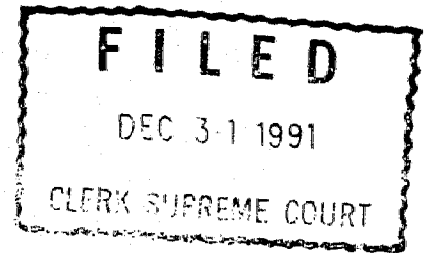


IN THE COURT OF APPEALS OF IOWA

No. 1-343 / 90-1366



RONALD W. SCHMITZ,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Dubuque County,
Alan L. Pearson, Judge.

Applicant appeals the district court's denial of his
request for postconviction relief based on his claim of
ineffective assistance of counsel. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, Fred H. McCaw, Dubuque County
Attorney, and Christine O. Corken, Assistant County
Attorney, for respondent-appellee.

Considered by Donielson, P.J., and Hayden and Sackett,
JJ.

HAYDEN, J.

In late 1986 Ronald Schmitz faced state charges of first-degree theft and second-degree arson. He also faced ten federal drug charges involving distribution of cocaine.

On the state charges, Schmitz pleaded guilty to the first-degree theft charge. As part of the plea bargain, the State dismissed the arson charge and agreed to make no sentencing recommendation on the theft charge.

At about the same time Schmitz and his attorney reached a plea agreement with federal authorities on the federal drug charges. Under this agreement Schmitz pleaded guilty to two of the federal drug charges, and the others were dismissed.

Schmitz and his attorney both expected that Schmitz's state and federal sentences would be concurrent. However, due to the effect of Iowa Code section 903A.5, concurrent state and federal sentencing was possible only if the state sentencing proceeding occurred first. Schmitz's attorney thought he had arranged for the state sentencing proceeding to occur first. However, due to circumstances beyond the attorney's control, the federal presentence investigation was finished early. The federal sentencing hearing was held on March 27, 1987. Schmitz received two twelve-year sentences, one of which was suspended, on the two federal charges.

The state sentencing hearing was held on March 30, 1987. The district court rejected Schmitz's request for a

sentence of probation and sentenced him to a ten-year term of imprisonment to begin at the end of Schmitz's federal sentence. Thus, Schmitz's state sentence proved to be consecutive to his federal sentence.

Schmitz later filed the present application for postconviction relief to challenge his state theft conviction. He claimed he received ineffective assistance of counsel. The district court denied postconviction relief, and Schmitz has appealed.

Proceedings for postconviction relief are special proceedings treated as an action at law. Gladson v. State, 439 N.W.2d 214, 215 (Iowa App. 1989). However, where there are fundamental constitutional rights involved, we review the case de novo in light of the totality of the circumstances. Id.

To establish a claim of ineffective assistance of trial counsel, the applicant may show: 1) counsel's performance was so deficient as not to be functioning as counsel guaranteed by the sixth amendment; and 2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989). An applicant must satisfy this burden by a preponderance of the evidence and rebut the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983). An applicant may be entitled to relief where, but for counsel's unprofessional errors, the result of the proceeding would have been different. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Kane, 436 N.W.2d at 627. Effective assistance of counsel does not mean successful. Fryer v. State, 325 N.W.2d 400, 414 (Iowa 1982).

We hold Schmitz has not borne his burden to prove he received ineffective assistance of counsel. His attorney's failure to seek a continuance of the federal sentencing was a mistake in judgment which we will not second guess. See Brewer, 444 N.W.2d at 83. While Schmitz and his attorney were hoping Schmitz would receive concurrent sentences, we find Schmitz was aware consecutive sentences were a possibility when he entered his plea. Schmitz failed to show he would not have entered a guilty plea but for his counsel's advice. We affirm the decision of the district court.

AFFIRMED.