IN THE COURT OF APPEALS OF IOWA

No. 16-2086
Filed November 22, 2017

THOMAS LEE HANSEN, SR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Washington County, Randy S. DeGeest, Judge.

Thomas Hansen Sr. appeals the denial of his application for postconviction relief. **AFFIRMED.**

S.P. DeVolder of The DeVolder Law Firm, Norwalk, for appellant.

Thomas J. Miller, Attorney General, and Darrel L. Mullins, Assistant Attorney General, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ.

DOYLE, Judge.

Thomas Hansen Sr. appeals the denial of his application for postconviction relief (PCR). He alleges his trial counsel were ineffective in failing to investigate and present evidence. He also alleges trial counsel were ineffective in failing to request an instruction differentiating malice and heat of passion.

I. Background Facts and Proceedings.

The State charged Hansen with first-degree murder in the shooting death of his girlfriend, Sharon Gerot, on May 1, 2011. Although Hansen admitted to shooting Gerot, he claimed he had only intended to scare Gerot by shooting at her and unintentionally killed her. After trial, a jury found Hansen guilty of second-degree murder. This court affirmed Hansen's conviction on direct appeal. *State v. Hansen*, No. 13-0177, 2014 WL 1495493, at *1 (Iowa Ct. App. Apr. 16, 2014).

Hansen filed a PCR application in which he alleged he received ineffective assistance of trial counsel when counsel failed to perform several duties. The relevant claims center on the premise that Hansen shot Gerot in the heat of passion—rather than with malice—after enduring years of abuse by Gerot. Hansen claimed his trial counsel were ineffective in failing to investigate and pursue this theory of defense at trial. He also claimed counsel were ineffective in failing to request a jury instruction differentiating between heat of passion and malice.

The PCR court denied Hansen's application after trial. The court found Hansen failed to show his trial counsel were ineffective because counsel presented a defense that "was consistent with and in fact based upon Hansen's own version of the event, that he still maintains as being true today, that the shooting was

accidental." The PCR court noted that Hansen had consistently stated he did not mean to shoot and kill Gerot, he only wanted to frighten her, and killing her was an accident. As a result, "[h]is attorneys, realizing that Hansen was convincing and consistent, developed a strategy based upon involuntary manslaughter." The PCR court found that trial counsels' decision to purse this strategy rather than advance a voluntary manslaughter defense was reasonable under the circumstances, noting it would have been incongruous for defense counsel to argue both theories simultaneously and doing so could have undermined Hansen's involuntary manslaughter defense. Likewise, the PCR court rejected Hansen's claim his counsel were ineffective in failing to request a jury instruction differentiating heat of passion and manslaughter because "voluntary manslaughter was never the primary defense and Hansen always maintained and still maintains that the shooting was accidental."

II. Scope of Review.

We typically review PCR proceedings on error. *See Diaz v. State*, 896 N.W.2d 723, 727 (Iowa 2017). When PCR proceedings implicate a defendant's right to the effective assistance of counsel under the United States Constitution and Iowa Constitution, our review is de novo. *See id.*

III. Ineffective Assistance of Counsel.

On appeal, Hansen argues the PCR court erred in denying him relief because he did not receive effective assistance from his trial counsel. Specifically, Hansen asserts his trial counsel were ineffective in failing to investigate and produce evidence in support of a voluntary manslaughter defense based on Gerot's alleged history of abusing him. Hansen also claims his counsel were

ineffective in failing to request an instruction on the difference between malice and heat of passion.

A. Standard of Review.

We employ a two-prong test for determining whether counsel was ineffective. *See State v. Russell*, 897 N.W.2d 717, 729 (Iowa 2017). The first prong of the test, established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requires a showing that counsel failed to perform an essential duty. *See State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). The second prong requires a showing of prejudice. *See id.* While asserting its right to apply different principles when analyzing state constitutional claims, our supreme court has applied the *Strickland* test when reviewing ineffective-assistance claims brought under the Iowa Constitution. *See, e.g.*, *State v. Halverson*, 857 N.W.2d 632, 635 (Iowa 2015) (applying the *Strickland* standard to ineffective-assistance claims brought under the Iowa Constitution when the defendant did not suggest the claims should be reviewed differently under the Iowa Constitution); *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011) (same).

Hansen asserts Iowa courts should adopt a "meaningful representation" standard in analyzing ineffective-assistance claims under the Iowa Constitution. Under this standard, a defendant's right to effective assistance of counsel is satisfied if "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation." *People v. Henry*, 744 N.E.2d 577, 578 (N.Y. 2000) (citation omitted). This standard, applied to ineffective-assistance claims brought under the New York Constitution, utilizes the first prong of the *Strickland*

test. *See Rosario v. Ercole*, 601 F.3d 118, 123-24 (2d Cir. 2010). The difference occurs under the second prong, which does not require a finding that counsel's inadequate representation resulted in a reasonable probability of a different result but instead focuses ultimately on whether counsel's error affected the "fairness of the process as a whole." *Id.* (citation omitted).

Aside from noting our court has the ability to apply a different test in analyzing claims under the Iowa Constitution and other states have done so in analyzing ineffective-assistance claims under their state constitutions, Hansen fails to advance any meaningful argument for doing so here. He asserts a "more lenient state constitutional standard should be applied in this case and PCR ineffective assistance cases in Iowa" without providing additional argument. Without a compelling reason, we reject his invitation. *See State v. Storm*, 898 N.W.2d 140, 148 (Iowa 2017) (rejecting defendant's request to depart from automobile exception to search and seizure provisions of the Iowa Constitution where defendant failed to offer a compelling reason for overruling precedent).

B. Merits.

On our de novo review, we conclude Hansen has failed to demonstrate he received ineffective assistance of counsel. With regard to the decision to forgo a voluntary manslaughter defense at trial, it "was a conscious tactical decision" reached by counsel after discussion:

> [W]e agreed that if we introduced absolutely all the evidence of all the offenses that Mr. Hansen had suffered at her hands and all the witnesses testifying about their observations, that it might . . . help the State establish everything it needs to in terms of malice aforethought, that Sharon Gerot acted so horribly toward Tom Hansen that he wanted to kill her and that's what he really wanted to do when he fired that shot.

> Q. And also as to specific intent, right? A. Everything: Specific intent, deliberation, premeditation, malice aforethought. There was enough evidence there, if we put everything in, that he really did hate her and he really wanted to get rid of her.
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> Q. And perhaps that conclusion might be even more magnetic to a jury, given what kind of person Tom Hansen was—otherwise nonviolent, otherwise well-respected in the community—and yet, with respect to this person, we can all understand essentially why he wanted to kill her? A. And it would reinforce the State's case on those issues.
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> Q. So that was the tactical decision that you made? A. Yes.

Further complicating the voluntary manslaughter defense was the fact that Hansen "repeatedly" said that he did not intentionally shoot Gerot, and "[h]e said it with passion." Counsel determined that although "there were nice facts in this case that could possibly support a voluntary manslaughter theory," they "could not have intentionally coached Mr. Hansen to completely contradict everything that he had passionately told us earlier and that he also told [law enforcement] hours after the shooting." If they pursued the voluntary manslaughter theory, "the State could always present [the] statement from Tom Hansen saying: 'Well, I didn't intend to shoot her.'"

In light of this evidence, counsel made a reasonable decision to forgo a voluntary manslaughter defense in order to pursue an involuntary manslaughter defense. Although counsel were unsuccessful in pursing the defense, this strategic decision does not amount to failure to perform an essential duty. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) ("[C]laims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney.").

Because counsel made a reasonable tactical decision to forgo a voluntary manslaughter defense at trial, counsel had no duty to request a jury instruction differentiating the mens rea for murder and voluntary manslaughter. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) ("[C]ounsel is not incompetent in failing to pursue a meritless issue." (alteration in original)).

AFFIRMED.