

QUESTION

Deft, who has a long history of mental illness, became enraged when Vic, his landlord, threatened to evict him for nonpayment of rent. He picked up a baseball bat and hit Vic over the head with sufficient force that Vic was momentarily stunned and suffered a concussion. Deft immediately exclaimed, "I'm sorry, Vic. I didn't mean to hurt you."

Based on those facts, Deft was indicted for attempted murder. Bail was denied. At Deft's first court appearance, Len was appointed to represent him because Deft was indigent. At his arraignment, Deft entered pleas of not guilty and not guilty by reason of insanity. After a hearing at which a magistrate ordered Deft held for trial, Len moved in the trial court for (1) dismissal of the charge on the ground that the evidence before the magistrate did not establish probable cause to believe Deft committed attempted murder; and (2) for appointment of a psychiatrist to assist in the preparation and presentation of the defense. The court denied both motions.

Deft asked Len to seek immediate appellate review of the denial of his motions. Although such review was available under established procedures, Len refused to seek it, telling Deft that he did not believe that a meritorious basis existed for claiming that the court had erred in denying the motions. Deft, discouraged and frustrated by his continued incarceration, then accepted Len's suggestion that he plead guilty. Len assured him that if he entered a guilty plea, the judge would sentence him to "time served" and release him from jail.

When Deft next appeared in court, Len advised the judge that Deft wanted to change his plea to guilty. After asking only, "Is that what you want?" and receiving an affirmative reply from Deft, the judge permitted him to withdraw his not guilty pleas and to enter a plea of guilty. The judge then sentenced him to five years in the state prison.

How should the appellate court rule on claims made in Deft's properly filed petition for post-conviction relief that:

1. Len gave him erroneous advice when he told Deft that there was no meritorious basis on which to seek pretrial review of the denial of his motions? Discuss.
2. He had potentially meritorious defenses of insanity and diminished capacity which Len should have presented? Discuss.
3. His plea of guilty was not: (a) shown on the record to be voluntary and intelligent and, (b) in fact was not voluntary and intelligent? Discuss.
4. Len's conduct of the defense denied Deft constitutionally adequate representation? Discuss.

ANSWER A

1. Pretrial motions.

Deft (D) made two pretrial motions: To dismiss charges because no probable cause and for appointment of psychiatrist to assist in defense.

Len (L) arguably gave D erroneous advice in telling him that he had no meritorious basis to challenge both of these motions.

a. Motion to dismiss charges.

D was charged with attempted murder. His pretrial motion argued for dismissal of the charge on the ground that the evidence before the magistrate did not establish probable cause.

We are not told the grounds for the denial of this motion, but D apparently has a good argument on this issue. Attempted murder is a specific intent crime. The prosecution must show 1) intent to kill the victim and 2) a substantial step in this direction.

From the bare facts in the problem, it appears that D may have lacked intent to kill. Indeed, D made a statement at the time of the crime that he did not intend to even hurt the victim. This contemporaneous statement at the time of the crime casts serious doubt on D's intent to kill. From the rest of the facts in the problem, I do not see how the evidence establishes intent to kill.

Hence, to the extent that the magistrate did not have additional evidence before him that the problem does not contain, D probably had a strong basis to seek pretrial review.

b. Appointment of psychiatrist.

D plead not guilty by reason of insanity. He is indigent. The court denied his request for a court-appointed psychiatrist. Under Abe v. Oklahoma, this was in error. A defendant who puts his mental state in issue by pleading insanity is entitled to a court appointed psychiatrist if he can prove indigency.

2. Defenses of insanity and diminished capacity.

The appellate court will have difficulty ruling on this motion because there really is very little record to assess D's claims of insanity and/or diminished capacity. In light of the fact that D's motion for a court-appointed psychiatrist was denied, there is very little to go on.

There are various formulations of the insanity defense:

a. M'Naughton Rule - The M'Naughton rule focuses on the defendant's cognitive abilities and allows a defense when the defendant has a mental disease or defect such that he:

(1) lacks capacity to understand the wrongfulness of his actions, and

- (2) lacks capacity to understand the nature or quality of his actions.
- b. Irresistible impulse test - This test focuses on the defendant's volitional abilities. The defense is available when, due to mental disease, the defendant:
 - (1) lacks ability to control his actions, or
 - (2) lacks ability to conform his conduct to the law.
- c. ALI-Model Penal Code approach - combination of the above approaches. Defense is available when due to mental disease or defect and either:
 - (1) lacks substantial capacity to understand the wrongfulness of his actions or,
 - (2) lacks substantial ability to conform his conduct to the law.
- d. Durham test - Defense is available when the criminal act is a product of mental disease. This is the broadest test.

Under any of these formulations, the appellate court really cannot assess whether L should have raised the defense. The facts do not allow a determination of whether D's mental illness was related to his conduct at all. It is not clear whether D had control over his volition. D's apology suggests that he did understand the nature of his actions to some extent, but that is not crystal clear.

As far as diminished capacity, this defense is available in some jurisdictions, when D's mental problems are such that he could not have formed the intent to commit a particular crime, i.e., the mental problem negates the requisite mental state. Here, it is possible that D did not have the requisite specific intent. But it is not clear whether or how D's mental problems were related to the lack of specific intent. Again, we just do not know enough about the nature of the illness.

The appellate court may conclude that the trial court should not have accepted the plea in light of the uncertainty about D's mental condition. It may grant post-conviction relief on the ground that a record needs to be developed to fully explore D's mental state.

3. Guilty plea.

- a. D's guilty plea was clearly not adequate on the record. A judge must follow careful procedures in accepting a guilty plea. Specifically, the judge must go through the following with the defendant on the record:
 - (1) review the nature of the charges, including the main elements,
 - (2) inform defendant of any maximum or minimum sentences,
 - (3) inform defendant that he need not plead guilty, and waives the right to trial if he does.

Clearly, the judge did not do this, which is a strong argument for allowing withdrawal of the

plea. D is entitled to this relief.

b. Was D's guilty plea in fact voluntary and intelligent?

This is a difficult question to assess on this record, but there are clearly reasons to question the voluntariness of the plea.

- (1) D's mental illness - It is not clear whether D had the capacity to understand the nature of the plea proceedings or the consequences of the plea.
- (2) Misinformation from lawyer - D's lawyer assured him that he would not get time. It is improper for a lawyer to ever make such "assurances." This assurance arguably prevented D's plea from being known because he had a false view of the consequences.

4. Ineffective assistance.

The Sixth Amendment guarantees a defendant the effective assistance of counsel. In order to show that assistance was constitutionally inadequate, a two-prong test must be met (Strickland):

- The lawyer's performance was deficient; and
- D was prejudiced by this deficiency, i.e., but for the deficiency, the outcome of the proceeding likely would have been different.

The second prong is very difficult to meet. Very few ineffective assistance challenges succeed. Here, there are several aspects of L's performance that were arguably deficient:

- Failure to appeal pretrial motions for reasons stated above,
- Failure to argue insanity,
- Improperly assuring D that he would not go to jail;
- Failing to object to improper plea proceeding.

But I doubt that D could establish that any of these errors undermined the result of the proceeding. Again, the standard is very high, and some of L's decisions were judgment calls that a court is unlikely to second guess.

ANSWER B

I. Denial of Motions.

A. Lack of Probable Cause.

When defendants are not arrested on the basis of an arrest warrant, which requires a showing of probable cause before a neutral and detached magistrate, a preliminary hearing must be held to establish that there is probable cause justifying their being held for trial.

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In this case, the prosecution was required to show that there is probable cause to hold Deft (D) for attempted murder. Probable cause requires sufficient facts that a reasonable person would conclude that there is a substantial likelihood that the defendant has committed the crime charged.

In this case, attempted murder is a specific intent crime. Conviction will require proof that D had the specific intent to murder Vic (V), and that D took substantial action that brought him dangerously close to successful completion of the crime.

Since there is substantial evidence (the landlord's testimony) showing that D hit the landlord on the head with a baseball bat, a potentially deadly weapon, probable cause to hold D for attempted murder exists.

Although D's statement, "I didn't mean to hurt you." seems to negate the required intent, it could be viewed as a subsequent change of heart. Thus, it does not defeat probable cause.

B. Appointment of a Psychiatrist.

The Supreme Court has held that indigent defendants who intend to rely on a defense of insanity are entitled to a psychiatrist to aid in the preparation of the defense. The defendant is required to make an initial showing that there is some basis for raising the defense. In this case, D has a long history of mental illness and certainly meets the minimal standard. The court is then required to provide a psychiatrist. In this case, the court erred in not providing psychiatric assistance.

In the federal court system, interlocutory review of orders is not generally available. However, in this case, apparently immediate appellate review of the denial of the motions was available. Thus, L should have sought review of the refusal to appoint a psychiatrist.

II. Insanity and Diminished Capacity.

The success of D's insanity defense may depend on the test for insanity employed by the jurisdiction.

Under the Durham rule, a defendant has a valid insanity defense if his conduct was the product of a mental illness. Here, D had a long history of mental illness. With the assistance of a psychiatrist, he may be able to prove that his rage and subsequent violence were products of the mental illness.

Under the M'Naughton test, a defendant has an insanity defense if he was unable to understand the nature and quality of his actions or to understand their wrongfulness. The problem here is that D's immediate remorse after hitting V - "I didn't mean to hurt." - suggests that he did know his conduct was wrongful.

Under the Model Penal Code test, an insanity defense requires that the defendant be unable to conform his conduct to the requirements of the law or to know the criminality of his actions. Here, D may be able to argue that his mental illness prevented him from conforming his conduct to the requirements of the law. On the other hand, his remorse might suggest that he realized the

criminality of his conduct.

Finally, some jurisdictions follow the irresistible impulse test. Under this view, a defendant has a valid insanity defense if he was unable to control his conduct. Again, D's mental illness may enable him to establish this.

If D has a mental defect which causes him occasionally to suffer unreasonable rages, he may have an argument that he was in a state of diminished capacity at the moment he hit V.

In short, D probably had potentially meritorious defenses of insanity and diminished capacity that should have been presented.

III. Guilty Plea.

A. On the Record.

Guilty pleas must be voluntary and intelligent. As a safeguard to ensure that this standard is met, the court is required to follow a certain procedure on the record to take a guilty plea.

First, the court must inform the defendant of the charges against him, including the elements to be proved and the mental state required. Second, it must tell the defendant any mandatory maximum or minimum sentences established for the crime. Finally, it must ascertain, that the defendant is aware that he has a right to a jury trial (or a bench trial for minor crimes) and that he is voluntarily waiving this right and proceeding directly to sentencing. Here, the court followed none of these procedures and hence, its acceptance of D's plea was improper.

Another problem here is D's possible lack of capacity to understand the nature of the judicial proceedings. If there is doubt about D's present capacity, the court should not have accepted his guilty plea (since it could not have been voluntary and intelligent) and should have ordered a psychiatric examination.

B. Voluntary and Intelligent in Fact.

D has a strong argument that his guilty plea was not voluntary and intelligent in fact.

First, as noted above, there may be a question about his present capacity to understand the proceedings.

Second, the court's failure to advise him of important facts - the nature of the crime charged and any maximum or minimum sentences, as well as his right to a full trial - arguably deprived him of the information necessary to make an informed decision.

Finally, D may be able to argue that L's performance as counsel was so deficient, particularly insofar as L assured him that he would not have to serve any time, that he was prevented from making a voluntary and intelligent choice. Although it is permissible for an attorney to advise the client of likely consequences, it is misleading and unethical to make a "guarantee." D may have believed L was making a statement about the law rather than merely a guess as to the likely sentence.

IV. Inadequate Representation.

A successful claim of inadequate representation requires both deficient performance by counsel and a showing that, but for the deficiency, the outcome would have been different.

Here, D has a strong argument that L's performance was deficient. Deficient performance requires more than a mere showing that counsel made strategic decisions that later turned out to be ill advised. Here, L chose not to pursue a potentially meritorious insanity defense. Even more importantly, he allowed his client to be denied his constitutional rights by refusing to appeal the denial of psychiatric assistance and the improper plea-taking.

Arguably, the outcome would have been different had L not been deficient in these respects because D would probably have had a strong insanity defense.

Thus, D should be able to claim successfully that he was denied effective assistance of counsel.