IN THE COURT OF APPEALS OF IOWA

No. 3-928 / 10-2035
Filed October 23, 2013

FRANKLIN L. HARRIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, Michael J. Schilling, Judge.

Applicant appeals the decision of the district court denying his request for postconviction relief from his conviction for second-degree murder. **AFFIRMED.**

Jeffrey M. Lipman of Lipman Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Amy K. Beavers, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Doyle, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.

I. Background Facts & Proceedings.

The record in this case provides evidence of the following facts. Franklin Harris was charged with first-degree murder for the stabbing death of his girlfriend. Harris entered into a plea bargain with the State whereby he agreed to plead guilty and the State agreed to reduce the charge to second-degree murder. During the plea colloquy, the district court informed Harris a charge of second-degree murder was punishable by up to fifty years in prison and he would be required to serve a mandatory minimum of seventy percent of the sentence. The court also discussed with Harris the element of malice aforethought.

Harris entered a guilty plea to second-degree murder in violation of Iowa Code section 707.3 (2007). At the sentencing hearing, the district court again informed Harris he would have to serve at least seven-tenths of the maximum term of incarceration. Harris was sentenced to a term of imprisonment not to exceed fifty years. He appealed, and his appeal was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 6.1005. Procedendo was issued on October 23, 2008.

Harris filed an application for postconviction relief on November 3, 2008. He claimed he received ineffective assistance because defense counsel: (1) did not adequately explain to him the mandatory minimum sentence; (2) did not "do her job" when the court discussed with him whether there was a factual basis for the element of malice; and (3) did not prepare a defense for him based on diminished responsibility due to his use of alcohol and marijuana and due to his

mental condition. The case was presented to the district court based on the written record and the depositions of Harris and his defense counsel.

The district court issued a decision on November 17, 2010, denying Harris's application for postconviction relief. The court determined Harris failed to show defense counsel neglected to inform him of the seventy-percent mandatory minimum rule. The court also found there was a factual basis in the record for the element of malice based on Harris's statement during the plea colloquy that he stabbed the victim with a knife and did so with the knowledge or plan that he was doing this because he was angry and upset with her. He also stated he intended to hurt his girlfriend. Furthermore, the court determined Harris had offered absolutely no credible evidence he was unable to understand the plea proceedings. Harris now appeals the decision of the district court.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). 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. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

III. Ineffective Assistance.

A. Harris first claims he received ineffective assistance because defense counsel did not adequately explain to him that he would be required to serve a mandatory minimum of seventy percent of his sentence. He points out he was diagnosed with attention deficit hyperactivity disorder (ADHD) while he was awaiting trial. He asserts that due to this diagnosis he was unable to understand the details of his sentence. Harris claims if he had been aware he would be required to serve a mandatory minimum of seventy percent he would not have pleaded guilty to second-degree murder.

In her deposition, defense counsel testified she recalled discussing with Harris the seventy-percent mandatory minimum. She also presented an exhibit on which she had written a note, "sentencing—max. penalties—70%—mandatory min.—150,000 to estate—or heirs," and stated she had written this during a telephone conversation with Harris. Additionally, the district court informed Harris during the plea proceedings and the sentencing proceedings about the mandatory minimum sentence, and Harris did not act surprised or ask for a recess to discuss the sentence with his counsel.

We agree with the district court's conclusion that Harris has not shown he received ineffective assistance based on his claim he was not fully informed about the seventy-percent mandatory minimum sentence.

B. Harris also contends he received ineffective assistance because defense counsel did not fully explain the term "malice." He states he now fully understands the concept of malice and does not believe he acted with malice at

the time he stabbed his girlfriend. He states if he had understood the concept of malice at the time of his guilty plea he would not have entered the plea.

The crime of second-degree murder requires proof the defendant killed another with malice aforethought. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). "Malice aforethought requires a 'fixed purpose or design to do some physical harm to another which existed prior to the act committed.'" *State v. Null*, 836 N.W.2d 41, 49 (Iowa 2013) (citation omitted).

During the plea colloquy, the district court explained the elements of malice aforethought to Harris, stating:

> And this malice aforethought basically means that at the time you stabbed Miss Badger, you at that point in time were acting out of hatred, anger or any other evil or unlawful purpose; and that you did so intentionally; and then you had at least a little bit of time to fix that plan or that idea in your mind before you stabbed her. Doesn't have to be that you planned a long time or thought about it for a long time, but at least you knew what you were doing when you did it.

Harris told the district court he understood this element. During the colloquy, Harris also told the court he stabbed the victim because of his anger and being upset with her. When questioned whether he was feeling hatred for her, he denied it, but stated he was angry and upset with her. He also stated he intended to injure the victim at the time he stabbed her and she died as a result of being stabbed.

The district court determined Harris's statements at the plea colloquy undercut his argument he did not understand the definition of malice, or that there was not a sufficient factual basis in the record to support the element of malice. We concur in the district court's conclusions. The record does not

support Harris's claim he did not adequately understand the element of malice aforethought at the time of the plea colloquy.

C. Finally, Harris claims he received ineffective assistance because defense counsel did not prepare a defense based on his claim he was unable to form a specific intent to commit murder because he was under the influence of alcohol and marijuana, as well as suffering from ADHD, at the time he stabbed the victim. He states if he had been fully aware of the intent element of second-degree murder, he would not have pleaded guilty, and instead would have insisted on going to trial.

While first-degree murder requires a specific intent to kill, *State v. Serrato*, 787 N.W.2d 462, 469 (Iowa 2010), second-degree murder is a general intent crime. *Anfinson v. State*, 758 N.W.2d 496, 503 (Iowa 2008). A defense of diminished responsibility is not available to a defendant charged with second-degree murder because diminished responsibility is a defense only to an element of specific intent. *Id*. at 503-04. "Thus, where 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).

Harris cannot show he received ineffective assistance due to defense counsel's failure to raise a defense based on his use of alcohol and drugs, and his mental condition, because the defense he now states he wanted to raise would not have negated any of the elements of second-degree murder. We will not find defense counsel ineffective for failing to raise a meritless defense. *See State v. Hoskins*, 586 N.W.2d 707, 710 (Iowa 1998).

We affirm the decision of the district court denying Harris's application for postconviction relief. Harris has not shown he received ineffective assistance of counsel during the guilty plea proceedings.

AFFIRMED.