IN THE COURT OF APPEALS OF IOWA

No. 6-843 / 05-1591
Filed January 31, 2007

JOSEPH HOUSTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Joseph Houston appeals following denial of his application for postconviction relief. **AFFIRMED.**

Jeffrey T. Mains of Mains Law Office, P.L.C., Des Moines, for appellant.

Joseph Houston, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Daniel C. Voogt, Assistant County Attorney, for appellee State.

Considered by Zimmer, P.J., and Eisenhauer and Baker, JJ.

ZIMMER, P.J.

Joseph Houston appeals following the denial of his application for postconviction relief. Appellate counsel raises two claims of ineffective assistance of trial counsel. In a pro se brief, Houston raises additional claims of ineffective assistance of trial counsel, as well as claims of district court error and the ineffective assistance of appellate counsel. We affirm the district court.

I. Background Facts and Proceedings.

In September 1996 the skeletal remains of Dawue Stigler, a suspect in the murder of Rafael Robinson, were discovered in a cornfield near Des Moines. Houston was arrested and charged with one count of murder in the first degree and one count of kidnapping in the first degree in connection with Stigler's death.[1] The matter was tried to a jury in February 1999. Houston was convicted of kidnapping in the first degree, acquitted of the murder charge, and convicted of the lesser-included offense of assault with intent to inflict serious injury.[2] He was sentenced to life imprisonment for the kidnapping conviction and an indeterminate two-year term of incarceration for the assault conviction.

Houston appealed, contending trial counsel was ineffective for failing to (1) adequately challenge the voluntariness of an inculpatory statement he made to law enforcement and (2) retain an expert witness to explain a break in the tape recording of the statement. This court affirmed Houston's convictions. *See State v. Houston*, No. 99-491 (Iowa Ct. App. May 31, 2000). We rejected his first claim, concluding the district court had addressed and resolved the voluntariness

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[1] Iowa Code §§ 707.1, .2(1)-(2) (1995) (murder); *id*. § 710.1, .2 (kidnapping).

[2] *Id*. § 708.1.

issue during a suppression hearing, and preserved the second claim for a possible postconviction relief proceeding. *Id*.

Houston filed a pro se postconviction relief application on August 6, 2001, which was recast by counsel on September 22, 2003. The matter was tried to the district court, and a ruling was issued in August 2005 by Judge Eliza Ovrom. The court considered and addressed several claims raised by both the initial and recast application, four of which are relevant to this appeal: (1) whether trial counsel were ineffective for failing to request missing specific intent language in an aiding and abetting jury instruction, (2) whether trial counsel were ineffective for failing to request that the district court clarify a joint criminal conduct instruction in response to jury notes, (3) whether trial counsel were ineffective for failing to retain an expert and present expert testimony regarding Houston's recorded statement to law enforcement, and (4) whether appellate counsel was ineffective for failing to raise the above issues on direct appeal.

The postconviction court determined that it need not assess the effectiveness of appellate counsel in light of an amendment to section 814.7. It then analyzed and rejected the above-noted claims. The court concluded Houston had not demonstrated he was prejudiced by the omission of the specific intent language in the aiding and abetting instruction. It further concluded trial counsels' handling of the joint criminal conduct issue was based on a strategic decision and not ineffective. It also noted that any pro se claims of district court error relating to the instruction were without merit. Finally, the court concluded trial counsels' decision to not hire a forensic expert to examine Houston's

recorded statement was a strategic decision and not ineffective, and that Houston had failed to demonstrate any prejudice as a result of the decision.

Houston filed a pro se motion pursuant to Iowa Rule of Civil Procedure 1.904(2) and asked the district court to address his "independent constitutional claims" of due process violations. He asserted that Jury Instruction No. 52, which set forth the elements of kidnapping in the first degree, was "constitutionally defective" for various reasons. He further argued that Jury Instruction No. 52 and Jury Instruction No. 17, which defined aiding and abetting, deprived him of a fair trial by erroneously instructing or failing to instruct the jury regarding elements of the offense. The district court denied his motion and Houston appeals.

On appeal from the postconviction proceeding, current appellate counsel asserts that Houston's trial counsel was ineffective in two regards: (1) failure to request the addition of specific intent language regarding aiding and abetting and (2) failure to retain an expert to examine Houston's taped statement. In a pro se brief, Houston raises the following additional claims: (1) the district court erred in failing to "clear-up jury confusion" regarding the joint criminal conduct instruction and trial counsel was ineffective for failing to object to the court's actions, (2) Jury Instruction No. 52 was "constitutionally defective," (3) appellate counsel in the direct appeal was ineffective, and (4) the district court abused its discretion when it did not rule on the merits of his claims of ineffective assistance of appellate counsel or notify the parties of an alleged conflict of interest.[3]

[3] We consider those claims and arguments raised in briefs by counsel and in Houston's "Amended *Pro Se* Supplemental Brief and Argument" and his "Pro Se Supplemental

II. Scope of Review.

Postconviction proceedings are generally reviewed for errors of law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises issues of constitutional dimension, our review is de novo. *Id*.

III. Necessity of Raising Claims on Direct Appeal.

Pursuant to Iowa Code section 822.8,

> Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted . . . .

This section has long been interpreted as providing that a "claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error." *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Sufficient reasons include the ineffective assistance of appellate counsel and factual and legal matters excusably unknown at the time of trial and appeal. *Id*. In addition, section 814.7(1) now allows individuals to raise a claim of ineffective assistance of appellate counsel in a postconviction proceeding even if the claims were not raised on direct appeal.

In light of section 814.7(1), the ineffective assistance of trial counsel claims were properly raised in this postconviction proceeding.[4] In addition,

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Reply Brief and Argument." We do not consider the arguments raised in "Appellants Supplemental Reply Brief," filed by Houston pro se, which is both unauthorized and untimely. *See* Iowa R. App. P. 6.13(2).

[4] Section 814.7(1) became effective on July 1, 2004, after Houston filed his application for postconviction relief but before his application was ruled on by the district court. This provision is procedural in nature. *See Dolezal v. Bockes*, 602 N.W.2d 348, 351 (Iowa

Houston asserts his claims of instructional error were not raised on direct appeal because his appellate counsel rendered ineffective assistance. Houston asserts appellate counsel was ineffective because his claims were "sure winners" that were "***ripe*** for direct appeal" and "the record was ***sufficient*** for review." Although this contention is lacking in specificity and detail, *see Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (requiring defendant to state specific way in which counsel's performance was deficient and identify how competent representation probably would have changed outcome), we conclude it is minimally sufficient and accordingly will address Houston's claims of instructional error.

IV. Relevant Legal Standards.

To establish the ineffective assistance of his counsel, Houston must overcome a strong presumption of his counsels' competence. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). He has the burden of proving his attorneys' performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsels' errors, the result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability

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1999) (defining procedural legislation). Procedural legislation will be applied to currently pending actions, *id*., unless "it is not feasible to do so or will work an injustice in the particular case." *Brewer v. Iowa Dist. Court*, 395 N.W.2d 841, 842 (Iowa 1986). However, the question of retroactive versus prospective application is ultimately governed by legislative intent. *Board of Trustees of Mun. Fire & Police Ret. Sys. of Iowa v. City of West Des Moines*, 587 N.W.2d 227, 230-31 (Iowa 1998). Employing these principles leads us to conclude that section 814.7(1) should be applied retroactively in this case.

sufficient to undermine confidence in the outcome of the proceedings. *State v. Carillo,* 597 N.W.2d 497, 500 (Iowa 1999).

We review the district court's jury instructions to determine if they are they are correct statements of the law and are supported by substantial evidence. *Collister v. City of Council Bluffs*, 534 N.W.2d 453, 454 (Iowa 1995). The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 2.19(5)(*f*); *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). However, even if instructional error is shown, reversal is warranted only if the error results in prejudice to the defendant. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

V. Absence of Specific Intent Language.

The jury was instructed that Houston could be convicted of kidnapping in the first degree as either a principal or an aider and abettor. Because kidnapping is a specific intent crime, to convict Houston as an aider and abettor the State was required to prove Houston participated in the kidnapping either with the requisite specific intent or with the knowledge a principal had the required intent. *See State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989). However, when instructing the jury on the requirements of aiding and abetting, the district court, without objection, omitted the following language that should be included when the crime charged requires specific intent:

> [B]efore you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either has such specific intent or "aided and abetted" with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent, [he] . . . is not guilty.

Iowa Crim. Jury Instructions 200.8.

Houston contends the district court erred when it failed to include the foregoing or similar language within either the aiding and abetting instruction or the marshalling instruction for kidnapping in the first degree, and that trial counsel were ineffective for failing to object to its omission. The State acknowledges the appropriateness of including such language, but contends Houston cannot demonstrate prejudice because (1) when the instructions are read as a whole, they adequately inform the jury of the State's burden to prove the required intent, *see Stallings*, 541 N.W.2d at 857 (requiring challenged jury instruction be judged in context with other instructions relating to the charge), and (2) the record contains overwhelming evidence that Houston either had the requisite specific intent or acted with knowledge a principal had the necessary intent.

We cannot agree with the State's first contention. Having reviewed the jury instructions, we find nothing that adequately substitutes for the missing language. We nevertheless conclude this error does not require reversal of the kidnapping conviction because, as the State correctly notes, Houston cannot demonstrate the necessary prejudice in light of the overwhelming evidence that he either had the specific intent, or knew one or more of the principals had the specific intent, to secretly confine or inflict serious injury upon Stigler. *See* Iowa Code § 710.1 (setting forth elements of kidnapping). The salient evidence on this point includes the following.

In the summer of 1996 Shauntelle Brown and Damon Calaway lived in a house at 900 East Lyon Street in Des Moines. Larry Botts, who was in a

relationship with Brown, and Tahamed Fowler, a friend of Calaway's and Houston's cousin, visited the home, as did Houston and Darrel Smith.

Brown remembered seeing Stigler at the house on one particular occasion. She stated that Stigler and another man, whose identity she could not recall, went into the basement of the house. Calaway, Botts, Fowler, Houston, and Smith were all in the home's basement that day. After Brown and the other man went into the basement, Brown heard angry yelling, "like somebody was fighting." She could identify Calaway as one of the people yelling. She also heard bottles breaking. Approximately thirty minutes later Calaway, Botts, Fowler, Houston, and Smith "came upstairs" and ate some food Brown had prepared. Brown did not see Stigler leave the basement. Later that night or the next day, Botts told Brown to go into the basement and clean blood that was on the carpet and the wall. Brown saw two or three areas of blood on the carpet, each approximately the size of a dinner plate, and a smear of blood on the wall about a "shoulder wide." She also saw a broken bottle.

Brown testified that Botts and Calaway each spoke with her about what happened that day. According to Brown, Botts stated that Stigler "was beat up" and that "[t]hey made him take his clothes off and put him in the trunk . . . ." He told Brown that if she spoke about it she would "end up like" Stigler. Calaway told Brown that he had "shot [Stigler] in the head," and that if she said anything she "would also end up dead."

Joe Robinson testified that Houston, Botts, Calaway, Fowler, and Smith were all members of the Crips, as Rafael Robinson had been. Accordingly to Robinson, sometime after Rafael had been killed, Calaway showed him some

blood on the basement wall at 900 East Lyon Street and told him it belonged to Stigler. Robinson further testified that Houston had stated he, Smith, Calaway, and Fowler "had went and picked [Stigler] up . . . and told him they wanted to smoke a blunt, then they took him to [Calaway's] house." Once there, they got Stigler into the basement, where Botts pulled out a shotgun and told Stigler to strip. "[T]hey" then beat Stigler because they thought he had some involvement with Rafael's death. Botts told them to let Stigler go, but Houston, Smith, Fowler, and Calaway took Stigler to a cornfield where Stigler was shot.

Houston was interviewed by Des Moines Police Officer James Rowley on two occasions. Both statements were recorded and made while Houston was incarcerated for another crime. During the first interview, which was initiated by Officer Rowley, Houston denied belonging to the Crips, ever having been at 900 East Lyon Street, or knowing Calaway, Smith, or Botts. He did acknowledge that Fowler was his cousin, he knew Stigler from prison, and he knew Rafael Robinson through his brother. He denied any involvement in Stigler's murder. During the second interview, which was conducted at Houston's request, Houston admitted involvement in the events leading up to Stigler's death.

According to Houston, he had heard Stigler was involved in the death of his "friend," Rafael Robinson. He, Calaway, Fowler, and Smith had picked up Stigler and brought him to Calaway's home at 900 East Lyon Street "to smoke some weed or something to get high," and with the intention to "get answers" about Rafael's death. The five men went into the basement of the home. When Botts found out Stigler was in the basement, he "grabbed the 12 gauge" shotgun, went downstairs, "pulled it" on Stigler, and told Stiger to "[s]trip naked." Stigler

was hit with a bottle, tied up, and beaten. Houston contended that he "really didn't beat on" Stigler, but admitted he "probably kicked him maybe once or twice," and that he questioned Stigler about his involvement in Rafael's death. Botts eventually decided that Stigler did not know anything and instructed Houston to untie him. However, when Houston sat down next to Stigler, Stigler stated that "if I get up out of this, it's going to be on . . . ." Houston understood this to be a threat against himself and his family, and did not untie Stigler.

Houston then heard Calaway say, "Well let's just kill him," after which Botts told the others that "you might as well get one under your belt." Houston stated the others "got [Stigler] up" and put him in the trunk of a car. Botts told them to "[g]o on with all your business," which Houston understood as an instruction to "go on and kill" Stigler. Houston got into the car with Calaway, Fowler, and Smith. Calaway had a pistol. Houston understood "someone was going to kill that man, [but] it wasn't going to be me." The men drove around, eventually stopping at a cornfield. Smith removed Stigler from the trunk. Stigler ran into the cornfield, and was chased by Calaway and Fowler. Houston heard Fowler say "we got him," then heard three or four gunshots. When Calaway returned to the car, he had the gun in his hand and admitted to shooting Stigler.

The foregoing evidence overwhelmingly indicates that, at a minimum, Houston aided and abetted others in the kidnapping of Stigler with the knowledge that one or more of principals had the necessary specific intent. In light of this evidence, Houston cannot demonstrate that the omission of the specific intent language prejudiced his defense, or that its inclusion would have given rise to a reasonable probability of a different outcome. Accordingly, the court's failure to

include the language, and counsel's failure to object to its omission, does not provide a basis for reversing Houston's kidnapping conviction.

VI. Failing to Retain Expert to Examine Recorded Statement.

Houston next asserts trial counsel were ineffective for failing to retain an expert to examine the tape recording of his second statement to Officer Rowley. Towards the beginning of the tape, and prior to Officer Rowley providing a *Miranda* warning, there is an audible pause or click. Houston testified that the pause/click occurred when Officer Rowley "turned off the tape and . . . made promises and threatened me, just to get me tell the lies." Specifically, Houston contended that while the tape was turned off, Officer Rowley informed Houston that if he failed to cooperate he would be the only person charged in relation to Stigler's death, responded to Houston's request for an attorney by stating that "[t]hen the prosecutor will not consider any deals," and eventually agreed that he was willing to try and persuade the prosecutor to reduce the charges against Houston.

Houston shared his allegation with trial counsel, and requested that they retain an expert to examine the tape recording. Counsel testified that they looked into the possibility of retaining an expert, but decided against it. A subsequent motion to suppress the statement was denied. The district court determined the interview was not a custodial interrogation and Houston's *Miranda* waiver was valid and voluntary. The court rejected Houston's claims of promissory leniency. The court believed Officer Rowley's testimony that the tape had not been turned off, finding his version of events to be far more credible than Houston's. Houston asserts that if an expert had been retained and been able to

prove the tape had been turned off, it would have bolstered his credibility and diminished that of Officer Rowley.

In assessing the effectiveness of trial counsel, we decline to second guess a reasonable tactical decision. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). A trial tactic or strategy is not unreasonable, and counsel is not ineffective, simply because the tactic or strategy was improvident or miscalculated. *See State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000). Here, Houston's trial counsel testified that the decision not to hire an expert was a strategic or tactical one.

Defense counsel Mike Mayer testified that he decided it was unnecessary to retain an expert because he did not believe the tape had been turned off. He was also concerned that a decision to retain an expert could "backfire," in that the expert might conclude the tape had not in fact been turned off. Mayer felt this would present problems for the defense if Houston wanted to testify during the suppression hearing, as he in fact did, that the tape had been turned off. Mayer also believed it would be difficult to convince the court the statement had been coerced given that the interview was conducted at Houston's request.

Defense counsel Kathy Goudy testified that she contacted the National Association of Criminal Defense Lawyers concerning tape experts, but determined an expert was unnecessary because it would be obvious to a lay person that the tape had been stopped then started again. She further testified that she had researched the issue under then-existing case law and determined the alleged statements by Officer Rowley, even if proven, would not have led to the suppression of Houston's statement. She believed the better course was

focusing on an alternative argument that Houston had been denied his right to counsel.

The foregoing demonstrates that trial counsels' decision not to retain an expert was a reasonable tactical decision. Under the circumstances, Houston cannot demonstrate his trial counsel were ineffective. His claim accordingly fails.

VII. Joint Criminal Conduct Instruction.

The court instructed the jury on joint criminal conduct as follows:

> When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The Defendant's guilt is the same as the other person's unless the act could not reasonably be expected to be done in aiding the commission of the crime.

The foregoing mirrors the uniform instruction and is a correct statement of the law. *See* Iowa Code § 703.1; Iowa Crim. Jury Instruction 200.7. Houston nevertheless asserts the district court erred when it failed to clear up jury confusion regarding the instruction and trial counsel was ineffective for not requiring the court to supplement or clarify the instruction.

Houston bases his claims on the fact that during deliberations the jury twice sent a note to the court requesting it to clarify the second sentence of the instruction. Each time the court consulted with the prosecutor and defense counsel. Defense counsel in turn consulted with Houston. In response to each note, defense counsel requested that no further instruction be given, and that the jury be directed to consider the instructions and continue its deliberations. Mayer and Goudy both testified that this was a strategic decision by counsel. Mayer clarified he did not want the judge to expand on the instruction because it

appeared the jury was having trouble reaching a decision which, in his experience, was to Houston's advantage.

The record reflects the district court's response to jury questions about a proper and supported instruction was made pursuant to and was consistent with a reasonable strategic decision by trial counsel. Under these circumstances, Houston cannot demonstrate either district court error or ineffective assistance.

VIII. Kidnapping in the First Degree Marshalling Instruction.

The jury was instructed that the State was required to prove the following elements:

> 1. . . . [T]he Defendant or someone he aided and abetting confined Dawue Stigler or removed [him] to 900 East Lyon, Des Moines, Iowa.
> 2. The Defendant or someone he aided and abetted did so with the specific intent to:
>
> a. Inflict serious injury upon Dawue Stigler;
> b. Secretly confine Dawue Stigler.
>
> 3. The defendant or someone he aided and abetted knew he did not have the consent or authority of the victim to do so.
> 4. As a result of the confinement or removal, Dawue Stigler suffered a serious injury or was intentionally subjected to torture.
>
> If the State has proved all the elements, the Defendant is guilty of Kidnaping in the First Degree. If the only element the State has failed to prove is "3," then the Defendant is not guilty of Kidnapping in the First Degree and you will then consider the charge of Willful Injury explained in Instruction No. 59 otherwise you will consider the charge of Kidnapping in the Second Degree explained in Instruction No. 53.

Houston asserts the instruction is "constitutionally defective" because it wrongfully instructs on the pertinent law, is confusing, and conflicts with other instructions. Like the joint criminal conduct instruction, this instruction generally comports with the uniform instruction and the underlying law. *See* Iowa Code § 710.1; Iowa Crim. Jury Instruction 1000.1. No reversible error is shown.

IX. Alleged Abuse of Discretion by Postconviction Court.

Finally, we turn to Houston's contention that the postconviction court abused its discretion when it failed to (1) rule on the merits of Houston's claims of ineffective assistance of appellate counsel and (2) notify the parties of an alleged conflict of interest. Because we have considered the merits of Houston's underlying claims, we need not consider the first contention. The second is based upon Houston's assertion that, prior to being appointed to the bench in 1999 and during the prosecution of the underlying criminal matter, Judge Ovrom served as an assistant Polk County attorney.

Houston cites to Canon 3(C)(1) of the Iowa Code of Judicial Conduct, which requires a judge to

> disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following instances:
> a. The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> b. The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . .

Thus, it is possible a set of facts could be shown which would have required Judge Ovrom to disqualify herself from deciding the merits of Houston's postconviction application. *But cf. State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) ("[S]peculation is not sufficient, and '[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.'" (citation omitted)).

The State asserts the question of whether Judge Ovrom had a conflict of interest sufficient to warrant recusal cannot be decided on the existing record and

that this claim should accordingly be preserved for a possible postconviction proceeding. If the claim had been raised as one of the ineffective assistance of postconviction counsel, we would agree. *See State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000) (noting that when a record on appeal is inadequate to assess the performance of trial counsel, we preserve the ineffective assistance claim for possible postconviction action). However, Houston raises this claim not as one of ineffective assistance, but as one of district court error. Houston does not cite to, and we are not aware of, any legal authority that would permit us to preserve this claim for a possible additional postconviction relief proceeding.

Moreover, we note that even if Houston were somehow able to demonstrate that Judge Ovrom was required to recuse herself, any error stemming from her failure to do so would be harmless. The postconviction hearing occurred before Judge Leo Oxberger and, with the consent of the parties, was decided by Judge Ovrom based on the existing record. We have considered all of Houston's claims in light of that record and have found them to be without merit. Accordingly, we reject this assignment of error.

X. Conclusion.

We have considered all of Houston's claims, whether or not specifically discussed. Finding them all to be without merit, the decision of the postconviction court is affirmed.

AFFIRMED.