

IN THE COURT OF APPEALS OF IOWA

No. 2-834 / 11-1851
Filed January 9, 2013

JUSTIN ADAM DEMOSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Monroe County, Lucy J. Gamon,
Judge.

Justin Adam DeMoss appeals from the district court ruling denying his
application for postconviction relief. **AFFIRMED.**

Victoria J. Place, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, and Steven E. Goodlow, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Justin Adam DeMoss appeals from the district court ruling denying his application for postconviction relief (PCR). He contends his trial counsel was ineffective in several regards. Because DeMoss has failed to demonstrate counsel breached an essential duty that prejudiced him, we affirm the denial of his PCR application.

I. Background Facts and Proceedings.

This case began when it was alleged that DeMoss, then twenty years old, had fondled the penis of an eleven-year-old child at least twelve times and performed anal sex with the child eleven times during April and May of 2005. The child reported the abuse to a school official, who contacted the Monroe County Sheriff. A forensic examination was performed on the child, and the child was interviewed.

DeMoss agreed to speak with law enforcement officers regarding the allegations and signed a waiver of his *Miranda* rights. During the interview, DeMoss stated he had heard rumors at work regarding things it was alleged he did to the child. DeMoss then admitted to fondling the child at least twelve times and engaging in anal sex ten or eleven times. DeMoss provided a signed, handwritten statement in which he confessed to engaging in anal sex and fondling the child. At that time, he was arrested.

In December 2005, DeMoss's original counsel moved to withdraw from the case and asked Hugh Michael Neary to assume DeMoss's representation. Neary agreed and was appointed to represent DeMoss. In April 2006, an ethics

complaint was filed against Neary. He never informed DeMoss regarding the complaint.

Trial began on May 31, 2006. The child testified generally that the touching and anal sex had occurred but could not recall specifics about the dates or number of times these acts took place. Dr. Easter, who performed a sexual assault examination on the child, testified that he did not find any visual signs of sexual abuse on the child but that such visual signs were rare with anal penetration. However, Dr. Easter testified without objection that he “was convinced that indeed [the child] had been subjected to penetrating anal intercourse.”

DeMoss testified in his own defense at trial and denied engaging in touching or sex acts with the child. He testified that he told the law enforcement officers about the rumors he had heard at work involving him and the child. He also testified that the officers made suggestions about what to write in his written statement. While DeMoss admitted to some details about his relationship with the child, as set forth in the written statement, he denied any sexual contact with the child. He testified that a letter he wrote to the child was an apology for kissing the child on the cheek.

On June 5, 2006, the jury found DeMoss guilty of eleven counts of second-degree sexual abuse and twelve counts of indecent contact with a child. DeMoss filed a motion for new trial, which the court denied. He was sentenced to an indeterminate term of imprisonment not to exceed twenty-five years on each count of second-degree sexual abuse and an indeterminate term of

imprisonment not to exceed two years on each count of indecent contact with a child. The court ordered the sentences to run concurrently.

DeMoss appealed his convictions to this court, arguing there was insufficient evidence to convict him on all eleven counts of second-degree sexual abuse and twelve counts of indecent contact. *State v. DeMoss*, No. 06-1337, 2007 WL 2004513, at *2 (Iowa Ct. App. July 12, 2007). He also argued he was denied a fair trial when the judge asked whether identification evidence had been entered into the record, *id.* at *3, and appealed the portion of his sentence relating to a no-contact order. *Id.* at *4. This court affirmed his convictions but vacated the no-contact order and remanded for resentencing. *Id.*

On May 20, 2009, DeMoss filed a pro se PCR application alleging he received ineffective assistance of counsel. He filed an amended application on August 31, 2010. Following an August 25, 2011 hearing, the district court denied the application. DeMoss's motion to enlarge was also denied, and DeMoss appealed.

II. Scope and Standard of Review.

Although PCR rulings are usually reviewed for a correction of errors at law, when an applicant asserts a constitutional claim as the basis for postconviction relief our review is de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). In order to prove ineffective assistance of counsel, DeMoss must show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* We presume counsel acted competently and will not find prejudice unless there is "a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different.” *Id.* Both elements must be proved by a preponderance of the evidence. *Id.*

III. Analysis.

On appeal, DeMoss argues the district court erred in denying his PCR application because his trial counsel was ineffective in several regards. He claims counsel was ineffective in failing to (1) investigate the forensic examination, (2) object to improper questioning and opinion testimony at trial, (3) object to Dr. Easter’s improper opinion testimony, (4) move for a change of venue, and (5) inform DeMoss of, and withdrew because of, the investigation regarding alleged misconduct.

A. Failure to investigate the forensic examination report.

DeMoss first contends his trial counsel erred in failing to investigate the findings of the forensic examination conducted by Dr. Shaw at Blank Children’s Hospital. A copy of the report is not part of the record. Both DeMoss’s trial counsel and the prosecuting attorney testified they did not recall seeing a copy. However, DeMoss speculates the report “could have refuted Dr. Easter’s testimony and resulted in a different outcome.”

We find DeMoss has failed to show a reasonable probability that had his trial counsel investigated the forensic examination findings, the result of the trial would have been different. He cannot show that the forensic examination findings would have contradicted Dr. Easter’s testimony. Dr. Easter testified there was no visual finding of sexual abuse. At best, the forensic examination would have mirrored this finding. DeMoss’s claim that the report could have

refuted Dr. Easter's testimony and changed the outcome of the trial is nothing more than speculation.

B. Failure to object to law enforcement officers' questioning.

DeMoss next contends his trial counsel was ineffective in failing to object during the testimony of Sheriff Johnson. Specifically, Sheriff Johnson was asked whether he believed DeMoss's handwritten statement consisted of rumors or whether it was a confession. Sheriff Johnson also testified without objection about his opinion of whether DeMoss's statement was truthful. DeMoss also contends his trial counsel was ineffective in failing to object during Sergeant Stewart's testimony when he was asked to give similar opinion testimony.

Again, DeMoss's claim of ineffective assistance of counsel falls short on the required proof of prejudice. We find DeMoss cannot show that even had his counsel objected to the testimony cited, the result of the proceeding would have been different. DeMoss's handwritten statement makes no mention of rumors. It simply reads as a history of what occurred between him and the child. Additionally, both the sheriff and sergeant permissibly testified that DeMoss admitted he had fondled the child more than twelve times and engaged in anal sex with the child ten or eleven times. A handwritten letter from DeMoss to the child apologizes for a "situation." DeMoss acknowledges he has "certain responsibilities and expectations to abide by" because of his "age and maturity level," but admits he let his "thoughts, feelings, and emotions get in the way first and that was wrong." Although DeMoss claimed at trial the letter was an apology for a kiss on the cheek, the jury could assess his credibility and reject his claim.

See *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (noting it is the jury's function to weight evidence and make credibility determinations, and may accept or reject any of a witness's testimony).

C. Failure to object to Dr. Easter's opinion testimony.

DeMoss also contends his trial counsel was ineffective in failing to object to the opinion testimony offered by Dr. Easter. Dr. Easter testified that the child had been subjected to penetrating anal intercourse and had been sexually assaulted despite the lack of physical evidence. DeMoss's trial counsel testified at the PCR hearing that because Easter was a doctor, he was qualified to testify regarding the issue of sexual assault.

Although the district court found Dr. Easter's testimony lacked foundation, it concluded that trial counsel was competent in his representation of DeMoss because of counsel's vigorous cross-examination of Dr. Easter and the closing argument he presented the jury, in which he stated:

So that gives the doctor—leads the doctor to this conclusion: “With the lack of physical findings, we feel that the physical examination correlates with the patient's story.” “Lack of physical findings correlates with the patient's story of multiple anal sex acts between a 19-year old and 11-year old that was painful and that caused pain to the [child].” That's the history, and the doctor comes with the lack of findings that supports or that proves that the sex abuse occurred. Does that sound logical to you? Does that sound consistent that a doctor will use the lack of physical evidence as a basis to substantiate that it occurred? . . . The doctor said yes, that's his opinion. There is no physical evidence. That doesn't corroborate—that doesn't corroborate anything when the doctor based his opinion on these facts. So [the child]'s lack of corroboration and the doctor's lack of corroboration leaves the State without corroboration on the confession for statements made by [DeMoss].

We conclude that DeMoss has failed to show the outcome of the trial would have been different had trial counsel objected to Dr. Easter's opinion testimony that the child was sexually assaulted. The most damning evidence of DeMoss's guilt was his own statements, both to law enforcement officers and his written statement, in which he admitted to both fondling and engaging in anal sex with the child. Because DeMoss has failed to show he was prejudiced by counsel's failure to object, his claim fails.

D. Failure to move for a change of venue.

DeMoss contends his trial counsel was ineffective in failing to move for a change of venue. Although his original counsel had filed a motion for change of venue, DeMoss withdrew the motion at the advice of Neary.

At trial, one of the child's family members was shaking his head "no" during DeMoss's testimony. The child's mother dramatically exited the courtroom during DeMoss's testimony followed shortly thereafter by a family friend. Concerned about courtroom safety, the court held a conference outside the jury's presence where it was determined a deputy would be stationed outside the courtroom to inspect anyone entering the courtroom for weapons. DeMoss argues the disruption would have been less likely to occur if the venue had been changed. He also alleges that Neary failed to make an appropriate motion regarding the prejudicial effect of that disruption.

Neary testified at the PCR hearing as to his belief that DeMoss would have a better chance of acquittal in Monroe County because the victim's family had a poor reputation for truthfulness. Neary also testified that he spoke with

community members regarding their knowledge of the case and determined it was unlikely potential jurors would have preconceptions about DeMoss's guilt or innocence. Believing the court was unlikely to grant the motion to change venue, he advised DeMoss to withdraw it.

Iowa Rule of Criminal Procedure 2.11(10)(b) states:

If the court is satisfied from a motion for a change of venue and the evidence introduced in support of the motion that such degree of prejudice exists in the county in which the trial is to be held that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county, the court either shall order that the action be transferred to another county in which the offensive condition does not exist, as provided in rule 2.11(10)(c), or shall order that the trial jury be impaneled in and transferred from a county in which the offensive condition does not exist, as provided in rule 2.11(10)(d).

DeMoss has failed to meet his burden of showing prejudice existed to such a degree that there was a substantial likelihood a fair and impartial trial could not be held. Furthermore, Neary made a tactical decision not to pursue the motion, believing the reputation of the victim's family would aid DeMoss's defense. Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel, and we will not delve into such tactics and strategy when they do not clearly appear to be misguided. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006).

We find DeMoss has failed to show his trial counsel breached an essential duty in failing to pursue the motion to change venue.

E. Failure to disclose the pending disciplinary case.

Finally, DeMoss contends his trial counsel was ineffective in failing to disclose he was undergoing an investigation for ethical or disciplinary violations

while representing DeMoss. He speculates that Neary may not have been able to give the case his full attention. Again, such speculation is insufficient to meet the prejudice prong of the ineffective-assistance-of-counsel test.

Because DeMoss is unable to show Neary breached an essential duty that caused him prejudice, we affirm the denial of his PCR application.

AFFIRMED.