

IN THE COURT OF APPEALS OF IOWA

No. 7-502 / 96-1163

000189

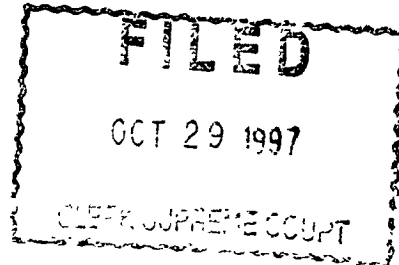
GARY GILMOUR,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, Edward B. de Silva, Jr.,
Judge.

Gary Gilmour appeals from the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Gary J. Koos, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, William E. Davis, County Attorney, and Joseph A. Grubisich, Assistant
County Attorney, for appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

PER CURIAM.

Appellant Gary Gilmour appeals the denial of his petition for postconviction relief. Gilmour was charged in 1992 and convicted with sexual exploitation of a child in violation of Iowa Code section 729.12 (1991) and pandering in violation of Iowa Code section 723.5 (1991). He waived a jury, was tried to the court, and was convicted on both charges. His conviction was affirmed on appeal. *State v. Gilmour*, 522 N.W.2d 595 (Iowa 1994). Gilmour claims in seeking postconviction relief that his trial attorney was not effective. We affirm.

Gilmour was a photographer. The charges followed Gilmour's photographing a seventeen-year-old girl having sex with her boyfriend and arranging for her to seduce a man delivering pizza. Gilmour believed the girl to be twenty-two years of age and alleged she had shown him a driver's license showing that to be her age.

Prior to waving a jury trial, Gilmour's attorney requested the trial court rule whether the State was required to prove Gilmour had knowledge of the age of the victim or if he could use his mistake of fact as to her age as a defense. The trial court determined knowledge of a victim's age was not an element the State must prove to convict defendant under section 728.12(1). The trial court further determined Gilmour's alleged mistake as to the victim's age was not a defense. The supreme court agreed with the trial court on both issues. *Gilmour*, 522 N.W.2d at 597-98.

Gilmour contends his trial counsel was not effective in advising Gilmour to waive a jury on the pandering charge. To support his claim, Gilmour relies on testimony of his trial attorney that (1) he knew with the trial court's ruling Gilmour would be found guilty of exploitation of a minor but he felt with a trial to the court he could make a better record for appeal; (2) he did not feel there was substantial evidence to support the pandering charge; and (3) had he realized there would be such a clear finding on the pandering charge, he would not have waived a jury.

Gilmour recognizes that when an attorney makes a tactical decision to waive a jury, he or she will generally not be found ineffective. *See Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991). Gilmour's argument focuses only on the fact his trial attorney did not consider the pandering charge in waiving a jury and did not believe Gilmour would be convicted on that charge.

The trial court, before finding Gilmour guilty of the crimes, found defendant was 43 years old, the victim ("C") was 17 years old, and they were casual acquaintances with only a professional relationship concerning photographing and compiling a photo portfolio for C; defendant admitted consensual sexual intercourse and other sexual activity with C; defendant proposed the subject of bachelor parties to C and then offered to "protect" her if she attended and participated in those activities; photographs were taken and retained by defendant that are sexually explicit and suitable and appropriate for use in promoting and soliciting C for prostitution; the

pizza incident occurred in defendant's home, with his knowledge and in his presence; these events occurred as part of an arrangement to reimburse defendant for the time, effort and materials expended in arranging the photo portfolio to be used in furthering C's modeling career; and C's evidence concerning defendant's making arrangements for her to engage in prostitution is, under these circumstances, more credible than defendant's.

To be successful on a claim of ineffective assistance of counsel, Gilmour must prove, among other things, there is a reasonable probability but for trial counsel's performance the result of the trial would have been different. *See State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). He has totally failed to offer any proof that had his case been tried to a jury he would have been acquitted.

We affirm.

AFFIRMED.