IN THE COURT OF APPEALS OF IOWA

No. 9-637 / 08-1772
Filed September 2, 2009

RODNEY MCCARTY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Rodney McCarty appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Gary Dickey Jr. of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

PER CURIAM

Rodney McCarty appeals the district court's denial of his application for postconviction relief seeking to set aside his convictions for first-degree burglary and first-degree theft.

The background facts of this case are set forth in this court's opinion involving McCarty's direct appeal. *State v. McCarty*, No. 03-1151 (Iowa Ct. App. April 28, 2004). On appeal, we affirmed McCarty's convictions and preserved his ineffective-assistance-of-counsel claim for postconviction proceedings. *Id.*

McCarty's amended application for postconviction relief asserted trial counsel was ineffective in (1) failing to object to inadmissible prior bad acts testimony, (2) failing to secure a written, pretrial ruling on his motion in limine, (3) failing to adequately cross-examine the complaining witness, (4) failing to obtain the results of the rape/sexual assault kit and have it examined by an independent expert, and (5) failing to adequately investigate the State's witnesses. After a hearing on the merits, the district court concluded McCarty's trial counsel was not ineffective. McCarty appeals.

This court reviews claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove a claim of ineffective assistance of counsel, McCarty must show by a preponderance of the evidence that his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Id*. To prove prejudice on this test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698

(1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Absent evidence to the contrary, we assume the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

We have thoroughly reviewed the briefs and the record in this case and find no error. The district court's ruling on the application was well reasoned and fully supported by the record. For all the reasons stated therein, we affirm. *See* Iowa Ct. R. 21.29(1)(*d*), (*e*).

We address only one issue further. McCarty asserts that trial counsel was ineffective in failing to object to testimony by the complaining witness about her prior sexual relationship with McCarty and that McCarty had been abusive.[1]

The district court wrote:

> McCarty had a prior romantic and sexual relationship with the victim. His defense at trial was that on the day she claims he sexually assaulted her, the victim had invited him into her home where they drank wine and had consensual sex. To bolster that defense McCarty wanted to present evidence of the nature of his prior relationship with the victim. The trial court ruled that if McCarty presented that evidence, the State would be allowed to present evidence of the true nature of the prior relationship, including evidence of McCarty's prior abusive behavior toward the victim. Defense counsel advised McCarty of this fact. McCarty remained adamant in his desire to nevertheless go forward with evidence of his prior relationship with the victim. As it turned out, McCarty never presented this evidence. Rather, it was solicited by the State from the victim during direct examination without any objection.
>
> There was nothing wrong with defense counsel's performance in this respect. It is a perfectly understandable and rational strategy decision to conclude, as apparently McCarty himself did, that the harm of not presenting evidence of a long term

[1] With respect to McCarty's prior bad acts claims, we note our supreme court has recently decided *State v. Reynolds*, 765 N.W.2d 283, 290-91 (Iowa 2009), in which it discusses the relevance of prior threats and assaults toward the same victim.

> prior romantic relationship between the victim and the defendant outweighed the harm of "opening the door" to evidence of abuse within the relationship. Further, allowing the State to present this evidence got the facts before the jury without McCarty having to testify about it himself and subject[ing] himself to cross examination.

McCarty complains this ruling was erroneous because he did not "open the door" to the evidence.

We find McCarty's argument specious. It is evident from this record that McCarty's defense to the charges against him rested on his claim that sex with the victim had been consensual. McCarty insisted that trial counsel present evidence of his prior consensual sexual relationship with the victim in support of his defense. Trial counsel testified that he and the State agreed they "were going to talk to [the victim] about their prior relationship." Trial counsel stated, "I don't think it was a thing where I had to get into it first before" the county attorney did. Under all the circumstances, we conclude McCarty has failed to show counsel's performance was deficient or that prejudice resulted.

AFFIRMED.