IN THE COURT OF APPEALS OF IOWA

No. 7-646 / 06-1997
Filed October 24, 2007

DANNY LEE BEASON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, James Q. Blomgren, Judge.

Defendant appeals from the district court order denying his application for postconviction relief. **AFFIRMED.**

Michael S. Fisher of the Fisher Law Office, Oskaloosa, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Rose Anne Mefford, County Attorney, for appellee State.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Danny Lee Beason appeals from the district court order denying his application for postconviction relief (PCR). We affirm.

I. Background Facts and Prior Proceedings

On October 18, 2002, Beason was charged with one count of second-degree sexual abuse. Beason's first trial to the court resulted in a guilty verdict. However, the court overruled its own findings of fact and ordered a new trial. Beason's second trial was to a jury. This trial ended when the jury was unable to reach a verdict. In the third trial, the jury found him guilty of second-degree sexual abuse. Beason was sentenced to a term of imprisonment not to exceed twenty-five years. Pursuant to the statutory punishment for his offense, he was required to serve a minimum of seventy percent of this sentence.

Beason obtained new counsel and appealed his conviction. The Iowa Court of Appeals affirmed the conviction, but preserved his ineffective assistance of counsel claims for postconviction relief.

Beason filed a PCR application on October 31, 2005, citing numerous claims of ineffective assistance of counsel. The only witnesses at the PCR hearing were Beason and his trial counsel. The district court denied his petition for relief.

Beason appeals, claiming his trial counsel was ineffective because (1) he did not inform Beason that the crime of second-degree sexual abuse carried a mandatory minimum sentence, (2) he did not call additional witnesses during trial, and (3) he did not adequately communicate with Beason.

II. Merits

Iowa appellate courts typically review PCR proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, where the applicant asserts claims of a constitutional nature, our review is de novo. *Id.*

To prove ineffective assistance, Beason must prove, by a preponderance of the evidence, his counsel failed in an essential duty and prejudice resulted. *Id.* at 142. To prove the first prong, Beason must overcome the presumption that counsel was competent. *Id.* To prove the second prong, he 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). We generally find that miscalculated trial strategies and mere mistakes in judgment do not rise to the level of ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

Mandatory Minimum Sentence. Beason claims he received ineffective assistance because he did not know that if he was convicted of second-degree sexual abuse, he would have to serve a mandatory seventy percent of the sentence. He claims the first time he became aware of this mandatory minimum was at sentencing. Beason contends he was prejudiced by this lack of information because, had he known, he would have accepted a plea offer that only involved probation.

At the PCR hearing, Beason's trial counsel stated that he did not specifically recall telling Beason about the mandatory minimum sentence. However, he testified that he did a lot of criminal trials and he was "sure" he told Beason about the mandatory minimum because he routinely tells all clients about

any mandatory minimum sentence and "what they are risking." He also indicated that there was never a potential plea agreement where Beason would avoid a prison sentence. Trial counsel recollected that the best plea offer was a ten-year prison sentence, but Beason refused to entertain any plea that involved a prison sentence.

Upon our de novo review of the record, we find the more credible evidence is that Beason was informed of the mandatory minimum sentence for his charge. Therefore, we find Beason has failed to prove his attorney violated an essential duty. Even if we assume, arguendo, that Beason was not informed of the mandatory minimum sentence, we still find there is insufficient proof of resulting prejudice. Beyond Beason's vague assertion that he had the chance to plead guilty to a lesser charge that would have only resulted in a term of probation, there is no evidence to support such a claim. Instead, his trial attorney adamantly denies that any such offer was ever on the table. In light of the serious nature of the crime involved, we find it unlikely Beason would have been offered the chance to only serve probation, and even more unlikely that his trial counsel would not have told him about the mandatory minimum punishment when he presented Beason with this alleged plea offer.

Additional Witnesses. Beason claims his trial counsel was ineffective "for not calling defense witnesses which . . . would have been important to his defense." Beason did not call any of these potential witnesses to testify at the PCR hearing. Instead, he simply stated what he thought they would have said at trial. His trial counsel listed strategic reasons for not calling these additional witnesses.

Because these witnesses did not testify at the PCR proceeding, any testimony they may or may not have given is purely speculative and thus any prejudice from the failure to call them as witnesses is equally speculative. Without these witnesses, we find little assurance that such testimony would be as favorable as Beason alleges. *See State v. Douglas*, 485 N.W.2d 619, 625 (Iowa 1992) ("A reviewing court cannot predicate error on speculation."). Accordingly, we find Beason has failed to prove that these witnesses would have had any significant impact on his original trial, let alone prove that the result of his trial would have been different.

Even if we assume these witnesses would have testified as Beason claims, we still find he failed to prove ineffective assistance because his trial counsel articulated a sound strategic reason for not calling some of these witnesses, and the rest of the alleged testimony would have been, at best, cumulative. *See State v. Schrier*, 347 N.W.2d 657, 664 (Iowa 1984) (noting that the failure to produce cumulative testimony is not a sufficient showing of prejudice on an ineffective assistance of counsel claim); *Johnson*, 604 N.W.2d at 673 ("Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel."). We find no ineffective assistance here.

We also find no merit to Beason's claim that his trial counsel was ineffective for failing to adequately communicate with him. Accordingly, we affirm the district court's decision denying Beason's application for postconviction relief.

AFFIRMED.