IN THE COURT OF APPEALS OF IOWA

No. 2-485 / 10-0613
Filed November 15, 2012

DAVID MILTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

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

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger and Kevin Cmelik, Assistant Attorneys General, Devin Kelly, Student Legal Intern, Michael L. Wolf, County Attorney, and Gary Strausser, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., Bower, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

BOWER, J.

David Milton appeals from the district court's denial of his application for postconviction relief. He contends his conviction for sexual abuse in the third degree should be reversed because his trial counsel was ineffective in two ways: (1) in failing to inform him of a plea offer by the State and (2) in failing to withdraw from representation based on an undisclosed conflict of interest. He seeks a remand to allow him to enter a guilty plea in accordance with the proffered plea agreement. In the alternative, he asks for a new trial.

Because we find Milton has failed to prove counsel breached an essential duty, we affirm the district court order denying his application for postconviction relief.

I. Background Facts and Proceedings.

On November 7, 2003, the State charged Milton with third-degree sexual abuse, in violation of either Iowa Code section 709.4(1) (2003) (by force or against the will of the other participant) or section 709.4(2)(c)(4) (performing a sex act on a person who is age fourteen or fifteen years and the perpetrator is more than four years older than the alleged victim). The first alternative is a forcible felony, while the second is not. *See* Iowa Code § 702.11(2)(c). Attorney Neill Kroeger was appointed to represent Milton.

On January 27, 2004, the prosecutor sent a letter to Kroeger, offering a plea agreement. The plea agreement would allow Milton to plead guilty to the second alternative: "This alternative would allow you the possibility of seeking

probation for Mr. Milton. I am not indicating that the State will join in this request." The letter also states, "The State would require an open plea."

On the Friday before trial, Milton threatened physical violence against Kroeger after learning Kroeger had not investigated an allegation of sexual abuse the alleged victim had made before. Milton made a number of ethics complaints against Kroeger over the weekend. On the morning of trial, Milton attempted to have Kroeger removed as counsel based on the reasons set forth in the ethics complaints. Following an in-court colloquy, the trial court denied the request.

On the second day of trial, Milton again requested his counsel be removed. The court allowed him to waive his right to counsel and proceed with Kroeger as standby counsel.

The jury convicted Milton of third-degree sexual abuse under both alternatives, and Milton was sentenced to a prison term not to exceed ten years and was ordered to register as a sex offender. Milton's conviction and sentence was affirmed by this court. *State v. Milton*, No. 04-0753, 2005 WL 1630040, at *1 (Iowa Ct. App. July 13, 2005).

On February 20, 2006, Milton filed a pro se application for postconviction relief (PCR). Counsel was appointed to represent Milton in the PCR proceedings. On December 1, 2009, Milton filed a "Supplement to Application For Postconviction Relief Pursuant to Iowa Code Chapter 822." Following a hearing, the district court denied the PCR application in its entirety.

Milton filed a timely notice of appeal. On November 15, 2011, the Iowa Supreme Court denied a motion to withdraw from the appeal, which asserted the

appeal was frivolous. The case was then transferred to this court and submitted for oral argument.

II. Scope and Standard of Review.

Generally, we review the denial of a PCR application for correction of errors at law. *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012). However, where an applicant alleges constitutional error, our review is de novo "in light of the totality of the circumstances and the record upon which the postconviction court's rulings were made." *Id.* In those cases in which a PCR applicant alleges the denial of effective assistance of counsel, we employ a de novo review. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Ineffective Assistance of Counsel.

In order to establish an ineffective-assistance-of-counsel claim, Milton must demonstrate: "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *See id.* at 251. He must prove both elements by a preponderance of the evidence. *See id.*

"An attorney breaches an essential duty when 'counsel's representation falls below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). We measure counsel's performance against the standard of a reasonably competent practitioner. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). We presume counsel performed competently. *Milliam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Miscalculated trial strategies and mistakes in judgment do not normally rise to the level of ineffective assistance of counsel. *Lado*, 804 N.W.2d at 251.

In order to prove the prejudice prong of the ineffective-assistance-of-counsel test, a claimant must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 251 (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Milliam*, 745 N.W.2d at 722 (quotation marks omitted).

A. Failure to Inform of the Plea Offer.

Milton first contends his trial counsel was ineffective in failing to inform him of the plea offer made by the State in the prosecutor's January 27, 2004 letter. At the PCR hearing, Milton testified as follows:

> Q. Okay. Did you ever see a letter by Mr. Strausser to Mr. Kroeger? A. No, I did not. I did not hear about the plea bargain until I was actually in the Clinton County Jail. I believe my wife came down. Actually, I had called my wife that day after court later on in the day, and she had told me that they had offered me a plea bargain.
>
> Q. Was this before the trial or after the trial? A. After. I was already convicted by the jury.
>
> Q. Okay. Do you feel like you would recall if you had been offered or told about a plea offer involving the possibility of probation? A. Yes. At the time I was holding my innocence. I still hold my innocence until this day. But at that time, had Neill Kroeger told me the differences and told me about the plea bargain, and told me, "If you are found guilty of this charge that you will have to register for life and that it's mandatory prison," and discussed that with me, yes, I would have took the plea or tried to negotiate a lesser plea.

Milton's wife also testified at the PCR hearing regarding her recollection of learning a plea agreement had been offered:

> [Kroeger] had told me after the trial was over, and you know, he had said that there was a plea bargain offered to David. And I said, "Did you say anything to David?" And he said, "No, He wasn't going to accept anyways."

> I stood there with my mouth open, and I said, "It's your obligation to tell him that there's a plea offer." And he said, "Well, he wouldn't accept it anyway, so I didn't see the point."

Kroeger also testified at the hearing. His file for Milton's case was destroyed in a fire in 2006, but he testified as to his recollection of what occurred. After being shown the letter to refresh his recollection, Kroeger testified,

> I don't know if I specifically presented that to Mr. Milton, but I'm sure I informed him that it was still an open plea to Sex Abuse Third. . . . I mean, I always tell all my clients what the State's offering. I'm sure we discussed it that week before.
>
> Q. Okay. But I think you earlier said that he maintained his innocence and wasn't going to take any offer? A. Right.
>
> Q. That he basically said that up front in the case? A. Right. Uh-huh (Yes). Right.
>
> Q. Is it possible that because of that you wouldn't have conveyed this over to him because you just simply thought he wouldn't have taken it? A. Well, I don't recall. I don't recall discussing the plea offer with him. I don't recall that. All I can say is I didn't feel—I mean, nobody wanted to do this trial because of the age of the victim, and I didn't think he had a particularly good chance of success at trial.
>
> I can't believe I wouldn't have discussed it with him, but I don't recall specifically that I did so.

The district court found Milton failed to prove Kroeger breached an essential duty: "Having considered the record, the Court finds Kroeger did communicate to Milton the State proposal outlined in Exhibit '1.' Kroeger has been in practice since 1988, is experienced in defending criminal cases, and is knowledgeable in the area of criminal law. His testimony is credible."

In PCR proceedings, we give weight to the lower court's findings, especially those concerning witness credibility. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). When considering the conflicting testimony of Milton and his wife versus Kroeger's testimony regarding his usual course of conduct, the

court found Kroeger's explanation to be more credible. Giving the court's findings due deference, we find Milton has failed to prove Kroeger breached an essential duty in relating the plea offer to him. Even if we had determined that Kroeger breached an essential duty, we find that Milton has failed to sustain his burden of proof as it relates to prejudice as required in *Missouri v. Frye*, 132 S. Ct. 1399, 1410 (2012).

Because Milton failed to prove the first prong of his ineffective-assistance-of-counsel claim, we need not consider whether he was prejudiced.

2. Failure to Withdraw or Inform the Court of a Conflict of Interest.

Milton next contends Kroeger was ineffective in failing to withdraw or inform the court there was a conflict of interest that adversely affected his performance. Specifically, he claims Kroeger should have disclosed that Milton threatened him with physical violence just days before the trial began. He argues that had the trial court known of the threat, it would "almost certainly" have found an actual conflict of interest had been established and removed Kroeger as his counsel.

On the morning of trial, Milton requested Kroeger be removed as his counsel. The court received a copy of Milton's ethics complaints against Kroeger, and a hearing was held on the matter. Milton admitted that Kroeger was not representing any of the witnesses in the case. His complaints involved actions he believed Kroeger should have been taking.

> THE COURT: Okay. Okay. Tell me any more of your complaints. I'm particularly concerned about this conflict of interest. So far it seems to me like you just have a breakdown in your

> relationship with your lawyer because he doesn't want to do everything you're telling him to do. What is the conflict of interest?
>
> THE DEFENDANY: Maybe I'm interpreting that whole thing wrong, but to me conflict of interest is—it's the case. I don't think he can deal with the case. He—he read my complaint. He told me this case is aggravating him. That's a conflict of interest to me. So I don't know if he's particularly talking about me or if he's particularly talking about the—the nature of the case, period.
>
> THE COURT: Does—do you have any reason to believe that he has an actual conflict of interest in representing you? Like, for instance, has he ever represented any of the witnesses in the case before, or does he have some relationship with a witness or the government or—that would affect his ability and interest in representing you in this case?
>
> THE DEFENDANT: That I don't know, Your Honor.
>
> . . . .
>
> THE COURT: . . . Can you think of any irreconcilable conflict you have, Mr. Milton, with your lawyer such that you couldn't proceed?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Is there such a breakdown in your communication that you folks can't communicate in the course of the trial?
>
> THE DEFNDNT: No.

Kroeger stated he could still talk with Milton and was prepared to proceed with trial. He did not disclose Milton had threatened him with bodily harm several days before. The court then found that while the ethics complaints "makes a potential conflict," there was no actual conflict of interest or grounds for his dismissal.

When a defendant alleges the right to counsel has been violated due to an impermissible conflict of interest, our analysis is the same regardless of whether it is brought as an ineffective-assistance-of-counsel claim. *State v. Smitherman*, 733 N.W.2d 341, 346 (Iowa 2007). That analysis is one question: whether the defendant has made a showing whereby we can presume prejudice. *Id.* If so, the defendant's constitutional rights have been violated, and a new trial is

warranted. *Id.* Prejudice can be presumed when there is an *actual* conflict of interest the trial court knew or should have known about but failed to make meaningful inquiry into. *State v. Smith*, 761 N.W.2d 63, 71 (Iowa 2009). However, when—as is the case here—the district court has conducted a meaningful inquiry into the claimed conflict prior to the conviction, the defendant must show a conflict of interest actually affected the adequacy of counsel's performance. *Id.*; *see also Cuyler v. Sullivan*, 466 U.S. 335, 349-50 (1980) ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.").

We conclude Milton has not shown an actual conflict existed that adversely affected Kroeger's performance as counsel. In a case in which a defendant assaulted his trial counsel, our supreme court found the defendant failed to prove an actual conflict of interest existed that adversely affected counsel's performance. *State v. Thompson*, 597 N.W.2d 779, 785 (Iowa 1999).

> We find no evidence here that the conflict alleged by [the defendant] progressed beyond a potential conflict of interest. [Counsel] did not have to make a choice between alternative courses of action. He was not struggling "to serve two masters" in completing his representation of [the defendant], a fitting test for determining whether a conflict exists. The success or failure of his representation of [the defendant] had no bearing on any potential claim [counsel] had against [the defendant] for assault. [Counsel] could seek the filing of criminal charges or pursue a civil case against [the defendant] regardless of whether the jury convicted or acquitted [the defendant]. It was still in [counsel]'s best interest to obtain an acquittal for his client. We will not assume that counsel

> intentionally gave a poor performance in his closing argument in hopes of obtaining revenge against his client for the assault. In fact, the transcript shows the opposite. [Counsel]'s closing argument was presented at length, analyzing evidentiary questions in detail.

Id. (citation omitted). Likewise, we find Milton's threat did not create a conflict of interest that required Kroeger to terminate his representation.

Furthermore, there is no evidence that Milton's threat adversely affected Kroeger's representation. Kroeger testified at the PCR hearing:

> Q. Do you feel that when you did represent Mr. Milton during the jury trial that you did advocate zealously for him? A. Yes.
>
> . . . .
>
> Q. Did you have any bad feelings about representing him anymore? A. No.
>
> Q. Did you feel like you could still represent him to the best of your ability? A. Yes.
>
> Q. And during direct, you mentioned that sometimes you have to deal with people that disagree with you—meaning clients. Is that something that is pretty standard in your line of work? A. Yes.
>
> Q. And do you feel that you are able to separate having personality issues with a client, versus being able to be a professional lawyer? A. Right.
>
> Q. And in his case, do you feel like you were able to do that? A. Yes.
>
> Q. Did you ever file harassment charges against Mr. Milton? A. No.

Milton lists a number of things Kroeger could or should have done at trial (objecting during the prosecutor's opening statement, conducting the cross-examination in a different manner, failing to consult with him before jury selection, and failure to make a more specific motion for judgment of acquittal), suggesting counsel's failure to act was a result of a lack of zealousness that occurred following his threat. Either these complaints can be characterized as trial strategy, or there is no evidence Milton was prejudiced by any failures.

Furthermore, there is nothing to link these alleged deficiencies to any conflict that resulted from Milton's threat.

Because Milton has failed to establish Kroeger breached an essential duty in his representation and that prejudice resulted, we affirm the denial of his PCR application.

AFFIRMED.