

IN THE COURT OF APPEALS OF IOWA

No. 1-569 / 10-1338
Filed December 7, 2011

RICKIE ROGER SLINGER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Floyd County, Christopher C. Foy,
Judge.

Rickie Slinger appeals from the district court order denying his application
for postconviction relief. **AFFIRMED.**

Andrew Abbott of Abbott Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Normand Klemesrud, County Attorney, and Rolf Aronsen, Assistant
County Attorney, for appellee State.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Rickie Slinger appeals from the district court order denying his application for postconviction relief. He contends his trial counsel was ineffective in several ways and then alleges his postconviction counsel was ineffective in presenting his case at the postconviction hearing. Because Slinger has failed to show either his trial counsel or postconviction counsel breached an essential duty and prejudice resulted from the breach, we affirm.

I. Background Facts and Proceedings. Slinger was tried and convicted of committing three sex acts on the same victim within a two-year period: one act when she was under the age of twelve, one act when she was twelve to thirteen years of age, and one act when she was fourteen or fifteen years of age. His direct appeal was dismissed as frivolous.

Slinger filed an application for postconviction relief claiming he was denied effective assistance of counsel because: (1) trial counsel's failure to depose the victim deprived him of the opportunity to make an informed decision regarding the State's plea offer; (2) trial counsel failed to strike a prospective juror who was employed by the father of a State's witness; (3) trial counsel permitted him to testify at trial; and (4) trial counsel failed to prepare him adequately to exercise his right of allocution at sentencing. Following a trial, the district court denied Slinger's application.

II. Scope and Standard of Review. We review the denial of postconviction relief for the correction of errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). However, where there is an alleged denial of constitutional rights, this court makes its own evaluation of the totality of the

circumstances in a de novo review. *Id.* Applications for postconviction relief alleging ineffective assistance of counsel raise a constitutional claim, and therefore our review is de novo. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011).

III. Analysis. Postconviction relief applicants seeking relief as a result of ineffective assistance of counsel must establish counsel breached a duty and prejudice resulted. *Id.* at 794. Both elements must be proved by a preponderance of the evidence. *Lado v. State*, ___ N.W.2d ___, ___ (Iowa 2011). A breach of essential duty occurs when counsel's representation falls below an objective standard of reasonableness. *Id.* Miscalculated trial strategies and mere mistakes in judgment do not normally rise to the level of ineffective assistance of counsel. *Id.* In order to establish prejudice, a claimant must ordinarily prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

A. Ineffective Assistance of Trial Counsel. On appeal, Slinger's complaints about trial counsel were narrowed to his failure to depose a victim, inadequate preparation, and failure to inform him of the terms of the plea agreement. He then presents a litany of other issues he claims the trial court failed to address.

Slinger first contends his trial counsel, Richard Tompkins Jr., was ineffective in failing to investigate the State's case and adequately advise him regarding a plea offer. Specifically, Slinger complains Tompkins was ineffective in failing to depose the victim to discover more about the facts on which the State was relying to establish her age at the time of the sexual abuse.

At the postconviction hearing, Tompkins testified it was his belief deposing State witnesses helped to strengthen their testimony at trial by giving them experience. He testified this is of particular concern where the witness is a child. Tompkins made the strategic decision not to depose the victim. Because the minutes of testimony revealed facts that established the age of the victim at the time of the sexual abuse, this strategy was reasonable and is not subject to second-guessing in postconviction proceedings. See *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999) (“Where counsel’s decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel.”).

Slinger also argues he was prejudiced by his trial counsel’s failure to “express the terms and expectations of the plea agreement and the likelihood of success at trial given the facts, the trial information and minutes of testimony, and the statements of the Petitioner/Applicant himself.” Tompkins testified at the postconviction relief hearing regarding his policy of never rejecting a plea offer without first speaking to his client, and his practice of informing his client of his “best belief” with regard to the case. He then testified he leaves the decision to the client.

Although Slinger disputes Tompkins ever discussed the terms of the plea agreement with him, the district court found:

To the extent that the testimony of Slinger and the testimony of Mr. Tompkins were in conflict, the Court accepted the testimony of Mr. Tompkins as more credible. While most of the allegations made by Slinger were conclusory and self-serving, Mr. Tompkins generally was able to support his statements with specific facts or with logical, common-sense explanations.

Giving this explicit credibility finding its due deference, we conclude Slinger has failed to show Tompkins breached any duty to him.

Slinger also notes Tompkins incorrectly advised him regarding the likelihood his counselor would testify, mistakenly believing Iowa Code section 622.10 (2005) prohibited the testimony.¹ At trial, the counselor testified Slinger had described sexual contact with the victim during their counseling sessions.

We find Slinger was not prejudiced by any failure by Tompkins with regard to this testimony. When questioned about his decision to reject the plea offer, Slinger was asked if he would have gone to trial had he known his counselor would be able to testify; Slinger answered, “I don’t believe so.” In order to prove prejudice, an applicant who previously rejected a plea offer in favor of going to trial “must show that, but for counsel’s advice, he would have accepted the plea.” *Kirchner v. State*, 756 N.W.2d 202, 205 (Iowa 2008). In order to do so, the applicant must present “some credible, non-conclusory evidence that he would have pled guilty had he been properly advised.” *Id.* Slinger has not done so. Therefore, his claim fails.

Finally, Slinger makes the claim the postconviction court failed to address numerous issues he raised in the postconviction proceeding. The trial court did not rule on any of the issues he has identified. An issue must be raised and decided by the postconviction court to be preserved for our review. *Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991). Because error was not preserved, we decline to address these issues on appeal.

¹ This type of testimony is allowed under section 232.74, which allows privileged communications made to a mental health professional into evidence where the evidence is regarding “a child’s injuries or the cause of the injuries”

B. Ineffective Assistance of Postconviction Counsel. Slinger alleges his postconviction counsel was ineffective in failing to introduce evidence to support several of his claims. The problem with Slinger's claims is he does not identify specifically what evidence should have been introduced and how he was prejudiced by this failure. Rather, Slinger makes general claims his postconviction counsel should have done a better job.

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome.

Dunbar v. State, 515 N.W.2 12, 15 (Iowa 1994) (citation omitted). We find Slinger's claims are insufficient to show ineffective assistance of counsel.

AFFIRMED.