

FILED

MAY 23 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ORLEY IVAN FARNUM, II,)

Petitioner-Appellant,)

114

vs.)

STATE OF IOWA,)

9-98
88-163

Respondent-Appellee.)

Appeal from the Iowa District Court for Polk County
(PCR 382), A.M. Critelli, Judge.

Defendant appeals the denial of his application for
postconviction relief. **AFFIRMED.**

William L. Wegman, State Public Defender, and James F.
Whalen, Assistant State Public Defender, for petitioner-
appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard
J. Bennett, Assistant Attorney General, for respondent-
appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett,
JJ.

SCHLEGEL, J.

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The defendant, Orley Ivan Farnum, II, appeals the district court's denial of his application for postconviction relief, in which he challenged his convictions on three counts each of third-degree sexual abuse, administering harmful substances to a minor, and dissemination and exhibition of obscene materials to a minor. He alleges that he was denied effective assistance of counsel when his trial attorney called an expert witness who testified adversely to him.

After a bench trial in 1985, Orley Farnum was found guilty of three counts each of third-degree sexual abuse, administering harmful substances to a minor, and dissemination and exhibition of obscene materials to a minor. The convictions grew out of incidents extending over a three-year period in which Farnum allegedly performed various sex acts on a fourteen-year-old girl, an eleven-year-old boy, and his nine-year-old sister, furnished them with marijuana, and showed them pornographic movies and videotapes. The Iowa Supreme Court affirmed the convictions in State v. Farnum, 397 N.W.2d 744 (Iowa 1986). Farnum subsequently applied for postconviction relief but was denied.

On appeal from that denial, Farnum alleges ineffective assistance of counsel. He contends that his trial attorney did not meet the standard of reasonable competence when he

called an expert witness who testified adversely to him. The witness, a psychologist who had treated one of the alleged victims, testified that in her opinion this victim was telling the truth when he accused Farnum of sexual abuse. Farnum asserts that his attorney neither deposed nor interviewed this expert witness before trial and had no reasonable explanation for calling her. Farnum argues that because this expert witness's testimony regarding a complainant's credibility would not have been admissible if presented by the State, the effect of his attorney's incompetence was to introduce damaging evidence that the State itself would have been prohibited from introducing.

Because Farnum is asserting that his constitutional rights have been violated, we make an independent evaluation of the totality of the relevant circumstances. State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984). The person claiming that his trial attorney was ineffective, depriving him of his sixth amendment right to counsel, must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The petitioner has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient or "outside the bounds of normal competency," see

State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982), we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). "Reasonableness under the prevailing norms" is the standard by which we measure counsel's performance. State v. Risdal, 404 N.W.2d 130, 132 (Iowa 1987).

In the case at bar, we agree with the defendant's first claim that his trial attorney breached an essential duty in calling Dr. Cavillan, who rendered an opinion that one of the victims was telling the truth for the defense.

As defendant quite correctly points out, there is no question that under State v. Myers, 382 N.W.2d 91, 97-98 (Iowa 1986), Dr. Cavillan's testimony would have been inadmissible if she had testified in the State's case-in-chief. In Myers, the Iowa Supreme Court held that the admission of expert testimony that children rarely lie about sexual abuse, constituted abuse of the trial court's discretion and prejudiced defendant, who had been charged with indecent contact with a child. The court held that as the credibility of the eight-year-old child was a fighting issue between the parties, "the prosecutor's obvious purpose in offering the expert testimony was to bolster the complainant's credibility. We believe the effect was comparable to telling the jury that the complainant would not lie about matters concerning sexual abuse." Id. at 93.

Although recognizing that Iowa has "long been a leader in the liberal use of expert witnesses presenting opinion evidence," the court surveyed previous cases in attempting to address the issue and stated that:

These cases reveal that we generally will not admit expert opinion testimony that essentially passes on the guilt or innocence of the defendant. These inadmissible opinions go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused. Additionally, expert opinions on the truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder.

Id. at 95.

As defendant notes, although Myers was not decided until after Farnum's trial, the postconviction court found that because a reasonably competent attorney should have been sufficiently aware of the current status of the law regarding the use of experts to issue opinions on the credibility of witnesses, counsel would have been expected to object to this evidence if offered by the State.

Based upon the record before us, we see no way to attribute counsel's error to mere improvident trial strategy, miscalculated tactics, or mistaken judgment. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). Counsel's postconviction hearing testimony reveals that counsel called Dr. Cavillan to attempt to reveal inconsistencies between the children's testimony and their statements to

Dr. Cavillan. He also claimed that he hoped to attack Dr. Cavillan's belief that the children were telling the truth, by cross-examining her with certain books and pamphlets he had reviewed prior to trial. Despite counsel's reasons, we have difficulty accepting this strategy as within the normal bounds of competency where the record shows that counsel never deposed this witness or interviewed her prior to trial. Apparently, counsel did not decide to call her until after the State had declined to do so.

Standing alone, Dr. Cavillan's testimony would likely meet the test of prejudice necessary to show a violation of defendant's constitutional right to effective assistance of counsel, however, in light of the overwhelming evidence in the record of defendant's guilt, it is not likely that, but for counsel's error, the result in this case would have been different. See State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987).

At trial, all three minor children testified and identified the defendant as the man who had committed numerous acts of sexual abuse against them over an extended period of time. Moreover, such testimony was corroborated by other evidence, which included a series of photographs depicting the children engaged in sex acts with parts of defendant's body. Other evidence introduced included items seized during a search of defendant's home, including a vibrator, which one of the victims identified, drug

paraphernalia, a movie projector, and sexually explicit videos. Medical evidence was also introduced by the State regarding the two female victims, indicating that both had been sexually abused.

Based upon the foregoing, we fail to find that defendant has carried his burden of showing, by a preponderance of the evidence, that but for counsel's error, the result would have been different. See, Hildebrant, 405 N.W.2d at 841.

AFFIRMED.