IN THE COURT OF APPEALS OF IOWA

No. 3-1090 / 12-1932
Filed December 18, 2013

JEFFERY ALLEN GERARD BAKER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Philip Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Kasey E. Wadding, Bremer County Attorney, for appellee State.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

Jeffery Baker appeals the district court's denial of his application for postconviction relief. Baker contends that his trial counsel did not provide effective assistance of counsel in two respects. First, trial counsel failed to move for a change of venue. Second, trial counsel advised Baker not to testify at his underlying criminal trial.

I.

Following a jury trial, Baker was convicted of kidnapping in the first degree, in violation of Iowa Code sections 710.2 and 710.1(3) (1997), robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3, and operating a motor vehicle without the consent of the owner, in violation of Iowa Code section 714.7. Baker was sentenced to incarceration for life without the possibility of parole. Baker appealed his conviction and sentence.

On direct appeal, we set forth the facts and circumstances of the offenses:

> In the early evening hours of July 20, 1998, Baker began drinking several glasses of beer at the Janesville Tap. He left the bar at about 8:00 p.m., but returned between 9:00 and 9:30 p.m. By the early morning hours of July 21, only Baker and the victim, Shareen, who was working as the bartender, remained.
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> Shareen began playing a video game. Baker approached her, touched her on the shoulder for a couple seconds, then kissed her shoulder, and asked if she wanted to have sex. She declined. Baker then wrapped his left hand around her neck, choked her, and asked if she wanted to die. He then forced her to the floor, placed himself on top of her, and again asked if she wanted to have sex. This time, she said yes. They then stood up, and Baker ordered her to get the money from the bar. She complied and he took the money. He then told her to get her car keys.
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> Shareen drove the car down streets and roads as ordered by Baker. At one point, Baker placed her hand on his exposed penis. They eventually arrived at a rock quarry, where Baker forced her to engage in oral sex and vaginal intercourse. Shareen escaped when they stopped at a convenience store.

State v. Baker, No. 99-0950, 2000 WL 1027290, at *1 (Iowa Ct. App. July 26, 2000). In the direct appeal, we rejected Baker's argument that he was entitled to a new trial due to juror misconduct, but we preserved for postconviction review the claims at issue in this proceeding. *See id.* at *5.

II.

We review ineffective assistance of counsel claims de novo. *See State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). An applicant for postconviction relief claiming ineffective assistance of trial counsel must establish that trial counsel failed to perform an essential duty and that this failure resulted in prejudice. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). It is the applicant's burden to establish an entitlement to relief by a preponderance of the evidence. *See Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

A.

To establish that counsel failed to perform an essential duty "the applicant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney." *Id. at* 142. The attorney's performance is measured against "prevailing professional norms," and it is presumed that the attorney performed competently. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688, (1984)). "[I]neffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment." *Id.*

Baker first contends that his trial counsel was ineffective for failing to move for a change of venue. At postconviction trial, Baker's counsel testified that he

considered filing a motion to change venue but made a strategic decision to not do so. First, trial counsel thought a non-local jury might be less sympathetic to the defense because the non-local jury would wonder "why are you bringing your problems over here." Second, there was only limited pretrial publicity, and it was factual in tone and did not saturate the community. The limited effect of any pretrial publicity was confirmed by trial counsel's private investigator's research into the jury pool. According to trial counsel, many residents of Janesville knew and liked Baker's family. The investigation did not discover any prospective jurors whose familiarity with Baker or Baker's family caused any concern. The result of the pretrial investigation was borne out during jury selection. Trial counsel testified he did not have much difficulty in picking a fair and impartial jury.

Generally, "[t]he question of when to seek a change of venue is . . . a matter of professional judgment about which experienced trial lawyers frequently disagree." *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982) (citation omitted). The postconviction record in this case shows that Baker's trial counsel, after diligent investigation, made a reasoned decision not to pursue a change of venue. Given the foregoing, we conclude that Baker has not established that his trial counsel breached an essential duty. *See id.* (holding counsel was not ineffective in exercising strategic decision to not file a motion for change of venue).

Baker next contends that his trial counsel rendered ineffective assistance by advising Baker not to testify. To better understand Baker's claim, we must briefly summarize Baker's trial strategy. At trial, Baker did not challenge the

substance of the victim's testimony regarding the events on the night in question. Instead, Baker contended that he could not have formed the specific intent to commit sex abuse—as charged here, an element of kidnapping in the first degree—due to alcohol and marijuana consumption on the night in question. The defense was presented through the testimony of Baker's expert witness, psychiatrist Dr. Thomas Gratzer. Baker took his counsel's advice and did not testify. In this postconviction proceeding, Baker now contends that his testimony would have helped the jury better understand and appreciate Dr. Gratzer's testimony.

"Counsel has a duty to advise the defendant about the consequences of testifying so that an informed decision can be made." *Ledezma,* 626 N.W.2d at 146-47. At postconviction trial, Baker's trial counsel testified that it was in Baker's strategic interest to remain silent during trial. Baker's testimony about the events of the night in question would have been similar to the victim's testimony, and trial counsel believed that Baker would not fare well on cross-examination. Furthermore, Baker's trial counsel concluded that all relevant testimony regarding the defense of diminished responsibility and intoxication was presented to the jury through Baker's expert without exposing Baker to withering cross-examination. "Generally, the advice provided by counsel is a matter of trial strategy and will not support a claim of ineffective assistance absent exceptional circumstances." *Id.* at 147. Baker has not established any exceptional circumstances here. Trial counsel's recommendation was reasoned and strategic, and we will not second-guess it. *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) ("Trial counsel's decision not to call [defendant] to testify clearly

was a strategical [sic] decision we will not second-guess."); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996) (finding trial counsel was not ineffective by failing to call as a witness non-defendant because defendant did not show "by a preponderance of the evidence that a reasonable probability existed that but for his trial counsel's failure to call [non-defendant] as a witness, the outcome of the trial would have been different").

B.

To establish prejudice, Baker must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998) (quotations and citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial." *Id.* Our ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged. *Id.* We conclude that Baker failed to establish any prejudice as a result of his counsel's conduct.

Baker has not presented evidence that filing a motion to change venue would have changed the outcome of his criminal proceeding. First, based on the record before us, it appears there never were sufficient grounds to support a motion for change of venue. Baker has not presented any evidence that there was any significant pretrial publicity. He has not presented any evidence that the jury pool was tainted by pretrial prejudice. He has not presented any evidence that the petit jury was anything other than fair and impartial. Thus, even if counsel would have made the motion, it likely would have failed. Further, even assuming the motion was successful, there is no evidence from the record

supporting the conclusion that trying this matter in a different county would have resulted in a different outcome. The evidence that Baker committed the acts was not disputed. The jury had the opportunity to hear Baker's defense, and the jury simply rejected the defense. There is no showing here that a jury in a different county would have reached a different result. *See Strickland*, 466 U.S. at 695 (stating that the "assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision").

Likewise, Baker has not presented any evidence that his testimony would have led to a different result. His testimony would have been duplicative of the victim's testimony, thus allowing the jury to hear the same damning facts again. In addition, Baker's proposed testimony would have been largely duplicative of his expert's testimony. The jury heard all of the relevant evidence regarding Baker's defense, and it rejected the defense. There is no indication that the jury would have reached a different result if Baker would have reiterated what the jurors had already heard.

AFFIRMED.