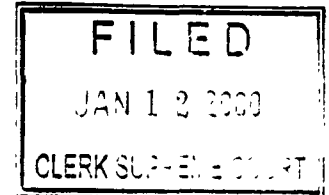


IN THE COURT OF APPEALS OF IOWA

No. 1999-503 (9-760) / 99-0503
Filed January 12, 2000



ROBERT FLETCHER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell,
Judge.

Appellant appeals from the grant of summary judgment denying his
postconviction relief application. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Paul E. Kittredge, Jr., Assistant
County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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MAHAN, P.J.

Robert Fletcher appeals the grant of summary judgment denying his postconviction relief application. Fletcher contends the district court erred in concluding there was no issue of material fact on whether his wife should have been called as a witness in the case. We affirm.

Fletcher was convicted in 1996 of second-degree sexual abuse and assault based on incidents involving his eight-year old stepdaughter and seven-year old stepson.¹ We affirmed the convictions on direct appeal and preserved several of Fletcher's ineffective assistance of trial claims for postconviction proceedings. *State v. Fletcher*, 554 N.W.2d 568 (Iowa App. 1996).

Fletcher petitioned for postconviction relief and claimed he had received ineffective assistance of counsel because trial counsel failed to: (1) use the interviews conducted by the child protection agency to cross examine witnesses; (2) have DNA testing performed; (3) call the children's mother, who had made allegations, as a witness; (4) investigate allegations that someone else was responsible for molesting the complaining witness; and (5) conduct depositions of witnesses.

The State filed a motion for summary judgment and a supporting affidavit from Fletcher's trial counsel which responded to each of Fletcher's allegations. Fletcher resisted the State's motion for summary judgment supported only by his own affidavit. The district court stated:

¹ Fletcher's wife is the mother of the children.

The applicable law is set out in the Respondent's motion and Applicant so agrees. Furthermore applicant agrees "there are no relevant facts which are undisputed." Applicant's affidavit raises no facts sufficient to create an issue of "ineffective assistance of counsel." Accordingly the Respondent is entitled to a judgment as a matter of law.

The district court sustained the State's motion for summary judgment and dismissed Fletcher's application for postconviction relief.

Fletcher appeals only as to whether there was an issue of material fact concerning the calling of the children's mother as a witness in the case.

I. Standard of Review. Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). When summary judgment is granted in a postconviction relief action, we examine the record to determine if a genuine issue of fact exists and whether the moving party is entitled to a judgment as a matter of law. Iowa R.Civ.P. 237(c); *Bugely*, 596 N.W.2d at 895. However, when there is an alleged denial of constitutional rights our review is de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

II. Failure to Call Fletcher's Wife as a Witness. Fletcher contends the district court erred in concluding there was no issue of material fact on whether his wife should have been called as a witness in the case. We disagree.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996).

"A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty; and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. The court will generally presume counsel is competent, and we will not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

In his affidavit, trial counsel stated:

That I did not call the children's mother as a witness as I did not believe she would have offered any testimony in support of the applicant. The applicant and I discussed Brenda Fletcher as a possible witness. He indicated to me that she was upset with him and had kicked him out of the house, and that she believed he molested her children. I asked him if he believed she could help in any way and he indicated no.

Thus, in order to avoid summary judgment on this issue, Fletcher needed to establish there were genuine issues of material fact that the decision not to call the children's mother as a witness was not a reasonable trial strategy. *See, e.g., Kone*, 557 N.W.2d at 102 (finding failure to call particular witness was a strategical decision). In addition, Fletcher's complaint about trial counsel's failure to call the children's mother should be accompanied by a showing that said testimony would be beneficial. *Nims v. State*, 401 N.W.2d 231, 235 (Iowa App. 1986). However, Fletcher not only failed to

dispute trial counsel's account of his participation in the discussion and decision not to call the children's mother as a witness, he also failed to show said testimony would be beneficial. He merely stated, "There are no relevant facts in this case that are undisputed" and that he "expected [his] wife, Brenda Fletcher to be called as a witness in [his] trial" "The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavit submitted, that there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." *Munz v. State*, 382 N.W.2d 693, 695 (Iowa App. 1985). We have carefully reviewed the facts of this case and conclude the district court properly granted summary judgment after reviewing the pleadings and affidavits in this case. We further conclude Fletcher's resistance was inadequate to show there was a genuine issue for trial. Iowa R. Civ. P. 237(e).

For these reasons, we affirm.

AFFIRMED.

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