

IN THE COURT OF APPEALS OF IOWA

No. 2-869 / 12-0188
Filed January 9, 2013

JOSEPH ALFRED DAILEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Joseph Dailey seeks postconviction relief from his conviction for homicide by vehicle. **AFFIRMED.**

Matthew R. Metzgar of Rhinehart Law, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller and Kyle Hanson, Assistant Attorneys General, Patrick Jennings, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee State.

Heard by Eisenhauer, C.J., and Doyle and Bower, JJ.

DOYLE, J.

Joseph Dailey seeks postconviction relief (PCR) from his conviction for homicide by vehicle. He contends his trial counsel was ineffective in preparing and arguing Dailey's defense theory. Upon our de novo review, we affirm.

I. Scope and Standards of Review.

We normally review postconviction proceedings for errors of law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights, such as effective assistance of counsel, we review the claim de novo. *Id.* To prevail on an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 158. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* at 159.

II. Background Facts and Proceedings.

In 2008, a jury found Dailey guilty of homicide by vehicle, in violation of Iowa Code section 707.6A(1) (2007). Dailey appealed thereafter, and we summarized the facts in our decision as follows:

At approximately 11:00 p.m. on August 11th, 2007, Dailey was driving Danny Peterson home from a Sioux City bar. Just a few blocks from the bar, Dailey crashed into another vehicle and Peterson was killed in the accident. Dailey's blood alcohol content . . . was .212.

. . . On March 18, 2008, a jury trial began. The State presented evidence that at the time of the accident, the night was clear and dry, the intersection was regulated with a marked turning lane and working stoplights, and the brakes on Dailey's vehicle were in proper working order. [The other car's driver] testified that she was stopped at an intersection in the left-hand turn lane. Just prior to the crash, she had no indication of an approaching vehicle, except for a quick flash of light in her left or driver's side mirror. Before she had time to react, Dailey smashed into the rear driver's

side of her vehicle. As a result of the impact, both vehicles spun around.

One of the first officers on the scene testified that Dailey was in the driver's seat of his vehicle. He was initially unconscious and breathing, but eventually regained consciousness. However, Peterson was unconscious and not breathing. Peterson's legs were in the passenger compartment but his upper body was laying on the seat, towards the driver. Because the passenger side of the vehicle was mangled around Peterson, emergency workers needed to use the "jaws of life" to get him out of the vehicle. The majority of damage to [the other driver's] vehicle was on the rear driver's side and the majority of damage to Dailey's vehicle was on the front passenger side.

Both Dailey and Peterson were taken to a hospital, where Peterson was pronounced dead. Dailey suffered a gash to his head, requiring the need for twenty staples. Another officer described Dailey as agitated and not cooperative with hospital staff or officers. Dailey also resisted being put in handcuffs and threatened to kick an officer. It took four officers to escort Dailey from the building.

....
Dailey testified that he did not believe he was drunk when he left the bar and that he was not impaired to any extent to drive. He claimed that just prior to the accident, Peterson grabbed the steering wheel and made "some remark about '[I]et's go this way' and kind of laughed." Dailey attempted to correct the path of the vehicle, which he claimed explained his vehicle "swooping . . . to the left." Dailey could not remember whether he applied his brakes. However, Dailey did not tell officers of this version of events nor did he tell his own accident reconstruction expert until the night before the trial.

State v. Dailey, No. 08–0909, 2009 WL 1492698, *1 (Iowa Ct. App. May 29, 2009). We affirmed his conviction on appeal, rejecting Dailey's claims of error as to the sufficiency of the evidence and his two ineffective-assistance-of-counsel claims concerning the jury instructions in the case. *Id.* at *1-*4. In concluding that there was sufficient evidence to find Dailey guilty beyond a reasonable doubt of homicide by vehicle, we explained:

The State was required to show Dailey "unintentionally cause[d] the death of another by operating a motor vehicle while intoxicated, as prohibited by section 321J.2." Iowa Code

§ 707.6A(1). Dailey does not challenge the fact that he was operating while intoxicated. Rather, he claims the State did not prove a causal connection between his intoxication and the accident.

Dailey testified that Peterson had grabbed the steering wheel just prior to the accident, causing it to swerve and Dailey was not able to correct the direction before it crashed into [the other driver's] vehicle. He supported this theory with his accident reconstruction expert opining Peterson was likely leaning to his left when the collision occurred. Based on that testimony, the jury was instructed that they could find Peterson's conduct was the sole proximate cause of his own death.

However, the jury was not required to accept Dailey's version of the events. Additionally, the jury may not have found Dailey's story credible, especially in light of the fact he told no one, not even his own expert, until the night before trial. Regardless, even if the jury did find Peterson grabbed the steering wheel, it could have found that an unimpaired driver could have avoided the accident. This would support the State's position, that even if Peterson had grabbed the steering wheel, it would not have been the sole proximate cause of the accident. The jury was so instructed.

Id. at *2.

Dailey filed his pro se application for PCR in November 2009. As a part of his claim, Dailey asserted that his trial counsel ("Counsel") rendered ineffective assistance because Counsel failed to "properly prepare the defense theory that Peterson grabbed the steering wheel of the Dailey vehicle, [causing] the vehicle to veer and thereby cause the accident that killed Peterson." The State resisted, arguing Counsel hired the expert who did, in fact, testify about the fighting issue in the case, proximate cause, and Counsel was therefore not ineffective. Rather, the State asserted the jury simply failed to accept the expert's testimony. Additionally, the State also argued there was overwhelming evidence that Dailey was intoxicated and unintentionally caused Peterson's death by operating his pickup while intoxicated. The State noted there was a jury instruction on sole

proximate cause, and it argued there was just as much evidence that the passenger may have been grabbing the wheel to correct rather than in recklessness.

A trial on Dailey's PCR application was held in 2011. Counsel testified, in person and by way of his earlier deposition admitted at the PCR trial, the defense's theory all along was that Peterson grabbed the steering wheel causing the accident. Counsel testified he retained Dr. Wilson Hayes, an expert in accident reconstruction and injury biomechanics, to provide an opinion on the speed of the vehicles involved in the accident. He stated he did not ask Dr. Hayes whether or not Dr. Hayes could in fact determine "the potential events that would have preceded the final resting place of the items in the cab" because he did not realize the expert might be able to give an opinion on the issue until an officer testified at trial that Peterson's body was found underneath the dash. Counsel explained that the police reports did not indicate that detail of the positioning of the body, and he had an "epiphany" during the officer's testimony and decided to ask the expert if the expert could offer an opinion on the issue.

Additionally, Dailey offered testimony from another expert in accident reconstruction who agreed with Dr. Hayes's testimony that Peterson's injuries indicated Peterson was turned toward his left and leaning to his left at the time of impact. The expert also stated Peterson's injury pattern, as described in the autopsy report, was consistent with Peterson being turned toward his left and leaning to his left across the seat at the time of impact.

After trial, the PCR court entered its ruling denying Dailey's PCR application. The court concluded Counsel breached his duty "for his untimely

investigation and lack of diligence into the body position of Peterson,” finding “[t]his evidence was available in part through numerous police officer narrative dictation and would have supported Dailey’s testimony even if [the body had not been] found below the dash.” However, the court found Dailey was not prejudiced by Counsel’s breach. The court explained:

[Counsel] was able to get the expert opinion on positioning, was able to argue that Peterson could have been reaching for the wheel as evidenced by his body position, and was able to obtain from the trial judge jury instructions on superseding and intervening cause. Dailey is most upset with the [State’s] use of the eleventh-hour defense argument. Dailey’s testimony of [Peterson’s] grabbing of the wheel was an eleventh-hour defense and a story not previously mentioned by him despite him having the opportunity to do so. Dailey did not do so and would have heard the eleventh-hour argument because of his actions.

Dailey now appeals.

III. Discussion.

Dailey testified as to his story of events. Counsel, even after having waited until the night before Dr. Hayes testified to first raise the issue of occupant dynamics with Dr. Hayes, was able to get into evidence Dr. Hayes’s opinion on the positioning of the body, an opinion which was consistent with Dailey’s defense. Counsel also explained in his closing why he waited to discuss the matter with the expert. Furthermore, Counsel was able to get the requested jury instructions on the issues of sole and proximate cause submitted to the jury. Although we have serious concerns with the PCR court’s conclusions that counsel breached an essential duty, we need not address that finding because we agree with the court’s conclusion Dailey cannot show the requisite prejudice.

“Prejudice exists if there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability means a substantial, not just conceivable, likelihood of a different result. Counsel’s error must undermine our confidence in the verdict.” *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012) (internal citations and quotation marks omitted).

The gist of Dailey’s argument is that but for the timing of Counsel’s disclosure to Dr. Hayes of Peterson grabbing the steering wheel, the door would not have been opened for the State to make its “eleventh-hour” argument. Dailey asserts the argument destroyed his credibility. The PCR court addressed this assertion in ruling on Dailey’s motion to enlarge and amend, making the following observations:

Mr. Dailey’s prejudice argument relates almost exclusively to the timing of the expert being provided the information and the closing argument he was subjected to. As previously mentioned, Mr. Dailey had not told anyone, but for his attorney, that Mr. Peterson pulled the steering wheel. This would have been disclosed during the trial when he testified except he asked for the defense expert to hear the facts and determine if he could render an opinion that was helpful. The defense expert did hear his version and did render an opinion that may, in some respects, be helpful. Again, ultimately the last minute argument and having testified after having heard the evidence at trial was Mr. Dailey’s to carry. It had advantages of late disclosure and the county attorney being unable to contradict it and it had the disadvantage of not being previously disclosed, though there was certainly no obligation by Mr. Dailey’s attorney to disclose his theory of the defense. As the Court of Appeals discussed, and this court concurs, the jury did not have to believe Mr. Dailey’s testimony. A sober driver with reasonable care may have avoided this accident, even if Mr. Peterson had grabbed the steering wheel. The court finds it reasonable a jury could find Mr. Dailey was intoxicated, the intoxication could have affected the manner in which he was driving and/or could have affected the ability of him to deal with someone grabbing the wheel and also his behavior after the accident when he was described as agitated and

not cooperative with hospital staff or others and resisted being placed in handcuffs and threatened to kick officers. It took four officers to escort Mr. Dailey from the building. Additionally, Mr. Dailey struck the other vehicle from behind and there were no signs of braking at the scene. It is reasonable to believe a jury could conclude he did not have control of his vehicle and/or was unable to stop the vehicle within an assured clear distance and/or failed to keep a proper lookout to see this stopped vehicle and that his level of intoxication caused or significantly contributed to his actions or failure to act. Evidence at trial was the brakes were examined and were operating properly.

We concur with these observations. Again, we note Dailey was able to present his defense theory to the jury through his own testimony, opinion testimony, argument, and in the instructions. Although it is conceivable a different result may have been reached had Counsel made his disclosure to Dr. Hayes earlier, we simply cannot find there is a reasonable probability of a different result. We accordingly affirm the PCR court's denial of Dailey's PCR application.

AFFIRMED.