IN THE COURT OF APPEALS OF IOWA

No. 7-442 / 07-0128
Filed July 25, 2007

MAURY WILKERSON, SR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Defendant appeals the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Colo, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Maury Wilkerson Sr. appeals the district court ruling dismissing his application for postconviction relief. We affirm.

I. Backgrounds Facts and Prior Proceedings

On July 30, 2001, Wilkerson entered an *Alford* plea to three felony drug charges. Wilkerson was found guilty and sentenced to three consecutive twenty-five-year terms of incarceration. His sentence was suspended, and he was placed on probation.

While on probation, Wilkerson allegedly violated his probation at least fourteen times. These violations included a positive drug test for cocaine, failure to provide a requested drug test, failure to follow through with the probation agreement payment plan, making false statements to his probation officer, leaving the county without informing his probation officer, public intoxication, and driving without a license. Wilkerson was also arrested for second-degree burglary, two separate counts of domestic abuse, and violation of a no-contact order. Wilkerson admitted many of the probation violations, and the State presented evidence in support of the pending domestic abuse charges. The court revoked Wilkerson's probation and ordered him to serve the previously suspended sentences consecutively.

Wilkerson's pro se motion for reconsideration was denied on March 5, 2003. That same day, the presiding judge attached a sticky-note in the court file. This note stated: "If [defendant] files another request for reconsideration, may reconsider consecutive sentences but will not reconsider to probation."

In August 2003 Wilkerson filed an application for postconviction relief claiming his probation revocation counsel was ineffective. New counsel (hereinafter "postconviction counsel") was appointed to represent him on this matter. When the district court dismissed Wilkerson's petition for postconviction relief, postconviction counsel began to prepare an appeal. During this time, someone in her office discovered the sticky-note in the court file. Postconviction counsel contacted the prosecuting attorney to see if the State would agree to waive the elapsed one-year deadline for a motion to reconsider,[1] but the prosecuting attorney refused.

Postconviction counsel went forward with the appeal, and our court affirmed the district court's decision to deny postconviction relief. Wilkerson then sent a second request for reconsideration to the district court specifically referencing the sticky-note. This request was denied as untimely.

Wilkerson then filed a second petition for postconviction relief, claiming his postconviction counsel was ineffective because she failed to find the sticky-note when she first reviewed the court file. After a full hearing, the district court[2] dismissed this second petition for postconviction relief, and Wilkerson appeals.

[1] Iowa Code section 902.4 (2003) states a sentence for which there is no mandatory minium sentence may be reconsidered for a period of one year. Upon reconsideration, the district court may reaffirm the sentence previously entered or "substitute for it any sentence permitted by law." Iowa Code § 902.4.

[2] While Judge Eliza J. Ovrom presided over this postconviction relief action, she was not the author of the disputed note.

II. Standard of Review

Our review of postconviction relief proceedings is for correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises constitutional issues, our review is de novo. *Id.*

III. Merits

To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). "To prove the first prong, the defendant must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *Id.* To prove the second prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984).

Wilkerson claims his postconviction counsel failed to perform an essential duty when she failed to conduct a thorough review of the court file. Specifically, he argues that "[i]f she had reviewed the entire file, she would have found the sticky-note . . . and would have either filed a timely motion for reconsideration . . . or informed [Wilkerson] so that he could timely file such a motion." Wilkerson also claims he was prejudiced because "there is a reasonable probability to

believe that if a timely motion for reconsideration of sentence had been filed, his sentence would have been reconsidered so that his three 25-year sentences [would] run concurrently rather than consecutively."

Essential Duty. Upon our review of the record, we find Wilkerson has not proven that postconviction counsel's performance fell below the standard of a reasonably competent attorney. The sticky-note left in the court file was written by a judge as a reminder to himself. The judge did not send the note to counsel, and the note was not docketed as part of the official court file. It was an extraneous piece of paper located somewhere within a voluminous court file.

The note was also not related to the issue before postconviction counsel. Postconviction counsel was appointed to represent Wilkerson in a postconviction action challenging the competence of his public defender during probation revocation proceedings. Accordingly, postconviction counsel testified that the focus of her investigation was the public defender's preparation in regards to the most serious probation violations—the pending charges for domestic abuse with intent to commit serious injury and second-degree burglary. Because none of the issues raised in the postconviction action related to the underlying criminal case, she only made "a cursory look through the underlying criminal file" relating to the three felony charges and Wilkerson's *Alford* plea.

The duty to investigate and prepare a defense is not limitless. *Schrier v. State*, 347 N.W.2d 657, 662 (Iowa 1984). The extent of the investigation required in each case turns on the peculiar facts and circumstances of that case. *Id.* Counsel is not required to "pursue 'every path until it bears fruit or until all conceivable hope withers.'" *Id.* (quoting *Lovett v. Florida*, 627 F.2d 706, 708 (5th

Cir. 1980)). Practical "[l]imitations of time and money" often "force early strategic choices, often based solely on conversations with the defendant" and such "choices about which lines . . . to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." *Strickland*, 466 U.S. at 681, 104 S. Ct. at 2061, 80 L. Ed. 2d at 689. Postconviction counsel devoted her time and efforts towards Wilkerson's claims against his probation revocation counsel. We will not declare her actions constitutionally ineffective simply because her investigation did not lead her to a sticky-note in one of the files pertaining to the underlying conviction. Her actions in no way "undermined the proper functioning of the adversarial process." *See id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. Therefore, we find postconviction counsel did not breach an essential duty when she did not discover the judge's personal note to himself.

Prejudice. Even assuming, for the sake of argument, postconviction counsel should have discovered the sticky-note, we conclude Wilkerson has failed to show prejudice resulted. The sticky-note indicates the court may have reconsidered his sentence again. It is far too speculative to assume this means the court would have changed the sentence had it been asked to do so again. At best, it indicates the court would have given full consideration to any request that the sentences be served concurrently, rather than consecutively. Therefore, we find it falls far short of proving that, but for counsel's alleged ineffective assistance, the result would have been different.[3]

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[3] We are cognizant that Wilkerson had a number of supporting documents from members of the community who felt his rehabilitation had been successful. However,

We find no ineffective assistance of counsel here.

AFFIRMED.

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this evidence does not sway our opinion that there was not a reasonable probability the result would have been different had counsel discovered the note and filed a second motion for reconsideration.