



IN THE COURT OF APPEALS OF IOWA

STEVEN LAVERNE ZAEHRINGER,)

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Petitioner-Appellant,)

Filed April 22, 1987

vs.)

STATE OF IOWA,)

7-21
86-526

Respondent-Appellee.)

Appeal from the Iowa District Court for Scott County (No. 71035),
Margaret S. Briles, Judge.

The petitioner appeals from the district court's denial of his application for postconviction relief, contending that he was denied both his right to a speedy trial by the delay between the supreme court's reversal of his original conviction and his rearraignment on the same charge and his right to a speedy retrial by the delay between the date procedendo issued and the date scheduled for his second trial. The petitioner further argues that he was denied effective assistance by his trial counsel's filing of discovery motions in a manner interpreted as waiving his speedy trial rights and his appellate counsel's failure to raise speedy trial issues on appeal from his second conviction. **AFFIRMED.**

Phillip B. Mears of Mears, Zimmermann & Mears, Iowa City, for petitioner-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Realff H. Ottesen, First Assistant Scott County Attorney, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SNELL, J.

On October 24, 1977, the appellant, Steven LaVerne Zaehring, was charged by trial information with the crime of rape. See Iowa Code § 698.1 (1977). He was subsequently tried and convicted. On appeal, the Iowa Supreme Court reversed Zaehring's conviction because of evidentiary errors. State v. Zaehring, 280 N.W.2d 416 (Iowa 1979). That opinion was filed on June 27, 1979. Because of a mistake made in the supreme court clerk's office, however, procedendo did not issue until March 3, 1980. Zaehring was rearraigned on May 6, 1980, and retrial date was set for July 21, 1980.

On June 5, 1980, the last day for filing pretrial motions, Zaehring filed a motion to dismiss, alleging a violation of his constitutional right to a speedy trial. This claim was based upon the eleven-month delay which had occurred between the supreme court's reversal of his conviction and his rearraignment. On July 9, 1980, Zaehring filed a second motion to dismiss. This motion alleged a violation of Zaehring's right to a speedy retrial due to the delay which occurred between the date procedendo was issued and the date set for retrial. This claim was grounded in the cases which established the rule governing the period for retrials. See State v. Wright, 234 N.W.2d 99, 103-04 (Iowa 1975). Hearing on all pending motions was set for July 16, 1980. Following this hearing, the district court sustained both motions to dismiss. The State sought appellate review of the dismissal. Our supreme court agreed with the State's position that the dismissal constituted reversible error and remanded the case for trial. State v. Zaehring, 306 N.W.2d 792 (Iowa 1981). The supreme court determined that Zaehring had not been denied his constitutional right to speedy trial and had waived his right to speedy retrial. Id. at 793-96.

Zaehring's second trial commenced on September 2, 1981. He was again convicted and sentenced. Again he sought appellate review, although he did

not seek review of his speedy trial claims. Our supreme court again reversed, this time on evidentiary and sentencing errors, and remanded for a third trial. State v. Zaehringer, 325 N.W.2d 754 (Iowa 1982). Zaehringer's third trial commenced in February 1983 and resulted in his third conviction. His appeal from that judgment was dismissed pursuant to Iowa Rule of Appellate Procedure 104.

On April 9, Zaehringer filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. This petition again raised the issues of Zaehringer's speedy trial rights. That court dismissed the petition after determining that Zaehringer had failed to exhaust all remedies available to him in the state courts. The federal district court held, on the authority of United States v. MacDonald, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978), that notwithstanding the Iowa Supreme Court's decision prior to Zaehringer's second trial disposing of his speedy trial claims, Zaehringer was required to appeal those issues following his second trial before seeking the assistance of federal habeas. Only in this way, according to the federal district court, may a state court have the benefit of a complete record on the element of prejudice. Zaehringer then initiated this postconviction proceeding. The district court denied relief and this appeal followed.

On this appeal, Zaehringer once again raises the speedy trial and speedy retrial issues, noted above, which he argued prior to his second trial. In addition, he claims he has been denied effective assistance of counsel in two respects: (1) because prior to his second trial his trial counsel engaged in conduct which was later held to constitute a waiver of his right to speedy retrial; and (2) because his counsel failed to raise the speedy trial issues on appeal following his second trial. Because Zaehringer has alleged constitutional violations, we review under the de novo or totality of the circumstances standard. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

We deal first with Zaehringer's claim that his constitutional right to a speedy trial was violated by the excessive period between the reversal of his first conviction and his rearraignment. He alleges that the present record contains evidence of prejudice which was not before the Iowa Supreme Court in 1981 when it decided the State's appeal. As is obvious from our rendition of this case's procedural history, this claim was not appealed following Zaehringer's second trial. A postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code section 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

Zaehringer's brief does not expressly address necessary "sufficient reason" and "prejudice" demonstrations. We assume that the allegation of ineffective assistance of counsel is to serve as one possible "sufficient reason" for the constitutional speedy trial issue not being properly presented on direct appeal following Zaehringer's second trial. Our courts recognize valid ineffective assistance claims as satisfying this requirement. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1985).

In order to succeed on a claim that he was denied effective assistance of counsel, appellants must show that their counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Appellants have the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Appellants must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Appellants must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsels' performances were within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). In addition, our courts recognize that attorneys need not be "crystal gazers" who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant. State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982).

In the present case, Zaehringer's counsel testified that Zaehringer's speedy trial claims were not appealed following his second trial because of the earlier decision of the Iowa Supreme Court. In light of that decision, counsel believed that the supreme court had already made a final determination of the issue and that an additional appeal on the issues was not merited. We think this was a reasonable exercise of counsel's judgment. The earlier supreme court opinion had held that Zaehringer's constitutional claim was without merit, Zaehringer,

306 N.W.2d at 794, and that his right to speedy retrial claim had been waived. Zaehringer, 306 N.W.2d at 796. The additional prejudice which Zaehringer claims was demonstrated by the posttrial record is irrelevant to the waiver issue and, consequently, counsel's decision not to appeal that issue following the second trial is unimpeachable. With respect to the constitutional issue we find no law in this state, and have not been directed to any, which would have led counsel to believe that a posttrial appeal was proper, or even permissible, in light of the supreme court's pretrial opinion. Although MacDonald had been decided prior to the time of Zaehringer's second appeal, that case deals only with the issue of a federal appellate court's jurisdiction over interlocutory rulings addressing an alleged violation of a defendant's right to speedy trial. 435 U.S. at 857, 98 S. Ct. at 1551, 56 L. Ed. 2d at 25. MacDonald's holding that such rulings are not appropriate subjects of federal appellate jurisdiction, 435 U.S. at 863, 98 S. Ct. at 1554, 56 L. Ed. 2d at 29, is, we think, a far cry from an obvious signal to state criminal defense attorneys that they are compelled, or even allowed, to reappeal claims such as that brought here with the state system. We do not think Zaehringer's counsel breached an essential duty by failing to reappeal Zaehringer's constitutional claim.

It may be argued, however, that this understandable failure to appreciate the relevance of MacDonald to this case itself provides "sufficient reason" for the failure to reappeal Zaehringer's constitutional claim. Cf. Reed v. Ross, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1, 15 (1984) (novelty of constitutional claim may provide cause for failure to raise claim earlier). Even if this was found to be a meritorious contention, Zaehringer must still demonstrate actual prejudice resulting from the alleged speedy trial error. Polly, 355 N.W.2d at 856. Because our supreme court has previously determined that insufficient prejudice was presented by the record prior to Zaehringer's second trial to find

a violation of his right to speedy trial, Zaehringer, 306 N.W.2d at 794, our inquiry is particularly concerned with the incremental amount of prejudice demonstrated by the posttrial record.

Zaehringer contends that there is "some evidence that" a witness he was unable to locate prior to his second trial would have testified in his favor. We note in passing that this allegedly-favorable witness was the victim's mother. Zaehringer also points to several unavailable witnesses whose testimony "may have been of great benefit" to him. The record is unclear as to whether these are the same witnesses whose unavailability formed the basis for Zaehringer's earlier prejudice argument which was rejected by the Iowa Supreme Court. See Zaehringer, 306 N.W.2d at 794. In any event, Zaehringer has failed to show anything other than a possibility of prejudice resulting from their unavailability. In addition, we are not persuaded by Zaehringer's claim that he was actually prejudiced by the pressure resulting from the delay. Our review of the record convinces us that Zaehringer has failed to demonstrate the type of actual prejudice required in order for us to entertain the belated appeal of his constitutional speedy trial claim.

Zaehringer next argues that his right to a speedy retrial was violated by the delay between the issuing of procedendo and the date of retrial. In the appeal taken prior to Zaehringer's second trial, the Iowa Supreme Court held that this issue had been waived. The amplified record of prejudice that Zaehringer claims distinguishes this case from the earlier appeal is in no way relevant to the waiver issue.

Iowa Code section 663A.8 (1985) provides in pertinent part that:

Any ground finally adjudicated . . . in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application

The Iowa Supreme Court has held this section to mean that a person is barred from relitigating in a postconviction proceeding any ground that was finally adjudicated on direct appeal. Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982); Armento v. Baughman, 290 N.W.2d 11, 12 (Iowa 1980). It follows accordingly that petitioner's claim, having been heard and rejected by this state's highest court, was a final determination and cannot be considered again today.

Finally, Zaehringer contends that he was denied effective assistance of counsel because prior to his second trial his counsel conducted himself in a manner that was later held to constitute a waiver of Zaehringer's right to speedy retrial. See Zaehringer, 306 N.W.2d at 794-96. Zaehringer claims that by conducting himself in such a manner, his counsel breached an essential duty in that he failed to protect Zaehringer's right to a speedy retrial. We disagree. Zaehringer's counsel attempted to protect Zaehringer's rights by filing his motions to dismiss on June 5, 1980, and July 9, 1980. A hearing on all pending motions was set for July 16, 1980. Trial was set for July 21, 1980. Pending the outcome of this hearing, Zaehringer's counsel continued to build a case for his client by filing several pretrial and discovery motions. It was this conduct that the Iowa Supreme court characterized as a waiver of Zaehringer's right to speedy retrial. Zaehringer, 306 N.W.2d at 794-97. We think that Zaehringer's counsel was justified in "covering his bases" by continuing to prepare Zaehringer's defense in the face of the distinct possibility that the motions to dismiss would be denied. It would be quite odd for us to hold that counsel's assistance was rendered ineffective by his attempt at thorough preparation.

The district court is affirmed.

AFFIRMED.