IN THE COURT OF APPEALS OF IOWA

No. 1999-561 (9-822) / 99-158

Filed February 23, 2000

WILLIAM SIMPSON EDWARDS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
FEB 2 3 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

William Edwards appeals the district court's denial of his application for postconviction relief. **REVERSED AND REMANDED WITH DIRECTIONS.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Thomas S. Mullin, County Attorney, for appellee

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ

VAITHESWARAN, J.

William S. Edwards appeals the district court's summary disposition of his application for postconviction relief. He contends a genuine issue of material fact exists as to whether original trial counsel provided ineffective assistance. We reverse and remand with directions.

I. Background Facts and Proceedings

A child's body was discovered on a farm in northwest Iowa. The State charged Edwards with one count of first degree murder and one count of third degree sexual abuse. Prior to trial, Edwards retained an expert witness to opine about certain DNA evidence. The expert and one of Edwards's attorneys traveled to the headquarters of the Federal Bureau of Investigation in Maryland to review certain records. An FBI agent remained in the room while they reviewed the documents.

The case was tried to the court. At trial the expert witness testified certain DNA records maintained by the FBI tended to exclude Edwards as the perpetrator. The State called the FBI agent as a rebuttal witness. He testified that, while defense counsel and the expert were reviewing records at FBI headquarters, defense counsel told the expert to use the term "exclusion" somewhere in his testimony.

Following this direct testimony, Edwards's co-counsel suggested it might be necessary for the attorney implicated in the FBI agent's testimony to withdraw. The district court called a recess, after which co-counsel advised the court his colleague would not be called as a witness and he would not withdraw. Defense counsel who was present at the FBI headquarters proceeded to cross-examine the FBI agent.

He did not attempt to discredit the agent's recollection, but instead suggested the FBI agent knew the statement had been made in jest. On redirect examination, however, the agent stated that defense counsel did not have a humorous or joking demeanor when he advised the expert witness what he should say.

The district court convicted Edwards of both charges and sentenced him to consecutive terms of life imprisonment without parole on the murder count and a term not to exceed ten years on the sexual abuse count. On direct appeal, Edwards raised three grounds for reversal, none of which addressed trial counsel's statements to the expert at FBI headquarters. We affirmed the conviction.

Edwards filed an application for postconviction relief, raising a number of grounds for relief, only one of which he pursued. He asserted trial counsel was ineffective in discussing possible trial testimony of the defense expert in the presence of an FBI agent.

The State filed a combined motion for summary judgment and motion to dismiss Edwards's petition. The State maintained Edwards waived all grounds asserted in his petition because they were not raised on direct appeal. Edwards resisted dismissal of the ineffective assistance of trial counsel claim, contending appellate counsel was ineffective in failing to raise this issue on direct appeal and, therefore, sufficient reason existed to permit Edwards to raise the issue for the first time in his postconviction relief application.

The district court granted the State's motion. The court concluded that absence of prejudice precluded Edwards from prevailing on either his claim of ineffective assistance of trial counsel or his claim of ineffective assistance of appellate counsel. This appeal followed.

II. Standard of Review

We generally review postconviction proceedings for errors of law. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, "when a postconviction applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review." *Id.*

The court may grant a motion by either party for summary disposition of the application where "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6 (1997); *Davis v. Davis*, 520 N.W.2d 319, 321 (Iowa App. 1994). This procedure is analogous to summary judgment procedure set forth in the rules of civil procedure. *State v. Summage*, 579 N.W.2d 821, 822 (Iowa 1998); *see also* Iowa Code § 822.7; *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980) (stating rules of civil procedure, including summary judgment rules, appear to apply to postconviction relief actions). "Whether a genuine issue of material fact exists so as to preclude summary disposition turns on whether reasonable minds could draw different inferences and reach different conclusions from them." *State v. Munz*, 382 N.W.2d 693, 695 (Iowa App. 1985).

III. Preservation of Ineffective Assistance of Trial Counsel Claim

A. General Principles

A claim not properly raised on direct appeal may not be litigated in postconviction unless there is a showing of "sufficient reason" for not properly raising it previously. Iowa Code § 822.8; *Osborn*, 573 N.W.2d at 921; *Collins v. State*, 477 N.W.2d 374, 377 (Iowa 1991). However, "[i]neffective assistance of appellate counsel may provide 'sufficient reason' or 'cause' to permit the issue of

ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief." *Collins*, 477 N.W.2d at 376.

On appeal, Edwards does not address the question whether "sufficient reason" existed to consider trial counsel's asserted ineffectiveness for the first time in a postconviction relief proceeding. Instead, he maintains only that a genuine issue of material fact exists as to whether trial counsel was ineffective. The State responds that dismissal of the application is warranted because original appellate counsel was not ineffective in failing to raise an ineffective assistance of trial counsel claim on direct appeal and, therefore, Edwards has not established "sufficient reason" for bypassing direct appeal. The State concedes the district court did not rely on this ground in dismissing Edwards's application, but asserts we may affirm on any ground even though it is not one on which the court based its ruling. We agree with this proposition and, therefore, will consider the issue of appellate counsel's ineffectiveness, even though the district court did not rely on that ground and Edwards has not raised the issue on appeal. *See id.; LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995).

B. Claimed Ineffective Assistance of Appellate Counsel

Generally, a defendant seeking to establish an ineffective assistance of counsel claim must show: (1) counsel breached an essential duty and (2) prejudice resulted. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995) (citations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674, 698 (1984). A different standard applies, however, where the ineffective assistance of counsel claim is based on an alleged conflict of interest. *State v. Thompson*, 597 N.W.2d 779, 782 (Iowa 1999); *see also Cuyler v. Sullivan*,

446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333, 346-48 (1980). Where a defendant establishes that an attorney has an actual conflict of interest, prejudice is presumed. *Id.*; *cf. State v. Vanover*, 559 N.W.2d 618, 631 (Iowa 1997) (affirming district court's disqualification of attorney based on potential conflict which "imperiled Vanover's right to adequate representation").

A postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Osborn*, 573 N.W.2d at 922. "Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel." *Id.* The petitioner must overcome a strong presumption of competence. *Id.* "The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency." *Id.*

Edwards proffered an affidavit in resistance to the State's motion for summary judgment which states he and appellate counsel discussed the issue of trial counsel's conversations with the defense expert in the presence of an FBI agent. Appellate counsel's responsive affidavit does not address whether or not these conversations took place, stating only, "[t]here is a cursory reference in my notes that 'Williams told Libby how to testify'. . . .There is no indication in my notes, and I have no recollection, why I did not raise this as an appellate issue." The district court stated, "[r]egardless of whether this omission was a tactical decision or an oversight, Edwards has not been prejudiced by the omission."

Because the claim that appellate counsel was ineffective is predicated on failure to raise an asserted conflict of interest between trial counsel and his client, we may not engage in a strict "no prejudice" analysis. *See Cuyler*, 446 U.S. at 348-

50, 100 S. Ct. at 1718-19, 64 L. Ed. 2d at 346-48; *Thompson*, 597 N.W.2d at 782-83. Instead, we must focus on the first prong of the *Strickland* test: whether appellate counsel breached an essential duty in failing to raise on direct appeal the claimed conflict of interest between Edwards and his trial lawyer. If appellate counsel reasonably believed no actual conflict existed which adversely affected the trial lawyer's performance, then he was not ineffective in failing to raise the conflict of interest claim on direct appeal.

We recognize "[s]electing assignments to assert as grounds for reversal is a professional judgment call we are reluctant to second-guess." *Osborn*, 573 N.W.2d at 922. The State asks us to heed this principle and infer from appellate counsel's affidavit that "he chose not to raise the claim in favor of the others." However, this begs the question. We believe reasonable minds could draw different inferences from the trial record and affidavits as to whether appellate counsel acted reasonably in failing to present the claim of trial counsel's ineffectiveness. While appellate counsel's performance may very well have fallen within the range of professional competency, we conclude the record is insufficient to resolve the issue and Edwards is entitled to an evidentiary hearing to amplify the record. If, after considering his evidence, the district court concludes that appellate counsel was ineffective in failing to raise the issue on direct appeal, then there would be "sufficient reason" for the court to consider the claim of trial counsel's ineffectiveness for the first time, using the standard applicable to conflict of interest claims. *See Thompson*, 597 N.W. 2d at 785. If, on the other hand, the court concludes appellate counsel's performance was not ineffective, the court could

dismiss the postconviction relief application for lack of "sufficient reason" to bypass direct appeal.

We reverse and remand for the limited purpose of developing a further record as to whether original appellate counsel was ineffective in failing to raise the ineffectiveness of trial counsel claim and whether there was "sufficient reason" to raise the ineffectiveness of trial counsel claim for the first time in a postconviction proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.