

IN THE COURT OF APPEALS OF IOWA

No. 3-830 / 12-1788
Filed September 18, 2013

CHRISTOPHER LEE ROBY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

A postconviction relief applicant contends postconviction counsel was ineffective in failing to assert that his trial attorney was ineffective in handling an alibi defense. **AFFIRMED.**

Joel Baxter of Wild, Baxter & Sand, P.C., Guthrie Center, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Christopher Lee Roby appeals the denial of his postconviction relief application. He contends postconviction counsel was ineffective in failing to assert that his trial attorney was ineffective in handling an alibi defense.

I. Background Proceedings

The State charged Roby with four counts of sexual abuse against a child. Each count specified a range of dates coinciding with either the child's or Roby's age. Roby notified the court of his intent to raise an alibi defense to the period covered by the third count as well as one day of the period covered by the fourth count.

At trial, the child testified the abuse occurred over several years, "[a]lmost every time" Roby visited their house. Roby's attorney vigorously cross-examined her about the extent of the abuse as well as inconsistencies between her trial testimony and earlier statements. He did not present defense witnesses.

A jury found Roby guilty of one count of second-degree sexual abuse occurring between May 1999 and July 17, 2000, and one count of third-degree sexual abuse occurring between July 18, 2000, and December 19, 2001. On direct appeal, this court affirmed Roby's judgment and sentence. *State v. Roby*, No. 05-0630, 2006 WL 206124, at *5 (Iowa Ct. App. Sept. 21, 2006).

Roby filed an application for postconviction relief. The district court denied the application following an evidentiary hearing, and Roby appealed.

II. Analysis

Roby specifically contends his postconviction relief attorney should have challenged the trial attorney's failure "to narrow any of the four time frames so he

could present an adequate defense to each charge.” In his view, this omission impaired his alibi defense and his ability to effectively cross-examine the State’s witnesses.¹

To prove ineffective assistance, an applicant must establish (1) a breach of an essential duty and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). On our de novo review, we are convinced Roby cannot establish the first prong because postconviction counsel in fact raised the precise issue Roby contends was not raised. See *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010) (setting forth the standard of review).

In a postconviction trial brief and again at the beginning of the postconviction hearing, Roby’s postconviction attorney stated the “primary issue” he was raising was the failure of Roby’s trial attorney to introduce evidence establishing Roby was not in the area during certain periods covered by the trial information. He acknowledged the evidence would not have established “a pure alibi,” but asserted it would have impugned the child’s credibility.

Before proceeding with testimony, the State stipulated that, sometime “during . . . May ’99 to 2000” Roby spent two weeks at camps, ten days in Mexico, and seven days in Colorado. The State also agreed as a general matter that Roby stayed with his grandmother in Illinois from May 1, 2001, to August 1, 2001, but did not agree Roby was exclusively at that location. To address this issue, Roby’s postconviction attorney called the grandmother as a witness. She testified Roby remained in Illinois over the weekends. She stated, “There was

¹ Because Roby was acquitted on the third and fourth counts, we do not consider his challenge to those counts.

not one day, one night that he wasn't home." However, on cross-examination, she admitted she was "[n]ot hardly" watching Roby every minute of every day because "[h]e was a man then."

Roby's postconviction attorney also elicited testimony from Roby about the times he was out of the vicinity. Roby mentioned the events to which the State had already stipulated as well as time spent in the military, a fact that was disclosed at trial. He admitted he did not have an alibi for the entire period covered by the trial information, but said he could "punch big gaps in there." When asked if he understood that an alibi had to be "for a specific date and time," he responded, "I can't produce that. There's not a specific date and time that this supposedly happened."

Finally, Roby's postconviction attorney questioned his trial attorney about why he did not call witnesses to establish an alibi defense. The attorney explained his decision was a strategic one. While he had certain witnesses under subpoena, he found the child's testimony "so vague," with "the time frame [growing] longer and the frequency increas[ing] the more she testified," that he believed his best line of attack was to focus on impugning her credibility. He also noted there was only one day in the time span for which he had definite evidence of an alibi. Finally, he said he did not tell him his grandmother might serve as an additional alibi witness and if Roby had insisted on calling her or any other witness he would have obliged, notwithstanding his reservations.

Based on this record, the district court determined trial counsel's decision not to call witnesses to establish a partial alibi "was purely a tactical defense decision that was based on a sound investigation and a solid understanding of

the facts.” The court concluded, “The decision to rest without calling those witnesses did not constitute a breach of the standard of conduct demanded of a reasonably competent attorney.”

Because postconviction counsel raised, litigated, and obtained a ruling on the issue of whether trial counsel should have pursued or expanded an alibi defense with respect to the first two counts of the trial information, he was not ineffective.²

We affirm the denial of Roby’s application for postconviction relief.

AFFIRMED.

² Roby suggests that his trial attorney also had an obligation to challenge the expansive time frame in the trial information. In *State v. Griffin*, 386 N.W.2d 529, 532–33 (Iowa Ct. App. 1986), the court stated that the State was not required to prove an exact timeframe and some liberality was needed when young children were involved.