**IN THE COURT OF APPEALS OF IOWA**

No. 9-266 / 08-0599
Filed May 29, 2009

**MICHAEL DERMOT KEARY,**
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Carla Schemmel, Judge.

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

Leanne M. Striegel-Baker of Booth Law Firm, Osceola, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.**

Michael Keary appeals from the district court's denial of his application for postconviction relief. We affirm.

A jury convicted Keary of eleven counts of sexual abuse in the third degree. Ten of the counts involved a thirteen-year-old girl, who was the daughter of Keary's girlfriend: Keary lived with his girlfriend and her daughter. One count involved the fourteen-year-old niece of Keary's girlfriend. After trial and before sentencing, Keary filed a pro se motion for new trial and alleged numerous instances of ineffective assistance of trial counsel. The district court appointed substitute counsel and scheduled a full evidentiary hearing on Keary's allegations. Against the advice of his substitute counsel, Keary insisted on addressing the issues regarding trial counsel's conduct as part of the hearing. Trial counsel testified at the hearing, as did Keary. The district court determined that trial counsel had provided constitutionally effective representation and denied the motion for new trial. The court ruled:

> [Trial counsel's] performance was well beyond any standards required of him. He properly and fairly represented Mr. Keary in this matter. I don't think there is anything that he could have done that would have changed the result of this trial. [Trial counsel] was faced with a situation where he had a defendant that was charged with multiple counts of sexual abuse against a 13- and 14-year-old girl. That while the defendant was not in custody, which means and not under arrest, there was no reason to have given him any type of Mirandizing in that telephone conversation, as far as this Court is concerned. Any motion to suppress would have been to no avail and frivolous . . . .
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> [Trial counsel] is faced with a situation where his client, a client, made admissions to the police officer that pretty much went hand-in-hand with what the State's evidence was . . . . The testimony of the victim was very clear that they were separate incidents that occurred in separate locations in the family—in the family home. And as indicated on the tape itself, and again today,

> Mr. Keary was asked the question as to how many times he had sexual—and I'm paraphrasing—sexual conduct or encounters of sex acts with the 13-year-old involved in this case, and has indicated—again, I'm paraphrasing. He said something to the effect, and the jury heard this, that—"That's maybe the most difficult or toughest question you have asked me yet in terms of answering how many times this occurred, but when I—when I try to think of the number of condoms that were used, I would estimate it at about a hundred times . . . .
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> This is the kind of case that [trial counsel] was faced with with the defendant, and he did the best job that he could possibly do, as far as this Court is concerned, under the totality of the circumstances. I don't think—I can't think of anything he could have done that would have changed the result of this case.

The trial court also rejected Keary's claims of prosecutorial misconduct and of insufficiency of the evidence, and sentenced Keary. The district court later filed a supplemental ruling on Keary's pre-sentencing application for postconviction relief, finding trial counsel exceeded the standards of competence, and that any different conduct would not have changed the outcome of the trial. The supreme court dismissed Keary's direct appeal from his convictions as frivolous.

Keary filed a pro se application for postconviction relief, including twenty allegations of ineffective assistance of trial counsel, a challenge to the tape-recorded interview with law enforcement, an Eighth amendment claim, a claim that the child witness was emancipated, and a claim that the children should have been charged as participants in the crimes. Counsel was appointed and an amended application for postconviction relief was filed. The amended application alleged two grounds upon which relief was sought: (1) Keary was denied effective assistance of trial counsel because counsel failed "to clarify the differences between Counts 2-10 . . . . Had [the victim] been 14, the crime would not have been a forcible felony, and this could have drastically reduced

Petitioner's sentence"; and (2) "the conviction or sentence is otherwise subject to attack upon grounds of alleged error formerly available under common law." At the hearing, Keary's postconviction counsel argued the first claim noted above only. Keary, pro se, presented argument on each of the additional claims in his pro se application. The district court denied Keary's application and Keary now appeals.

In this appeal, Keary asserts that the district court erred in not making specific findings as to each of his pro se claims, in violation of Iowa Code section 822.7 (2007), which provides in part: "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Keary and his postconviction counsel specifically asked the district court to rule on each of his pro se issues. However, the district court did not address each issue in its ruling, and Keary did not file a motion to expand the court's findings. Thus, as the State contends, these pro se claims were not preserved for review. *State v. Ashburn*, 534 N.W.2d 106, 109 (Iowa 1995) (concluding issues must be presented to and passed upon by trial court to be raised and adjudicated on appeal).

Keary claims that postconviction counsel was ineffective in failing to file a post-trial motion asking the court to make those specific findings, thus allowing our review. The State contends that postconviction counsel was not required to advocate for Keary's pro se claims, acknowledging that this dilemma results from the "pitfalls of allowing hybrid representation." We agree.

As noted in *Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006), and *Leonard v. State*, 461 N.W.2d 465, 468 (Iowa 1990), a postconviction relief

applicant may be represented by counsel and also proceed as his own counsel. The applicant may raise additional issues pro se and demand full consideration of all claims raised—both by counsel and pro se. The district court allowed Keary to present evidence and argument on his pro se claims. *See Jones v. State*, 731 N.W.2d 388, 392 (Iowa 2007). Both Keary and his trial counsel testified at the first hearing before the trial judge. Trial counsel again testified, and Keary presented argument on each of his pro se claims in the postconviction trial. However, when the postconviction court failed to make individual findings of fact and conclusions of law on each of the pro se claims, Keary was required to preserve error on those issues by requesting expanded or additional rulings. Iowa R. Civ. Proc. 1.904(2); *see State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984) ("It is well settled that a rule [1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication.").

We have said that we do not utilize a deferential standard when persons choose to represent themselves. "The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metropolitan Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991); *accord In re Estate of DeTar*, 572 N.W.2d 178, 180 (Iowa Ct. App. 1997); *Kubik v. Burk*, 540 N.W.2d 60, 63 (Iowa Ct. App. 1995).

Because Keary did not preserve error on these claims, we will not address them.

**AFFIRMED.**