

**IN THE COURT OF APPEALS OF IOWA**

No. 7-020 / 05-1351  
Filed April 11, 2007

**BENNIE MAE HARRINGTON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Bennie Mae Harrington appeals the district court's ruling in her postconviction relief proceeding. **AFFIRMED.**

Angela Gruber-Gardner of Marks Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Paul L. Martin, County Attorney, and Carlyle Dalen, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Mahan and Vaitheswaran, JJ.

**MAHAN, J.**

Bennie Mae Harrington appeals the district court's ruling in her postconviction relief proceeding. She argues her trial counsel rendered ineffective assistance of counsel by failing to plead and argue a diminished capacity defense. We affirm.

**I. Background Facts and Proceedings**

Harrington was convicted of first-degree murder and sentenced to life in prison for the death of eighty-one-year-old Robert Crawford. She appealed her conviction and sentence. This court affirmed both, but preserved the issue of ineffective assistance of counsel for postconviction relief. *State v. Harrington*, No. 03-0824 (Iowa Ct. App. Feb. 27, 2004).

Harrington is of borderline intelligence and has a history of mental health issues. In 1996 she reported to her doctor, Dr. Mahoney, that she was hearing voices. Mahoney diagnosed her with depression, auditory hallucinations, schizophrenia, and schizoaffective disorder. She was prescribed medication, but the problem persisted for the next several years. In 1999 she started referring to the voices as "other personalities." Following Crawford's death, Harrington told officers about an alternate personality, "Sally." She made no mention of "Sally" to her doctors previously.

Prior to trial Harrington's attorney, Susan Flanders, had Harrington evaluated by Dr. Dan Rogers, a clinical psychologist. Flanders believed there was a possibility to assert an insanity or diminished capacity defense. Rogers, however, told her Harrington's problem had more to do with her competency to stand trial than her capacity to commit the crime. He observed Harrington had

difficulty perceiving, remembering, and reporting events accurately. Dr. Michael Taylor also met with Harrington. He was reluctant to diagnose her as he had only spent an hour with her, but did state she suffered from major depressive disorder. The district court determined Harrington was incompetent to stand trial. She was committed for treatment at the Iowa Medical and Classification Center (IMCC). At IMCC Dr. Curtis Fredrickson diagnosed Harrington with adjustment disorder with mixed emotions and anxiety disorder. He concluded she was not schizophrenic. He referred Harrington to Leonard J. Welsh, a staff psychologist at IMCC, for psychological testing and evaluation. He concluded Harrington had depression and anxiety but did not note any psychotic symptoms during his evaluation. He concluded she was competent to stand trial.

For Harrington's second competency hearing, the defense had her evaluated by Dr. Paul Anderson, a psychiatrist in general practice. Anderson diagnosed Harrington with bipolar mood disorder, mixed, with psychotic feature. He agreed that Harrington was not schizophrenic, but indicated the illnesses are similar and the symptoms can overlap. He concluded Harrington was not competent to stand trial. The district court, however, determined she was competent. The court's opinion was based on improved mental functioning reported by Fredrickson and Welsh.

Flanders did not file a notice of intent to rely upon the insanity or diminished responsibility defenses. Instead, she pursued a defense based on Harrington's denial she committed the crime. Harrington was convicted.

At the postconviction relief hearing, Flanders testified she chose not to present a diminished responsibility defense because (1) Rogers told her

Harrington's problem was related to competency, not capacity; (2) none of the experts who examined Harrington had consistent or strong diagnoses; (3) Harrington's actions after Crawford's death indicated she was capable of planning and follow-through; (4) videotapes of police interviews with Harrington indicated she was "smarter" than her intelligence test scores; (5) a diminished responsibility defense required an implicit admission though Harrington had at all times denied the crime; and (6) a diminished responsibility defense was both inconsistent and confusing in conjunction with a defense on the facts. Harrington did not present any expert testimony supporting her assertion she had diminished responsibility for her actions. The district court dismissed Harrington's application for postconviction relief. Harrington appeals.

## **II. Standard of Review**

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Nguyen v. State*, 707 N.W.2d 317, 322-23 (Iowa 2005).

## **III. Merits**

In order to show her counsel was ineffective, Harrington must show both that her attorney failed in an essential duty and that the failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699.

In reviewing an ineffective assistance of counsel claim, we are to consider the totality of the evidence. *Id.* at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

The test we employ for the first element is objective: whether counsel's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1997). We start with a strong presumption that counsel's conduct was within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2052, 80 L. Ed. 2d at 694. Miscalculated trial strategy and mistakes in judgment usually do not rise to the level of ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). Further, "counsel has no duty to raise an issue that has no merit." *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005). The test for the second element is whether there is a reasonable probability that, without counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052, 80 L. Ed. 2d at 698. A reasonable probability is one that undermines confidence in the outcome. *Kone*, 557 N.W.2d at 102.

The record shows Flanders carefully considered presenting a diminished responsibility defense. Flanders was aware of Harrington's mental health issues and her intelligence. She had Harrington evaluated by numerous experts and took their opinions into account in forming her trial strategy. In order to present that defense, she would have to implicitly admit Harrington's guilt and show Harrington could not form the requisite intent for first-degree murder. See *State v. Gramenz*, 256 Iowa 134, 139, 126 N.W.2d 285, 288 (1964) (describing diminished responsibility defense). The evidence supporting a diminished responsibility defense was at best mixed. At worst, it supported the opposite conclusion. Additionally, the evidence connecting Harrington to the murder was

not strong. The only evidence linking her to Crawford's death was a smudge of Crawford's blood inside her car and her relationship with him.

Essentially, Flanders had three options: first, she could have presented a diminished responsibility defense; second, she could have presented a defense solely on the facts; and third, she could have presented both defenses together. Any of these options would have tested the State's case. We will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even when that judgement fails. *Fryer v. State*, 325 N.W.2d 400, 413-15 (1982). Additionally, Harrington herself denied committing the crime and acquiesced in presenting a defense on the facts. *See Hughes v. State*, 479 N.W.2d 616, 618 (Iowa Ct. App. 1991). Harrington cannot show Flander's trial strategy completely "fails to subject the prosecution's case to meaningful adversarial testing." *Florida v. Nixon*, 543 U.S. 175, 190, 125 S. Ct. 551, 562, 160 L. Ed. 2d 565, 580 (2004) (quoting *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657, 668 (1984)). We conclude Flanders did not fail in an essential duty to her client.

Even if we concluded Flanders breached an essential duty, we would have to conclude that breach did not prejudice her client. As stated above, the evidence indicating Harrington could not form the requisite intent for first-degree murder was not strong. She told coworkers the day after Crawford's death that she had done something bad. She told police they could not search her home until she got home from work. She then left work early, washed her home with bleach and her car with vinegar, then called police to search. Police videotapes give the impression she was savvier than her intelligence test scores indicate.

She presented no additional evidence at her postconviction relief hearing to show she could not form specific intent. Therefore, Harrington cannot show the outcome of her trial would have been different had Flanders presented a diminished responsibility defense.

The district court's ruling dismissing Harrington's application for postconviction relief is affirmed.

**AFFIRMED.**