received inpatient treatment, and he insists his waiver was in effect an Alford plea.

Becker also argues his trial counsel failed to properly investigate and prepare for his defense. He contends counsel knew of his long history of chronic alcoholism but did not attempt to seek the critical medical help necessary in preparation of his defense. In addition, Becker argues he told counsel he had blacked out just prior to the shootings.

Becker also maintains the trial court erred in holding he had waived his right to raise the issue of ineffective assistance. Becker claims the assistant state appellate defender never contacted him about his case, and he argues appellate counsel should have discovered the ineffective assistance of trial counsel in advising him he could receive inpatient treatment despite the language of Iowa Code section 811.1(1) (1989). Finally, Becker argues appellate counsel focused solely on whether sufficient evidence existed to convict Becker instead of on the alleged errors.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

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)). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985).

In order for the applicant to prevail, the record must indicate (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

Becker first contends his trial counsel misstated the law to him which resulted in Becker's misinformed decision to waive his constitutional right to a jury trial. Becker claims he was led to believe by counsel that agreeing to the terms of the proposed waiver would increase his chances of being sentenced to inpatient treatment for alcohol abuse, which would in turn result in a substantial reduction in the amount of time he would spend incarcerated. In essence, Becker contends counsel informed him he would be able to obtain inpatient treatment after a conviction despite the impact of Iowa Code section 811.1(1) (1989). This provision prohibits the court from admitting bail or releasing a defendant who is awaiting judgment of conviction and sentencing following either a plea or guilty verdict of a felonious assault. We find Becker's contention to be entirely without merit.

The record reveals the trial court painstakingly ensured that Becker properly understood if he was found guilty to the charges included in the waiver agreement, the law might very well preclude him from attending the inpatient treatment. During the morning of the scheduled trial date, Judge Ruigh held the jury panel while he made an extensive record regarding matters relating to Becker's waiver of trial by jury. After the defendant admitted reading the document with the assistance of trial counsel and stated he had no questions, he indicated he wanted to forfeit his right to trial by jury and have the case tried by a judge.

Thereafter, some of the court's admonitions setting forth the differences between a jury trial and a bench trial were again repeated by the court reporter reading back the transcript. Following this, Becker stated, "[t]hey're clear now[,]" and the following discussion occurred:

> THE COURT: Mr. Becker, let me just address you personally. Mr. Halbur has said that if you are found guilty, there would be some time lapse, a delay, before you had a sentencing hearing. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Mr. Halbur has said that if you are found guilty--Let me back up. If you're found not guilty, of course, you'll be released and you'll be allowed to do whatever you want as far as treatment goes. If you're found guilty, however, Mr. Halbur has said that you would ask the Court to have you participate in a substance or alcohol abuse treatment program. Is that what your wish is?
>
> THE DEFENDANT: I want some kind of treatment, yes.
>
> THE COURT: Mr. Becker, here's what I'm telling the attorneys. The law says that if you are found guilty to this charge, I cannot admit you to bail. What that means is that you must be held in custody until the sentencing hearing is held. Mr. Bruner is saying that if the Court saw fit and if the law allows you to be held in custody in a treatment program, as opposed to in custody at the sheriff's department, in their jail, that he would have no objections to that, but what I'm telling you, Mr. Becker, is without researching the law further, I don't know whether I can do that for you. I'll certainly listen to your request, but I don't know if the law would allow me to do that or not and so I can't make any promises to you here today. Do you understand that?
>
> THE DEFENDANT: Yes, I do. Your Honor, if you send me to a place like Clarinda or Cherokee, Monsignor suggested Cherokee, get me into a place like that, I'll guarantee and swear on a stack of bibles I won't leave the place until they tell me to go, if that will do you any good. Please get me some help. I need help.

THE COURT: All right. Mr. Becker, I would very willingly listen to your request. What I'm saying is I don't know if the law lets me do that or not, but I have to look in the books further before I can tell you if I have the authority to do that, but I would certainly listen to your application; and if the law allows it, I'll consider it. If the law doesn't allow it, then I couldn't do it. Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Now, with that in mind, do you still want to have a trial to the judge?

THE DEFENDANT: Yes, I do.

Subsequently, Becker waived his right of confrontation of the evidence to be admitted at the trial.

Later, Halbur explained some of the strategy thusly:

MR. HALBUR: I might add, Your Honor, that the reason for this procedure is set out in the documents he signed, but I believe that an Alford plea in this matter would not be appropriate; and I will not let the defendant enter an Alford plea because in an Alford plea he would have to admit to remembering the incident, and I believe he will testify at the trial he does not remember. So the only way to accomplish the defendant's wishes, in my opinion, is to waive the right to a jury trial and just let the evidence into the Court. The defendant does not here, and will not in his testimony, admit any guilt.

The defendant was further asked the following:

THE COURT: Mr. Becker, I've talked to you quite a bit this morning now; and I think you've talked quite a bit with Mr. Halbur this morning. Do you have any questions about anything that has happened here this morning?

THE DEFENDANT: No, I don't.

THE COURT: Do you feel like anybody has forced you into waiving your right to a jury?

THE DEFENDANT: No, I don't.

THE COURT: Has Mr. Halbur forced you to do that?

THE DEFENDANT: No.

THE COURT: Do you feel like I as a judge have forced you or Mr. Bruner as the county attorney have forced you?

THE DEFENDANT: No.

THE COURT: Is that your own voluntary decision?

THE DEFENDANT: Yes, it is, Your Honor.

The court then proceeded to accept the waiver of jury and found it to have been made voluntarily, intelligently, and knowingly, with the State's consent. In light of this extensive record, Becker cannot plausibly argue his decision to waive his right to a jury trial was misinformed.

Secondly, Becker contends his trial counsel failed to adequately investigate and prepare his defenses. We find this contention equally without merit. After filing notice of insanity, intoxication, and diminished responsibility defenses with the State, trial counsel conducted an investigation into the validity of these defenses.

In his investigation of the intoxication defense, counsel consulted with Becker who refused to take an alcohol test. Law enforcement officers administered the alcohol test pursuant to a warrant. Although the test result exceeded the legal limit, .13, counsel strategically decided the result was too low to support the intoxication defense.

Similarly, counsel investigated the diminished responsibility and insanity defenses by having Becker evaluated by two psychiatrists. One of the psychiatrists stopped the examination after eighteen minutes, phoned counsel and told him there was "no hope"--Becker was competent. Counsel then suggested Becker suffered from organic brain damage due to his long-term alcohol abuse.

However, after consulting with the psychiatrist, counsel strategically determined investigating this theory would more likely prove Becker's competence.

Our review of the record reveals Becker's trial counsel acted well within the normal range of competency in performing his duties. Counsel's investigation and research were reasonable under the circumstances. Becker's claim of ineffective assistance of trial and appellate counsel is unfounded. Accordingly, we affirm the district court's denial of the defendant's postconviction relief claim.

AFFIRMED.