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IN THE COURT OF APPEALS OF IOWA

No. 7-564 / 96-1602

FILED
NOV 25 1997
CLERK SUPREME COURT

KEVIN LEE GRANDSTAFF,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Jasper County, George Bergeson, Judge.

Kevin Grandstaff appeals the district court's denial of his application for postconviction relief based on a claim of ineffective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Steven Johnson, County Attorney, and John C. Heinicke, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Mahan, JJ. Streit, J., takes no part.

HUITINK, J.

This is an appeal by an applicant claiming he should have been granted postconviction relief on his claim of ineffective assistance of counsel at his criminal trial. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Kevin Grandstaff was charged with sexual abuse in the second degree, in violation of Iowa Code section 709.3(2). The trial information alleged the sexual abuse occurred in the months of October, November, or December 1993. During the trial, Grandstaff elicited information from the victim's family which revealed they had moved from Iowa during August 1993, and Grandstaff had no contact with the victim during the months in question.

The Stated then filed a motion to amend the trial information to allege the sexual abuse occurred during the year of 1993. The district court overruled Grandstaff's objection to the amendment. Grandstaff was convicted of the crime charged. He did not appeal.

On September 20, 1995, Grandstaff filed an application for postconviction relief. He alleged he received ineffective assistance because his trial counsel, Bradley McCall, told him he had no basis for appeal. Grandstaff claimed this advice caused him to forego an appeal. He asserted he would have been successful in an appeal on the ground the trial court improperly allowed the State to amend the trial information.

The district court denied the application for postconviction relief. Grandstaff now appeals.

We find Grandstaff failed to show he received ineffective assistance of counsel. We do not find sufficient evidence to show McCall offered Grandstaff deficient advice. The evidence shows the sentencing judge advised Grandstaff of his right to appeal. Grandstaff told the judge he was not going to appeal. McCall stated he discussed filing an appeal with Grandstaff, and left the ultimate decision to him. We determine it was Grandstaff's decision not to appeal his criminal conviction.

We also conclude that even if Grandstaff received deficient advice, he was not prejudiced. We do not believe an appeal would have been successful. Iowa Rule of Criminal Procedure 4(8)(c) allows an amendment to the trial information during a trial if substantial rights of the defendant are not prejudiced, and a wholly new or different crime is not charged. *See State v. Berney,* 378 N.W.2d 915, 919 (Iowa 1985). Here, the amendment only expanded the timeframe when the alleged sexual abuse was to have occurred.

We affirm the decision of the district court denying Grandstaff's application for postconviction relief. Costs of this appeal are assessed to Grandstaff.

AFFIRMED.