IN THE COURT OF APPEALS OF IOWA

No. 0-72 / 88-1762

FILED
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CLERK SUPREME COURT

GEORGE WILLIAM HALL,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jefferson County, Phillip R. Collett, Judge.

Hall appeals district court's denial of postconviction relief. **AFFIRMED.**

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Michael R. Brown, County Attorney, and Gordon M. Liles, Keokuk, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ. Hayden, J., takes no part.

OXBERGER, C.J.

In 1985, George William Hall was convicted of first-degree murder. In State v. Hall, 395 N.W.2d 640 (Iowa 1986), the Iowa Supreme Court affirmed his conviction on direct appeal. Hall subsequently challenged his conviction by filing the present application for postconviction relief. The district court denied his application, and Hall has appealed. We affirm.

Hall contends his statutory right to speedy trial was denied. This issue arose under the following fact situation. The crime occurred in 1977, but Hall was not charged until late in 1984. Under the statutes in effect in 1977, the State was required to bring a defendant to trial within sixty days of the information. Under the statutes in effect in 1984, this speedy-trial period had been lengthened to ninety days. Hall's trial began ninety-one days after the information was filed. Hall asserts that he was entitled to be tried within sixty days of the information, under the 1977 statutes in effect at the time of the crime. The 1977 Code was, at Hall's insistence, applied to this case in other respects. Hall also asserts that the delay in bringing him to trial was not attributable to him or to his attorney.

We first look to the merits of Hall's speedy trial issue. In State v. Petersen, 288 N.W.2d 332 (Iowa 1980), which purports to apply the same standard to Iowa Rule of Criminal Procedure 27(2) as it did to Iowa Code section 795.2, the Iowa Supreme Court stated:

> Our requirement is both more specific and more stringent than the [federal] constitutional speedy trial requirement. A set period, . . . is fixed within which trial must commence. If trial is not commenced within [that] period the case must be dismissed unless one of three things has occurred: (1) the defendant has waived his right to a speedy trial, (2) the delay is attributable to the defendant, or (3) there is "good cause" for the delay.

Id. at 335 (citing State v. Ege, 274 N.W.2d 350, 354 (Iowa 1979)). The state does not and cannot seriously contend that either of the first two conditions in Petersen exist. It thus becomes the State's burden to show "good cause" excusing the delay. State v. Hines, 225 N.W.2d 156, 158 (Iowa 1975); cf. Petersen, 288 N.W.2d at 334 (applying standard to Iowa R. Crim. P. 27(2)).

"In determining whether good cause exists which will justify a delay," the Petersen Court stated,

> we do not apply the four-factor balancing test of Barker v. Wingo[, 407 U.S. 514 (1972) (giving nonexclusive list including length and reason for delay, assertion of right, and prejudice)]. Good cause, under our rule, focuses on only one factor: the reason for the delay. If the reason for the delay is sufficient the other factors are not needed. If the reason for the delay is insufficient the other factors will not avail to avoid dismissal.
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> Yet, the reason for the delay cannot be evaluated entirely in a vacuum. The surrounding circumstances bear on the focal point of the inquiry, that is the reason for the delay. . . . [T]o whatever extent the delay has been a short one, or the defendant has not demanded a speedy trial, or is not prejudiced, a weaker reason will constitute good cause. On the other hand, if the delay has been a long one, or if the defendant has demanded a speedy trial, or is prejudiced, a stronger reason is necessary to constitute good cause.

Petersen, 288 N.W.2d at 335. The state urges that there is

substantial evidence to support the trial court's finding of "good cause."

Both the original and the postconviction trial courts found that each side had assumed a ninety-day period. Both found that this was a mutual, honest mistake. The Petersen case quoted above goes on to say that "an honest misunderstanding of counsel" constitutes good cause for delay. Id. In that case, there was a fourteen-day delay, and much like this case, the defendant was prepared to proceed with little ado at the later date. In Petersen, in fact, the defense was ready to proceed at an earlier date, but through some confusion the prosecution was not. Here, the State argues and the postconviction trial court found that the defense was not prepared to proceed at the earlier date (which had passed, and in any event probably could not have been prepared), expected to be tried at the later date, and benefited from the extension of time. Thus, Hall was not prejudiced.

In addition to raising the merits of his speedy trial issue, Hall also contends that his attorney in the 1985 trial rendered ineffective assistance by failing to realize in a timely fashion that the sixty-day speedy trial limit of the 1977 statute applied in this case, and by failing to raise the speedy trial issue in an adequate or timely fashion. Finally, Hall contends his attorney on direct appeal rendered ineffective assistance by failing to raise the speedy trial issue on direct appeal.

Ordinarily, our review of postconviction proceedings is for the correction of errors at law. Morris v. Auger, 414 N.W.2d 858, 860 (Iowa App. 1987). However, when, as here, a postconviction petitioner asserts violations of constitutional safeguards, such as right to speedy trial and ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. Mark v. State, 370 N.W.2d 609, 610 (Iowa App. 1985). The petitioner has a burden of proof to show a constitutional violation by a preponderance of the evidence. Williams v. State, 378 N.W.2d 894, 896 (Iowa 1985).

Hall first argues that the trial court erred in holding that his statutory speedy trial rights were not violated. We initially note, however, that this issue was not raised on direct appeal. Generally, a petitioner will not be allowed to claim in postconviction proceedings that the trial court erred on issues that were not properly presented for review on direct appeal. Polly v. State, 355 N.W.2d 849, 855 (Iowa 1984). The petitioner must not only show "cause" or "sufficient reason" for failure to challenge alleged errors in the trial court, but must also show actual prejudice resulting from the alleged errors. Waterbury v. State, 387 N.W.2d 309, 311 (Iowa 1986). Such errors must work to the petitioner's actual and substantial disadvantage, infecting the entire trial with error of constitutional dimension. Id.

Though Hall does not directly express a "cause" for his failure to raise this issue on direct appeal, Hall does claim that he was denied effective assistance of counsel on direct appeal and on appellate review. We thus treat his arguments for ineffective assistance of counsel as the alleged "cause." To establish a claim of ineffective assistance of counsel, Hall must prove by a preponderance of the evidence that counsel failed to perform an essential duty and that prejudice resulted. State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986); Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). The first prong (failure of essential duty) is not satisfied by a mere showing that trial strategy backfired or that another attorney would have tried the case differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). We generally will not second-guess trial tactics, strategies, or other decisions calling upon judgment. Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982).

The second prong (prejudice) must show that a failure amounted to "a denial of the accused's due process right to a fair trial, fundamental miscarriage of justice, or an equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The prejudice must be to the extent "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, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984).

Upon our review of the totality of the circumstances, we find no ineffective assistance of appellate counsel. Hall's appellate counsel had been intensively involved in appellate defense for over eight months. The record reveals that appellate counsel consulted with Hall's trial counsel, as well as with Hall himself. Appellate counsel testified at the postconviction hearing that he declined to raise the speedy trial issue since speedy trial issues are difficult ones on which to succeed and that other issues appeared to have a better chance. We have strongly adhered to the view that "[h]ighly competent appellate lawyers generally assign only the strongest points and rely on them for reversal." Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987). Appellate counsel is thus not obligated to raise every colorable claim on appeal. Jones v. Barnes, 463 U.S. 745, 754, 103 S. Ct. 3308, 3314, 77 L. Ed. 2d 987, 995 (1983).

Hall additionally alleges that his trial counsel was ineffective in failing to raise the speedy trial issue. Hall must overcome the presumption that counsel was competent. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The record in the present case reveals that trial counsel gave a spirited defense. We note that in the original proceedings trial counsel was able to obtain a hung jury. Our review of the entire record leads us to conclude that trial counsel's failure to realize that the sixty-day rule applied to Hall was not such a breach of an

essential duty. Additionally, we note that despite Hall's option to be tried under the 1977 rules of criminal procedure, Hall from the outset proceeded under the 1984 rules. Numerous motions filed by Hall before trial clearly referenced the 1984 rules.

We further note that Hall apparently believed he was operating under the 1984 rules, evidenced by his filing numerous pretrial motions well past the December 28, 1984, deadline imposed by the sixty-day rule. On November 26, 1984, Hall requested an extension of the discovery period. Hall was still taking depositions in January 1985. It was not until January 17, 1985, that Hall first moved for relief based on the alleged mistake in applying the 1984 ninety-day speedy trial rule. We therefore cannot say, under these circumstances, that trial counsel was ineffective.

It is quite apparent in the present case that Hall may have intended to be tried under the 1977 rules, but completely acquiesced in the time frame set by the trial court. In State v. Gansz, 403 N.W.2d 778, 780 (Iowa 1987), the defendant alleged that the State's failure to retry him within ninety days of the issuance of procedendo from the appeal of his first trial violated his statutory right to a speedy retrial. The Iowa Supreme Court, however, affirmed the trial court ruling that the defendant's right to a speedy trial had not been violated:

> It is clear from the record that the district court was led to believe defendant's speedy trial

> rights could properly be measured from the date of the filing of the new information. The defendant was present, was aware of the assumption under which the district court was assigning the case for trial, and acquiesced in that date without bothering to advise the court that he believed his speedy trial rights were properly to be measured from the date of procedendo. It was within this framework that the district court, in an earnest attempt to satisfy defendant's speedy trial rights, assigned the case for trial thirteen days beyond the time that defendant now claims the period allowed for retrial expired.

Gansz, 403 N.W.2d at 780.

We believe the analysis enunciated in Gansz is applicable to the present case. Hall's utilization of the court's given schedule and requests for more time for discovery evidenced his acquiescence in the trial court's schedule. Hall does not allege that he was not present during the various pretrial procedures, and he was apparently aware of the court's mistaken application of the 1984 speedy trial rule. It would, therefore, appear that any delay in his trial could be attributable to Hall's actions as well as trial counsel's alleged failure to alert the court to the problem. Hall did nothing to correct the problem and may not now claim that it was in contravention of his speedy trial rights. See also State v. Zoehringer, 306 N.W.2d 792, 795 (Iowa 1981) (Acquiescence in the setting of a trial date beyond the speedy trial period is a factor which may be considered in determining whether a defendant has waived his speedy trial right.)

In summary, we hold that Hall has failed to prove that but for trial counsel's and appellate counsel's failure to

raise the speedy trial issue, the outcome of the present case would have been different. Hall should not be allowed to use the speedy trial rules as a technical device to exonerate himself from the crime for which he was duly convicted.

AFFIRMED.