IN THE COURT OF APPEALS OF IOWA

No. 4-241 / 93-475

FILED
AUG 25 1994
CLERK SUPREME COURT

GEORGE FOX,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Fox appeals the denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget Chambers, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

DONIELSON, C.J.

George Fox was charged with sexual abuse following allegations by his granddaughters, Sara and Melissa. On the morning of trial the State filed a motion in limine seeking to prohibit Fox from questioning the girls about prior instances of sexual abuse or whether they were in counseling. Fox asked to be allowed to question Sara about previous false allegations of sexual abuse that she had made. The court overruled Fox's request on grounds it raised matters which should have been included in a pretrial motion pursuant to Iowa Rule of Evidence 412.

At trial Fox cross-examined Sara about having lied in the past. Dr. Barbara Cavallin gave expert testimony that victims of sexual abuse sometimes delay reporting the incident. Fox asked Cavallin on cross-examination, "Are you aware of Sara [C.] making false allegations of sexual abuse?" The State objected. Following extensive argument and a threshold hearing, the court concluded the question did not raise matters of sexual conduct, Rule 412 did not apply, and Fox could ask the question. However, the court expressed concerns "as to what comes next." Fox withdrew the question.

Fox was convicted of second-degree sexual abuse and appealed. The court of appeals affirmed the conviction, preserving Fox's claim his trial counsel was ineffective for failing to file a motion to offer evidence of past sexual conduct pursuant to Rule 412.

Appellant then filed an application for postconviction relief alleging trial counsel was ineffective in failing to conduct an adequate pretrial investigation which would have revealed impeachment evidence from Sara's psychiatric records, in failing to file a Rule 412 motion, and in failing to call appropriate witnesses for the defense. At the hearing trial counsel testified she did not file a formal discovery motion because the prosecutor opened his file. She also testified she did not believe she was entitled to obtain Sara's medical and counseling records because they were privileged. Trial counsel also testified she did not file a Rule 412 motion because she did not believe Sara's previous false allegations of sexual abuse constituted sexual conduct. Therefore Rule 412 did not apply. Finally, she testified she did not question Dr. Cavallin further because she believed the trial court would then have allowed the doctor to testify the allegations about who the sexual abuse perpetrator was may have been false but the allegations of sexual abuse were not.

The district court denied appellant's application for postconviction relief. He now appeals. We affirm the district court.

Appellant claims he was denied effective representation of counsel. Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding

whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to appellant's specific claims.

Appellant asserts his counsel should have filed a pretrial motion pursuant to Iowa Rule of Evidence 412 to be able to question witnesses concerning Sara's previous false accusations of sexual abuse. He argues his counsel should have questioned Sara and Dr. Cavallin about the false accusations. First we note counsel was not ineffective for not filing the rule 412 pretrial motion. Counsel's testimony at the postconviction relief hearing was she did not believe the evidence concerning prior false accusations fell under rule 412. This position was sustained by the court at trial. The court determined a false accusation is not sexual conduct and is not rule 412 conduct. Appellant and counsel then made the tactical decision not to pursue that line of questioning with Dr. Cavallin because the potential harm to the case outweighed the benefit. The perceived best interest of the defendant may dictate counsel forego certain avenues of defense. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Counsel is not ineffective simply because trial strategy is erroneous or unsuccessful. Jasper v. State, 477 N.W.2d 852, 855 (Iowa 1991); State v. Risdal, 404 N.W.2d 130, 133 (Iowa 1987). Sara's credibility had been challenged in other questioning. We do not find counsel was ineffective because of her choice of trial tactics.

Next appellant alleges his counsel was ineffective in conducting her investigation of the case. He cites numerous examples of information which might have been

discovered, but wasn't. We recognize counsel could have filed a motion to produce evidence the State had for the case. However, the prosecutor gave her access to the State's evidence after her oral request. We do not find a formal motion necessary or required. Appellant argues counsel should have filed a specific request which would have provided exculpatory evidence. After our review of the totality of the circumstances in the record before us, we reach the same conclusion as the district court. Some of the alleged exculpatory evidence would not have been admissible because it was not relevant to this case. Most of the undiscovered evidence would have been cumulative to other evidence. The duty to investigate is not limitless. Luke v. State, 465 N.W.2d 898, 901 (Iowa App. 1990); see Schrier v. State, 347 N.W.2d 657, 662 (Iowa 1984). We do not find counsel's actions fall outside the bounds of normal competence. Nor do we find appellant was prejudiced by the evidence not being discovered and presented at trial. Therefore counsel was not ineffective.

We determine any other issues appellant may have raised are either covered by this opinion or are without merit. We find appellant has failed to show either counsel failed in an essential duty or appellant was prejudiced by counsel's actions. Therefore we affirm the decision of the district court denying appellant's application for postconviction relief.

AFFIRMED.