FILED
JUN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

368

DAVID GEORGE DEE,	)	Filed June 30, 1981
Petitioner-Appellant,	)	1-136
		2-63731
vs.	)	
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from Jefferson District Court. Phillip R. Collett, Judge.

Defendant appeals the denial of his application seeking post-conviction relief from his 1973 guilty plea conviction of rape, asserting ineffective assistance of counsel.

AFFIRMED.

Tim B. Kuiken, of Foss & Kuiken, Fairfield, Ia., for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa and John P. Messina, Assistant Attorney General for respondent-appellee.

Submitted to Oxberger, C. J. and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant, David Dee, appeals the denial of his application seeking post-conviction relief from his 1973 guilty-plea conviction of rape in violation of section 698.1, The Code 1973, for which defendant was sentenced to a period of incarceration of fifty years. We affirm.

Defendant contends that he was denied effective assistance of counsel at trial. Since defendant asserts a constitutional violation, we make an independent evaluation of the totality of the circumstances. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. Id.

The sixth amendment of the United States Constitution guarantees criminal defendants the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L. Ed. 2d. 799, 804 (1963). The sixth amendment is made obligatory on the states by the fourteenth amendment to the United States Constitution. Id. The right to counsel means the right to effective assistance of counsel. McMann v. Richards, 379 U.S. 759, 771 n.14, 90 S. Ct. 114, 1449 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974); State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). The test for judging the quality of representation accorded a criminal defendant who challenges the competency of his attorney is whether in all the circumstances counsel's performance was within the range of normal competency. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Defendant has the burden of proving ineffectiveness of counsel. Veverka, 271 N.W.2d at 750; State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978). In order to sustain his burden defendant must establish by a preponderance of the evidence, Sims, 296 N.W.2d at 423; Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977), an affirmative factual basis demonstrating counsel's inadequacy of representation, Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976). Defendant is confronted with a presumption that counsel is competent, and he must overcome the presumption in order for an ineffective assistance of counsel claim to lie. Sims, 295 N.W.2d at 423.

The State contends that section 663A.8, The Code 1979, bars defendant from raising the ineffective assistance claim either because the issue was finally adjudicated in State v. Dee, 218 N.W.2d 561, 563 (Iowa 1974) or, in the alternative, because the issue

was not raised in that case and defendant has not shown sufficient reason for this failure. We decline to address these arguments, because we conclude that defendant's ineffective assistance claim fails on the merits.

In support of his ineffective assistance claim defendant contends that there is a lack of evidence that H. S. Life, the trial attorney, spent enough time working on defendant's case. Defendant misapprehends the burden of proof in an ineffective assistance proceeding. It is defendant's burden to prove by a preponderance of evidence the amount of time spent by Life on his case and that such amount of time was less than an attorney acting within the range of normal competency would have spent on defendant's case. There is some evidence that Life spent an hour in all discussing the facts and circumstance of the case with defendant. There is no evidence concerning how much time Life spent on the case doing work outside of defendant's presence and there is no evidence that an hour of discussion with defendant was inadequate. Defendant has not met his burden of proving that Life rendered defendant ineffective assistance by virtue of the amount of time spent on the case.

Mrs. Greer, the wife of a co-defendant, testified at the post-conviction hearing that while Life was handling defendant's case, Life told her that the parents of the rape victim would not allow their daughter to testify. According to Mrs. Greer, Life asked her not to reveal this information to defendant, because Life was afraid the defendant, if he knew the information, would plead not guilty and consequently receive a life sentence. Defendant testified that he was informed of the information Life withheld from him after he was sentenced. Life testified that he had no memory of telling Mrs. Greer any such thing. A serious flaw in defendant's credibility is the absence of testimony of the rape victim's parents confirming Mrs. Greer's story. The post-conviction court stated: "In light of the transcript of the plea and evidence from other witnesses, including this court's observation of petitioner while testifying, most of petitioner's testimony is simply not believable." We give weight to the trial court's conclusion. See Iowa R. App. P. 14(f)(7). Since Life has no memory of his statement to Mrs. Greer, since the victim's parents did not testify in confirmation of Mrs. Greer's testimony, and since defendant's testimony appears generally unreliable, we find defendant's and Mrs. Greer's testimony insufficient to satisy defendant's burden of proof.

While in jail awaiting sentencing defendant wrote Life a letter dated August 7, 1973, stating that he wanted to see and talk to Life. Life did not see defendant until September 4, 1973, the date of sentencing. Defendant appears to contend that Life's tardiness in seeing defendant amounted to ineffective assistance, but he has pointed to no evidence showing how Life's tardiness affected defendant's case. We therefore reject the contention.

Defendant contends that the totality of circumstances surrounding Life's treatment of defendant demonstrates that defendant's guilty plea was not intelligent, knowing, or voluntary. In defendant's direct appeal the Supreme Court rejected the contention that defendant's guilty plea was involuntary. State v. Dee, 218 N.W.2d 561, 563-64 (Iowa 1974). The record made at sentencing clearly indicates that defendant's guilty plea was made intelligently, voluntarily, and knowingly. The record made after sentencing does not demonstrate a contrary conclusion.

Life represented both defendant and co-defendant Greer at trial. For this reason, defendant contends that Life was presented with a conflict of interest resulting in ineffective assistance of defendant. Dual representation does not automatically deprive defendant of effective representation. Jackson v. Auger, 239 N.W.2d 180, 183 (Iowa 1976). The burden is upon defendant to demonstrate a substantial possibility that the situation of dual representation created a conflict between his interests and the interests of the other persons represented. Id. In Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 1719, 64 L. Ed.2d 333, 348 (1980), the Supreme Court held that the mere possibility of a conflict of interest in a dual representation situation is insufficient to impugn a criminal conviction. Defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Id. In his brief defendant admits that there is no evidence of an actual conflict of interest, nor can we see any upon an independant examination of the record. Therefore, defendant has not sustained his burden of demonstrating that Life's effectiveness of assistance was impaired due to a conflict of interest.

AFFIRMED.