IN THE COURT OF APPEALS OF IOWA

No. 7-327 / 06-1246
Filed August 22, 2007

RICARDO LEE McGLOTHLIN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Davis County, Michael R. Mullins, Judge.

Ricardo McGlothlin appeals the district court's decision denying his request for postconviction relief from his conviction for second-degree murder. **AFFIRMED.**

Justin Swaim of Swaim Law Firm, Bloomfield, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Rick Lynch, County Attorney, for appellee State.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Ricardo McGlothlin appeals the decision of the district court that denied his request for postconviction relief from his conviction for murder in the second degree. McGlothlin claims he received ineffective assistance of trial and appellate counsel in a variety of respects. We affirm the decision of the district court.

I. Background Facts and Proceedings.

Ricardo McGlothlin and Robert Carter decided to hitchhike north from Oklahoma to find employment. On Saturday, May 11, 2002, they were picked up in Missouri by Kim Capplinger. Capplinger took them to the home of her father, Don Hines, which was located just over the border in Iowa. After visiting with McGlothlin for awhile, Hines invited the men to stay at his home for the next week to take care of his animals while he went on a trip. Hines left the next day, May 12.

After Hines left, McGlothlin and Carter began drinking. They drank whiskey, wine, and beer and had some arguments. On Tuesday, May 14, McGlothlin took some money from Hines's home and drove his host's car to a convenience store where he purchased beer and whiskey. When McGlothlin returned to Hines's home, Carter was setting up a tent near a fire pit, which was about thirty-five feet from the house. The men drank some more, then Carter went into the tent to sleep.

While Carter was sleeping, McGlothlin began grilling some food at the fire pit. When Carter awoke, he became angry with McGlothlin, because he believed McGlothlin was using up too much of their food. Carter grabbed a metal electric

fence post, which had been used to prod the logs in the fire pit, and swung it at McGlothlin. McGlothlin raised his arm to defend himself and received a burn on his palm. McGlothlin went into the house and retrieved a gun. When he came back outside, Carter was still at the fire pit, prodding the fire with the fence post. McGlothlin walked over to Carter, touched the gun to his back, and shot him. Carter died from the gunshot wound.

After he shot Carter, McGlothlin called some friends in Oklahoma. He then called 911. Deputy Sheriff Dave Davis was the first officer to arrive at the scene. He testified McGlothlin had an odor of an alcoholic beverage and glossy eyes, but did not have other indications of intoxication, such as staggering or slurred speech. Deputy Davis gave McGlothlin a preliminary breath test (PBT), which showed a blood alcohol level of .14.

The State charged McGlothlin with first-degree murder. McGlothlin raised a defense of justification, or self-defense. If completely successful, this defense would have resulted in an acquittal at trial. McGlothlin did not file notice of and did not raise intoxication as a defense. As will be discussed later, this was a tactical decision. During trial the court ruled that evidence could be presented to show a PBT was given, but the result of the test was inadmissible. Following the court's ruling, McGlothlin and his trial counsel chose not to present evidence that he submitted to a PBT. Other evidence of alcohol use by McGlothlin and Carter, as outlined above, was presented to the jury.

The district court instructed the jury on the elements of first-degree murder and the lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. One of the jury instructions,

No. 25.5, provided, "No amount of intoxicants or drugs taken voluntarily can reduce second-degree murder to manslaughter."[1] The jury acquitted McGlothlin of first-degree murder and found him guilty of the lesser-included offense of second-degree murder. McGlothlin filed a motion in arrest of judgment and for a new trial which the court denied. McGlothlin was sentenced to a term of imprisonment not to exceed fifty years and he appealed.

A panel of this court rejected McGlothin's direct appeal. *State v. McGlothlin*, No. 02-1587 (Iowa Ct. App. Oct. 15, 2003). We found there was sufficient evidence to support McGlothlin's conviction of second-degree murder and denied McGlothlin's claim that by giving Instruction No. 25.5 the trial court signaled the appropriate verdict to the jury. *Id.* We concluded that even if giving the instruction was improper, it was not prejudicial *Id.* McGlothlin filed an application for further review, which our supreme court denied.

McGlothlin subsequently filed an application for postconviction relief, claiming he received ineffective assistance of counsel at trial and on direct appeal. The district court denied his application. This appeal followed. Although McGlothlin has raised a variety of claims on appeal, it is fair to say that his appellate arguments focus primarily on three related claims. He contends he received ineffective assistance of counsel due to counsel's failure to: (1) properly challenge jury instruction No. 25.5, (2) obtain the admission of a preliminary breath test, and (3) obtain an expert witness on intoxication.

[1]This instruction is based on Iowa Uniform Jury Instruction No. 200.14.

II. Standard of Review.

Our scope of review in postconviction proceedings is for the corrections of errors of law. Iowa R. App. P. 6.4; *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, we review constitutional claims, such as ineffective assistance of counsel, de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984); *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). The petitioner must overcome a strong presumption of counsel's competence, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Jury Instruction.

McGlothlin first contends he received ineffective assistance due to his counsel's failure to raise and properly preserve error regarding his claim that Instruction No. 25.5 was legally in error under the facts of the case. He argues trial counsel should have challenged the instruction as not correctly stating the

law based on *State v. Wilson*, 166 Iowa 309, 147 N.W. 739 (1914).[2] He argues the instruction improperly precluded the jury from reaching voluntary manslaughter, a conviction that the defendant now concedes would have been appropriate under the facts of this case.

McGlothlin is not contending intoxication is an affirmative defense to second-degree murder.[3] Instead, he is claiming that

> evidence of intoxication is relevant and can be used to determine the State has failed to prove beyond a reasonable doubt that he acted with malice (the mens rea (general intent) requirement of second degree murder), and to determine instead that the State has only proved beyond a reasonable doubt that he acted in the 'heat of passion" for voluntary manslaughter.

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[2]The parties refer to this case as *State v. Pierce Wilson.* The supreme court made the following statement in *State v. Wilson*, 166 Iowa 309, 327, 147 N.W. 739, 740 (1914):

> But if there is evidence of provocation which, if acted upon immediately by a sober man, would be regarded as sufficient to reduce the offense to manslaughter, and the inquiry is whether the accused actually acted thereon, it is held by the weight of authority that evidence of intoxication may be considered in deciding whether the fatal act is to be attributed to malice, or to the passion of anger, excited by the previous provocation; such passion or anger being more easily excitable in an intoxicated person than in one who is sober.

(Citations omitted.) *Wilson* permits evidence of intoxication "to be considered on whether the defendant did in fact kill in the passion of anger brought on by provocation which would be sufficient if acted on by a sober man." *State v. Hall*, 214 N.W.2d 205, 210 (Iowa 1974).

These cases do not stand for the proposition that evidence of intoxication may negate the malice element in a charge of second-degree murder. Instead, the cases state that once evidence of provocation is found, which would be sufficient if acted upon by a sober person, evidence of intoxication is relevant to the subjective element of voluntary manslaughter—that is the element showing defendant acted solely as a result of sudden, violent, and irresistible passion. *See* Iowa Code § 707.4; *Hall*, 214 N.W. 2d at 210; *Wilson*, 166 Iowa at 327, 147 N.W. at 740. In that instance, it is not the evidence of intoxication which will negate malice, it is the evidence of provocation.

[3] "[W]here the defendant has been charged with second-degree murder, a general intent crime, the defendant's voluntary intoxication cannot negate malice aforethought and reduce the crime to manslaughter." *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986). This is because voluntary intoxication only provides a defense to a specific intent element of a crime. *Id.*

This is not an unreasonable argument. However, if the argument is accepted, we are not convinced the error was in failing to object to Instruction No. 25.5 based on the law as set forth in *Wilson*. Instead, an argument can be made that the error was in failing to request a separate theory of defense instruction informing the jury that if it found the defendant was provoked, it could then consider his intoxication as to whether he was acting from that provocation. In any event, we find it unnecessary to determine whether the defendant's counsel breached a duty by failing to object to Instruction No. 25.5 on the grounds now alleged by McGlothlin.

The postconviction court found that even if the instruction was improper, McGlothlin was not prejudiced by defense counsel's failure to object to the instruction on the ground he now raises in this postconviction action. We reach the same conclusion, based on slightly different reasoning.[4]

In order to meet the second prong of an ineffective assistance of counsel claim, a postconviction applicant must show a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994). If an applicant fails to show prejudice, we do not need to consider whether defense counsel failed to perform an essential duty. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000).

[4] McGlolthlin points out that the postconviction court concluded he was not prejudiced by Instruction No. 25 because he did not act "immediately" on a provocation and therefore, could not have acted in the "heat of passion." McGlothlin argues the "immediate" standard applied by the postconviction court is not the correct standard under the law of voluntary manslaughter. We believe this argument has merit. We believe the correct standard is whether there was an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

We conclude McGlothlin has failed to show the result of his criminal trial would have been different if defense counsel had successfully objected to Jury Instruction No. 25.5 on the grounds now urged.

Under section 707.4, a person may be found guilty of voluntary manslaughter if the person causing the death of another

> acts solely as the result of sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a person and there is not an interval between the provocation and the killing in which a person of ordinary reason and temperament would regain control and suppress the impulse to kill.

The facts in the present case show McGlothlin and Carter argued, and McGlothlin received a minor burn on his palm when Carter swung a fence post at him.[5] At that point, McGlothlin then left the area near the fire pit. Carter did not pursue him. McGlothlin entered the house and armed himself with a loaded gun. He then returned to the scene of the argument, walked up to Carter (who was facing away from him), placed the gun against Carter's back, and shot him. There is no dispute that it was necessary for McGlothlin to cock his weapon before he shot Carter. It is also apparent that McGlothlin had time to consider several different options, such as leaving the vicinity or locking himself inside the house. Instead, he returned to Carter's location and shot him in the back. The jury rejected McGlothlin's justification defense and concluded he acted with malice aforethought, an element of second-degree murder absent from either voluntary or involuntary manslaughter.

[5] Contrary to McGlothlin's assertions, his hand was not severely burned. The record reveals McGlothlin was left with a slight white mark on his hand and a blister or two that required no medical attention.

Based on the evidence presented at trial, we conclude McGlothlin has not shown a reasonable probability that if Instruction No. 25.5 had not been given, the result of this proceeding would have been different. Because McGlothlin has failed to demonstrate prejudice, we reject this assignment of error.

IV. Evidence of Intoxication.

In his next assignment of error, McGlothlin contends, as follows:

> The District Court in McGlothlin's postconviction relief proceeding erred in ruling McGlothlin was not prejudiced by the exclusion of the preliminary breath test from evidence at the criminal trial and by counsel's ineffective assistance due to counsel's failure to retain an expert witness on intoxication.

In support of this claim, McGlothlin argues his trial counsel should have retained an expert witness on intoxication when he knew evidence of the PBT and its test result would be disputed, and to support his evidence that McGlothlin was under the influence at the time he shot Carter.

As the postconviction court noted, McGlothlin chose not rely on the defense of intoxication at trial. Instead, he and his counsel asserted the defense of justification. The record makes clear that this was a tactical decision. McGlothlin was represented by an experienced and competent defense attorney. It is apparent from the record that trial counsel did not believe his client's degree of intoxication rose to the level of asserting intoxication as a legal defense to his crime. The record suggests that this was not an unreasonable conclusion.

Although the record contains evidence that McGlothlin was intoxicated, it also contains evidence that he was sufficiently sober to give a thorough and detailed description of the events which led to Carter's death. As the postconviction court noted, McGlothlin's description to law enforcement officers

was consistent with the physical evidence. As the court stated, "McGlothlin knew what he did and told what he did." The defendant's primary defense had to account for the clearly volitional conduct which McGlothlin engaged in as shown by the evidence. In addition, trial counsel testified that, in his experience, juries are not very receptive to the defense of voluntary intoxication. We believe trial counsel selected a defense strategy that was reasonable under the circumstances. We will not find counsel ineffective for pursuing a reasonable, but ultimately unsuccessful defense. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). We conclude that McGlothlin's trial counsel breached no duty by failing to obtain an expert witness on intoxication. We also conclude that the defendant suffered no prejudice as a result of this failure.

We now turn to McGlothlin's claim regarding the PBT. As we have mentioned, McGlothlin contends the postconviction court "erred in ruling [he] was not prejudiced by the exclusion of the preliminary breath test from evidence at the criminal trial." For the reasons which follow, we reject this argument. As the postconviction court noted, trial counsel "made reasonable and competent efforts" to gain admission of the PBT results, but was not successful. The record does not support the conclusion that the exclusion of this evidence was based on defense counsel's failure to adequately raise the issue. Defense counsel eventually obtained permission from the court to admit the fact that the test had been given to rebut evidence that officers did not believe McGlothlin was intoxicated. However, after discussions with McGlothlin, counsel made a tactical decision not to pursue testimony regarding the PBT if the test results could not be admitted. The State and the defendant then stipulated that no evidence

regarding the PBT would be offered by either party. We conclude that defense counsel breached no duty in connection with his handling of the PBT issue. We also conclude that McGlothlin has failed to demonstrate prejudice regarding this issue. We find no reason to believe the outcome of McGlothlin's trial would have been different if the results of the PBT had been admitted.

To the extent that McGlothin's argument raises the issue, we reject the claim that appellate counsel was ineffective for failing raise the issue of the trial court's ruling relative to the PBT on direct appeal. Selecting issues to assert as grounds for reversal is a judgment call that the courts should be reluctant to second guess. *Osborn v. State,* 573 N.W.2d 917, 924 (Iowa 1998). Appellate counsel enjoys the same presumption of competence that is enjoyed by trial counsel. In this case appellate counsel selected other issues to pursue on appeal. Furthermore, during the postconviction hearing no inquiry was made concerning why this particular claim was not raised. We reject this assignment of error.

V. Other Claims.

McGlothlin has offered some claims of ineffective assistance of counsel in a somewhat cursory fashion. Some of the claims are not supported by legal authority. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 6.14(1)(*c*). As to those arguments where McGlothlin has cited legal authority, we agree with the postconviction court's conclusion he has failed to show prejudice. In general, McGlothlin's claims relate to his argument that he should have been found guilty of voluntary manslaughter, not second-degree murder, under the facts on this

case. We conclude McGlothlin has failed to show he received ineffective assistance of counsel in connection with any of these claims.

We affirm the decision of the district court rejecting McGlothlin's request for postconviction relief.

AFFIRMED.