IN THE COURT OF APPEALS OF IOWA

No. 6-193 / 95-1039

WAYNE H. ANDERSEN,

Appellee,

vs.

STATE OF IOWA,

Appellant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pocahontas County, William C. Ostlund, Judge.

The State appeals the district court order granting Wayne Andersen a new criminal trial based on a finding of ineffective assistance of Andersen's trial counsel.

REVERSED.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Ann E. Beneke, County Attorney, for appellant.

William H. Habhab, Fort Dodge, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ., but decided by Huitink, P.J., and Streit and Vogel, JJ. Sackett, C.J., and Habhab and Cady, JJ., take no part.

HUITINK, J.

The State appeals the district court order granting Wayne Andersen a new trial based on ineffective assistance of trial counsel. We reverse.

Wayne Andersen was charged with sexually abusing ten-year-old L.F. while she visited his family on their farm during the summer of 1989. At trial in October 1992, L.F. testified Andersen had sexually abused her on one occasion at his home when he pulled down her pants and underwear and inserted his finger into her vagina. L.F. testified that she screamed and asked him to stop before she was able to get away. She stated Andersen threatened that if she spoke to her mother about the incident her mother would hate her.

L.F.'s mother, Rhonda, and grandmother, Irene Dicus, also testified regarding the alleged abuse. Defense counsel attempted to challenge the credibility of both women with evidence they had previously made false sex abuse allegations against Andersen. Rhonda and Dicus denied making any such allegations, though Dicus admitted to having heard a rumor Andersen had molested two teenage girls in Sioux City. Andersen's attorney did not introduce a department of human services report and videotape which purportedly contained reference to the allegedly false accusations, nor did counsel call the DHS worker to whom the purportedly false accusations were made.

Andersen was convicted as charged. At the hearing on Andersen's motion for a new trial, defense counsel argued Dicus and Rhonda perjured themselves. She told

the court that she was surprised the women had denied making the previous allegations, that she did not introduce the videotape because it was inaudible, and that she did not call the DHS worker because that same worker ultimately filed a founded sexual abuse report against Andersen. The district court denied Andersen's motion.

We affirmed Andersen's conviction on direct appeal. *See State v. Andersen*, No. 93-105 (Iowa App. April 26, 1994). In doing so, we denied Andersen's claim counsel was ineffective in failing to file a motion based on prosecutorial delay, but preserved Andersen's remaining ineffective assistance claims for postconviction review. *See Andersen*, No. 93-105 at 5-6. Following the subsequent postconviction proceeding, the district court found Andersen's counsel ineffective in: 1) soliciting prior bad acts evidence from Dicus and Rhonda; 2) inadequately investigating and preparing for trial; and 3) failing to properly advise Andersen regarding his sentencing.[1] The district court vacated Andersen's conviction and ordered a new trial. The State appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When, however, a postconviction

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[1] The postconviction court also concluded counsel was ineffective in failing to move for dismissal on the grounds of prosecutorial delay. We, however, reached a contrary result on direct appeal, finding Andersen had not shown he was prejudiced by counsel's failure to move for dismissal on these grounds. *See Andersen*, No. 93-105 at 5. Because we resolved this issue in favor of the State on direct appeal, it was error for the district court to consider it during postconviction proceedings. Accordingly, we reverse the district court's determination on this issue.

petitioner asserts violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

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. 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). 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). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *See Hinkle*, 290 N.W.2d at 34. In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131.

We first find the district court erred in determining trial counsel was ineffective in eliciting prior bad acts testimony from L.F.'s mother and grandmother. The testimony at issue concerned allegations both women had purportedly made to

the department of human services wherein they falsely stated that Andersen had previously molested two teenagers. When asked about the allegations by Andersen's trial counsel, both women denied making these prior accusations. Unlike the district court, we do not believe counsel's pursuit of this line of questioning rendered her ineffective. Instead, we find trial counsel's decision to question L.F.'s mother and grandmother about prior false abuse allegations was a reasonable trial strategy. There is nothing in the record to indicate trial counsel expected L.F.'s mother and grandmother to answer as they did. Rather, it is apparent from the record that counsel asked these questions in an effort to challenge the credibility of the individuals making the allegations against her client. Accordingly, we cannot say trial counsel's actions constitute a breach of duty rendering her ineffective.

We further find trial counsel was not ineffective in her investigation and preparation for trial. The district court determined trial counsel's pretrial investigation and preparation were deficient based in part on an exchange between counsel and L.F.'s grandmother, Irene Dicus. During cross-examination, counsel asked Dicus why she objected to having her grandchildren visit Andersen's farm. Dicus responded by relating a prior incident where Dicus claimed Andersen had touched her in a manner she deemed inappropriate by rubbing his hands up and down her back. After relating the incident, Dicus stated, "if a man can do this to a strange woman, what else will he do? . . . . I want to protect my grandchildren."

We do not believe this unanticipated response was the result of inadequate preparation by trial counsel, but was instead an instance where a reasonable trial strategy failed. During a deposition prior to trial, Dicus had stated that she did not want her children spending time with Andersen for "personal reasons." Counsel attempted to illicit this same response during trial pursuant to a strategy of showing Dicus's personal ill will toward Andersen and her motive to make accusations against him. We believe that while counsel may have miscalculated Dicus's response to her question, this unfortunate occurrence was not the result of any deficiency in preparation or failure to adequately investigate. We find no breach of duty.

Even if trial counsel had breached an essential duty in her questioning of Dicus, Andersen has failed to show prejudice. Although Dicus's comments may have been somewhat damaging to Andersen's defense, their omission would not likely have changed the result of the trial. The actions described did not even remotely resemble Andersen's alleged sex abuse of L.F., and Dicus conceded that others may not have been bothered by Andersen's actions. As such, we cannot say Dicus's testimony caused Andersen to suffer prejudice sufficient to undermine our confidence in the outcome of his trial.

The district court also found trial counsel's preparation inadequate based on her failure to challenge Dicus's professional credentials. At trial, Dicus testified that she had worked at St. Luke's Medical Center for twenty-two years as a licensed practical nurse (LPN) and a psychiatric nurse. During the course of her testimony,

Dicus described L.F. in the weeks following the alleged sex abuse as exhibiting "every symptom of child abuse." The district court determined trial counsel should have challenged Dicus's opinion on grounds she had misrepresented her credentials. In doing so, the court made a clear distinction between LPNs and psychiatric nurses, apparently concluding that psychiatric nursing was outside the range of LPN duties. We find counsel breached no duty in choosing not to delve into this complex matter. Dicus was not testifying as an expert witness on child sex abuse, but was instead testifying in her capacity as L.F.'s grandmother. As a result, her professional credentials were not a significant factor lending weight to her testimony. We find counsel breached no duty in failing to challenge Dicus's credentials.

The district court also erred in finding counsel failed to present exculpatory evidence. At issue were several affidavits and business records describing Andersen's whereabouts during the summer of 1989 and documenting his business relationship with L.F.'s mother. We find that because these documents were not a necessary part of the defense's case, counsel had no duty to offer them into evidence. Although the business records purportedly would have established Andersen's whereabouts during the time the alleged abuse occurred, we believe their admission was unnecessary because Andersen admitted during trial that he was home and with L.F. from July 1 through July 5, 1989. Use of the business records to establish that L.F.'s mother was a former employee of Andersen's was also unnecessary because both Andersen and L.F.'s mother testified regarding their former employment relationship. Accordingly,

we cannot say admission of these documents would have changed the result of Andersen's trial, as any relevant information contained in these documents was otherwise made available to the jury through witness testimony.

We further find trial counsel breached no essential duty in her failure to introduce a DHS videotape referencing the allegedly false accusations made by L.F.'s mother and grandmother. At the hearing on Andersen's motion for a new trial, trial counsel stated that she did not admit this video tape because it was inaudible. She further testified that she did not call the DHS worker to whom these allegedly false accusations were made because that DHS worker ultimately filed a founded sexual abuse report against Andersen. Counsel's decision not to offer the DHS evidence regarding these allegedly false accusations was not ineffective assistance of counsel, but rather a reasonable trial strategy under the circumstances of the case. The district court erred in concluding otherwise.

The district court also erred in its determination counsel was ineffective in failing to present scientific testimony regarding L.F.'s memory capacity. Our review of the record reveals counsel made several attempts to challenge the credibility of all of the State's witnesses, including L.F. Having done so, we do not believe counsel had any additional obligation to solicit scientific expert testimony solely for the purpose of impeaching L.F.'s testimony. We find no breach of duty.

Finally, we find counsel was not ineffective in providing sentencing and plea advice to Andersen. On April 3, 1995, counsel filed a sworn affidavit with the

postconviction court stating she had discussed sentencing options with Andersen on several occasions and had informed him that he could receive a sentence of up to twenty-five years in prison if found guilty. We found counsel's sentencing advice was reasonably competent and, accordingly, did not constitute a breach of duty. *See State v. Walton*, 228 N.W.2d 21, 23 (Iowa 1975) (decision of how to plead is one for the defendant); *see also State v. Krause* 397 N.W.2d 671, 674 (Iowa 1986) (new trial not merited where attorney misadvice led defendant to reject plea bargain and enter a not guilty plea).

We have considered all of the arguments raised by Andersen and by the State and find them to be either covered by this opinion or without merit. On our de novo review, we are unable to find trial counsel breached any essential duty in her representation of Andersen. For that reason, we reverse the decision of the district court and re-affirm Andersen's conviction and sentence.

REVERSED.