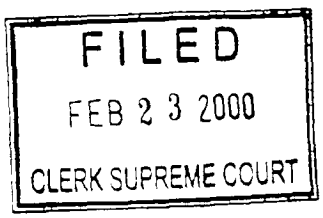
IN THE COURT OF APPEALS OF IOWA

No. 1999-534 (9-795) / 98-1924
Filed February 23, 2000



JACK L. BOWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

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

Chad R. Frese of Moon Law Office, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, James J. DeTaeye, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

A man convicted of sexual abuse complains his trial attorney was ineffective for failing to exploit his mental limitations at trial. However, absent objective manifestations of a mental disorder, we cannot expect defense counsel to question his client's competency. Because we find Bown demonstrated no objective manifestations of incompetence and his counsel acted in a prudent manner, we cannot find trial counsel ineffective and affirm his conviction.

I. Background Facts & Proceedings.

Jack Bown was charged with and convicted of two counts of second-degree sexual abuse in violation of Iowa Code section 709.3 (1987). Bown was sentenced to serve an indeterminate term of imprisonment not to exceed twenty-five years on each count. In December 1997 Bown filed an application for postconviction relief, claiming his trial counsel was ineffective for failing to investigate the possibility he was incompetent to stand trial. The district court dismissed the application, ruling trial counsel performed competently because Bown, although of somewhat low intelligence, took an active and defining role in his defense and demonstrated no objective manifestations that would imply he was incompetent.

Bown appeals, claiming the district court erred in concluding there was no evidence of ineffective assistance of counsel. He contends trial counsel should have inquired into his competency to stand trial due to his illiteracy and low mental capacity. He further alleges postconviction counsel was ineffective for failing to seek an independent psychiatric evaluation to substantiate his claim.

II. Standard of Review.

Normally, a trial court's denial of an application for postconviction relief is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). If, however, the applicant asserts violations of constitutional safeguards, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

III. The Merits.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. With regard to the first prong, Bown must prove his trial counsel's performance was not within the normal range of competence. *State v. Grant*, ___ N.W.2d ___ (Iowa 1999). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

For a defendant to be adjudged legally incompetent during any stage of a criminal proceeding, it must reasonably appear as though "the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3 (1987). The law, however, strongly presumes competency and places the burden on the defendant to show otherwise. *State v. Rieke*, 542 N.W.2d 577, 580 (Iowa App. 1995). In determining whether the defendant's mental illness rises to the level of incompetency, "subnormal intelligence is only one factor to be considered." *State v. Mann*, 512 N.W.2d 528, 531 (Iowa 1994).

A. Bown Appreciated the Nature of the Charge. Throughout the course of proceedings, Bown appeared to appreciate the nature of the charge. Bown's trial testimony betrays a clear knowledge of the charges against him as he presented a plausible explanation for his alleged misconduct. He testified he was simply "blowing bubbles" on the victim's stomach and the witnesses simply misunderstood his actions. Furthermore, his trial counsel, recognizing his client was somewhat low functioning, read all documents to Bown prior to trial and actively discussed his options.

B. Bown Understood the Proceedings & Assisted in His Defense. Bown's conduct throughout the proceedings was that of a cogent, sound-minded individual. His actions demonstrate he understood the proceedings and he actively participated in his defense. When he was rearrested while on bond, he immediately called his attorney and asked for assistance in obtaining a bond to secure his release. Bown also made knowledgeable decisions regarding the

plea negotiations by rejecting the State's offer to reduce one of his charges in exchange for his plea. In fact, he actually countered the offer by telling his attorney he would consider pleading guilty if the State dropped one of the charges. Finally, Bown made the decision not to appear for the taking of the victims' testimony and had intimate knowledge of the criminal justice system based on prior experiences—he actually served a criminal sentence for an arson conviction and had been charged with numerous other criminal offenses.

Bown simply did not display any objective manifestations of incompetence. Not only did his actions fail to raise the issue, but also at no time did he specifically state to the court or his attorney that he failed to understand the proceedings. His actions would not alert a reasonable attorney that his competency was in issue. Defense counsel in this specific situation had extensive criminal experience, and had raised the competency of criminal defendants on a number of occasions. Bown cannot prove the initial prong of ineffective assistance of counsel because counsel's performance was well within the range of competence. We will not preserve Bown's claim of ineffective assistance of postconviction counsel because we have resolved the issue underlying his application for postconviction relief. He cannot show prejudice even if we were to presume postconviction counsel failed to perform competently. The conviction in affirmed.

AFFIRMED.