

**IN THE COURT OF APPEALS OF IOWA**

No. 9-222 / 08-0638  
Filed April 22, 2009

**CODY LEVEKE,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Polk County, Karen A. Romano,  
Judge.

Cody Leveke appeals from the district court's ruling denying his  
application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Frank Severino, Assistant  
County Attorney, for appellee State.

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

**MAHAN, P.J.**

Cody Leveke appeals from the district court's ruling denying his application for postconviction relief. Leveke argued he was denied effective assistance of counsel at his probation revocation hearing on remand. We affirm.

**I. Background Facts and Proceedings.**

Leveke pleaded guilty to incest in 2004 and was granted a deferred judgment and placed on probation for two years. In *State v. Leveke*, 06-0137 (Iowa Ct. App. Aug. 23, 2006), Leveke challenged the revocation of his probation, which was grounded upon two alleged violations. This court concluded one of the alleged violations was not adequately proved but there was sufficient evidence to support the district court's determination that Leveke violated his probation when he was terminated from sex offender treatment on November 19, 2005, as reported in a January 3 addendum. *Id.* We ruled:

Because the court's dispositional decision was based on a determination two violations occurred, we reverse the court's revocation of Leveke's deferred judgment, and its imposition of judgment and sentence, and remand this matter for a new determination of these questions in light of our present decision.

*Id.*

On October 23, 2006, the remand hearing was held. There was a discussion at the beginning of the hearing as to how to proceed, and it was determined that the attorneys would be allowed to argue their respective positions. During the State's argument, the prosecutor began to refer to incidents that occurred while Leveke was out on appeal bond. The court stopped the prosecutor and had further discussion with counsel about if, and how, such information would be presented. During the course of the discussion, Leveke's

counsel, Dean Stowers, stated he felt the court should hear all of the evidence from both sides before making its decision. The court expressed its concern about Leveke being “blindsided” by new allegations. The court stated:

What I understood from the Court of Appeals to be telling me was that my determination that Mr. Leveke had violated the terms of his probation by being discharged from the SOTP program was upheld, the other violation was not, and my job then was to redetermine whether or not to revoke the defendant’s probation and, if so, what sentence to impose.

Stowers agreed with the court’s understanding of the remand order. The prosecutor summarized for the court the evidence the State intended to present, to which Stowers responded, “I can deal with that.” The hearing proceeded with testimony from probation officer Steven Naeve on behalf of the State, and from Leveke’s mother and sister (the victim) on behalf of Leveke. Four exhibits were offered in support of Leveke’s position: a letter indicating Leveke was enrolled in university studying mechanical engineering; an academic transcript; an enrollment certification; and a letter from Anthony Santiago, Ph.D., indicating Leveke’s participation in therapy. Leveke was given his right of allocution and had an opportunity to make any statement he wished to the court. At the conclusion of the hearing, the court revoked Leveke’s deferred judgment and probation, stating:

The Court has previously determined that Mr. Leveke violated the terms of his probation.

The Court finds again that the violation of that probation is grounds for revocation of his probation and also grounds for revocation of the deferred judgment that he was granted at the outset.

The Court has once again reviewed the defendant’s presentence investigation report, has taken into consideration the age of the defendant, his prior record of convictions and

deferments, which I think Mr. Stowers has accurately stated; his employment and family circumstance, the nature of the offense that was committed here and the harm to the victim, the victim's desires in this regard, the fact there was no weapon involved in this offense, the defendant's financial circumstances, his need for rehabilitation and potential for that, the necessity for protecting the community from further offenses by the defendant and others and the other factors that are set forth in the presentence investigation report; I guess the evidence that was presented here today as well, although that really isn't in the presentence investigation report.

Leveke was sentenced to five years in prison.

Leveke filed a postconviction relief application alleging his revocation hearing counsel was ineffective. Leveke argued that attorney Stowers should have either (1) not presented evidence at the October 23, 2006 hearing in order to prevent the State from presenting evidence or (2) sought a continuance of the hearing when the State indicated its intent to present additional information to the court. Leveke also alleged that the evidence presented by Stowers at the October 2006 hearing should have been presented at the original revocation hearing.

In Stowers's November 14, 2007 deposition testimony, he explained why he proceeded in the manner in which he did at the October 23 hearing. Stowers believed that had he objected to the State's evidence, Leveke might also be precluded from introducing evidence. Stowers's strategy was to make sure the judge knew about the circumstances that weighed in favor of Leveke being continued on probation including, the victim's forgiveness, his family's support, and his status as an engineering student. Stowers believed delaying the remand hearing would have been worse for Leveke. He also felt it would have been futile to ask the judge to put Leveke back on probation without some new information

that was favorable to Leveke. Moreover, the judge was aware of some of the problems with Leveke during the time he was out on appeal bond because prior hearings had been held.

The district court ruled that, in light of the broad scope of a probation violation dispositional hearing, “[a]ll the evidence submitted by both the State and Leveke at the October 23, 2006 hearing was relevant to the court’s decision.” The court also found that “a continuance would have merely moved the date of the hearing; it would not have prevented the evidence from being received.”

The evidence of Leveke’s conduct while out on appeal bond is relevant to the district court’s sentencing decision, and would almost certainly have been admitted at the later hearing if a continuance had been sought and granted. In addition, there is no evidence that any objection to this evidence would have been successful in excluding the evidence.

The district court also concluded: “There is no reasonable probability that the result of this proceeding would have been different even if Mr. Stowers had acted in the manner Leveke now urges. Prejudice has not been established.” Finally, the court rejected Leveke’s claim that had the evidence presented by Stowers at the October 23, 2006 hearing been presented at the original revocation hearing, the result would have been different. For these reasons, the district denied the application for postconviction relief.

Leveke now appeals. He contends his revocation hearing counsel was ineffective in failing to object to the “testimony regarding infractions occurring after his initial sentencing and up to the time of his hearing upon remand.” He also asserts the district court relied upon improper sentencing considerations in revoking his deferred judgment and probation.

## II. Ineffective-Assistance-of-Counsel Claim.

Ordinarily, postconviction proceedings are reviewed for errors of law. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998). However, we review ineffective-assistance-of-counsel claims de novo. *Id.* We review an ineffective-assistance-of-postconviction-counsel claim under a de novo standard of review as well. *Id.*

To prevail on his ineffectiveness claim, Leveke must prove his counsel failed in an essential duty and prejudice resulted. *Id.* at 402.

The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. The petitioner must overcome a strong presumption of counsel's competence, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective.

*Id.* (internal citations omitted).

Upon our de novo review, we—like the district court—conclude Leveke's ineffectiveness claim fails. Leveke contends Stowers should have objected to the “testimony regarding infractions occurring after his initial sentencing and up to the time of his hearing upon remand.” However, a sentencing court is allowed to consider “all pertinent information.” See Iowa Code § 901.5 (2005).

Generally, courts may consider a variety of factors to justify the imposition of a sentence, including rehabilitation of the defendant, protection of the community from further offenses by the defendant and others, Iowa Code § 901.5, the defendant's age and criminal history, the defendant's employment and family circumstances, the nature of the offense, and “such other factors as are appropriate.” Iowa Code § 907.5.

*State v. Bentley*, 757 N.W.2d 257, 266 (Iowa 2008); see generally *State v. Formaro*, 638 N.W.2d 720, 724-25 (Iowa 2002) (enunciating relevant sentencing factors and noting the “arduous task” of the sentencing court). For the reasons stated by the district court, we conclude the complained of testimony was relevant to the sentencing court’s task—to consider “all pertinent information.” Moreover, Stowers determined that if he objected to the State’s evidence, the favorable evidence he wished to introduce might also be kept out. While Leveke might complain counsel’s strategy was ultimately unsuccessful, Leveke has not overcome the strong presumption of counsel’s competence. His ineffectiveness claim was properly rejected by the district court.

### **III. Improper-Sentencing-Factor Claim.**

Leveke now also contends the sentencing court relied upon evidence consisting of improper sentencing considerations. He asserts the testimony received on remand constituted unproven or unprosecuted offenses, which were improperly considered in revoking his deferred judgment and probation.

“We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure.” *Formaro*, 638 N.W.2d at 724. Moreover, we “will not draw an inference of improper sentencing considerations which are not apparent from the record.” *Id.* at 725.

We reject Leveke’s characterization of the factors considered by the district court in its sentencing decision. We do not find the district court considered any improper factors in imposing sentence. Furthermore, the district

court did not abuse its discretion. Thus, we will not disturb the sentence imposed. *See id.*

**AFFIRMED.**