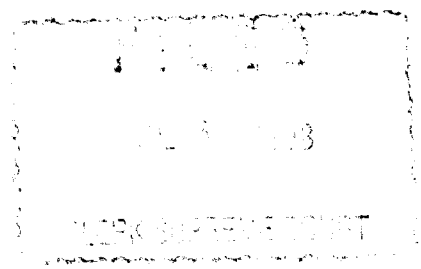
IN THE COURT OF APPEALS OF IOWA

No. 8-353 / 97-1481
Filed July 31, 1998

CHRISTOPHER FARNUM,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Johnson County, Thomas L. Koehler, Judge.

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

Jon M. Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Streit and Mahan, JJ.

STREIT, J.

Farnum appeals the postconviction court's denial of his application for relief based on alleged ineffective assistance of counsel. Because his counsel's actions were reasonable trial strategy and within the bounds of professional competency, we affirm the postconviction court.

I. Background Facts & Proceedings.

In 1995, Christopher Farnum was convicted of third-degree sexual assault. His conviction was affirmed by this court on appeal. *State v. Farnum,* 554 N.W.2d 716 (Iowa App. 1996). In that case, we preserved Farnum's ineffective assistance of counsel claim for postconviction proceedings.

In December 1996, Farnum filed an application for postconviction relief alleging ineffective assistance of counsel based upon counsel's failure to object to portions of police testimony. After receiving no answer to the application from the State within thirty days, Farnum filed a motion for default judgment. The Clerk of Court entered the default. On the same day, the State filed an answer and motion to set aside the default. The court granted the State's motion and the case proceeded to trial.

Farnum argued his counsel should have objected to the testimony of two police officers who offered opinions about whether there had been an assault, the elements of the crime, and the credibility of the victim. The court denied Farnum's application. He appeals.

II. Standard of Review.

An appellate court's standard of review in postconviction actions involving constitutional claims, such as the right to effective assistance of counsel, is de novo. *Snethen v. State,* 308 N.W.2d 11, 14 (Iowa 1981). This court makes an independent evaluation of the result in light of the totality of the circumstances. *Id.* To establish a claim of ineffective assistance of trial counsel, the applicant must prove counsel breached an essential duty and prejudice resulted. *Taylor v. State,* 352 N.W.2d 683, 685 (Iowa 1984).

III. Default Against the State in a Post-Conviction Relief Proceeding.

The trial court was correct in setting aside the default against the State for failure to respond to Farnum's application for postconviction relief within thirty days.

Section 663A.6 states, in part:

> Within thirty days after the docketing of the application, or within any further time the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. * * * The court may make appropriate orders for * * * extending the time of the filing of any pleading.

Then section 663A.7 says, also in part: "All rules and statutes applicable in civil proceedings . . . are available to the parties." Also, the relevant portion of Iowa R.Civ.P. 230 provides: "A party shall be in default whenever he . . . (d) fails to comply with any order of court or do any act which permits entry of default against him, under any rule or statute."

However, there is no statutory provision which specifically or inferentially allows a default against the State in a postconviction proceeding if the State fails to respond within thirty days. *Furgison v. State*, 217 N.W.2d 613, 618 (Iowa 1974). Even though a civil matter, default procedures are inconsistent with and would serve no useful purpose in our postconviction review process. *Id.* Farnum's claim the trial court erred in setting aside the default is without merit.

IV. Ineffective Assistance of Counsel Claim for Failure to Object to Opinion Testimony.

Farnum argues the district court erred by denying his ineffective assistance of counsel claim. Farnum argues the following portions of testimony should have been objected to:

> Q: . . . After you interviewed Dana Reinke, did you call any other officers to the scene?
> A: . . . I went ahead and got initial information that the assault had taken place. I went ahead and had the city call for detective who was trained to investigate this type of situation, as well as called for a crime scene tech to collect evidence and pictures.
> . . .
> Q: And what does it show?
> A: It shows the bedroom itself where the assault took pace.
> . . .
> Q: What did you do once you arrived at the hospital?
> A: Basically, briefed Detective Krei, who is trained in this type of sexual assault, on what I knew of the situation and let him take over from that point.
> . . .
> Q: And what did you charge him with?
> A: . . . I believe the exact charge was Third Degree Sexual Assault.
> Q: What was the basis for that charge?

> A: It was based on the fact that Dana was sleeping in bed, was awoke by Chris who is on top of her. Her pants had been removed by Chris. He was on top of her with -- with his penis in her vagina. It would make it -- a sex act actually happened. It was without consent of Dana. There was also a forced oral sex and again vaginal sex on the victim.
>
> . . .
>
> Q: Did her mental capacity to consent become an issue in this case?
>
> A: There was no consent. That's why the charge was filed. If there was consent, there wouldn't be a charge.

Farnum contends the police officers' testimony was inadmissable opinion testimony because it went to the ultimate issue to be decided by the jury, whether an assault had been committed and to an element of the crime, consent.

Iowa Rule of Evidence 704 allows otherwise admissible opinion testimony even though "it embraces an ultimate issue to be decided by the trier of fact." Iowa R. Evid. 704; *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994) (citing *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990)). A witness may testify concerning one element of the crime. However, a witness may not express an opinion on the defendant's guilt or innocence. *Smith*, 522 N.W.2d at 593-94; *compare Murphy*, 451 N.W.2d at 156 (opinion testimony on intoxication permissible), with *State v. Maurer*, 409 N.W.2d 196, 198 (Iowa App.1987) (testimony that, beyond all reasonable doubt, defendant operated a motor vehicle while intoxicated was inadmissible).

Farnum's challenge to the first three pieces of testimony are without merit. However, the officer's testimony of what happened and that Reinke did not consent to the sex act was inadmissable. The only issue in the case was whether Reinke

consented to the sex act. This was the ultimate issue for the jury to decide. The officer's statement of what happened was the repetition of what someone told him and was clearly hearsay. Expressing an opinion Reinke did not consent to sex with Farnum was tantamount to expressing an opinion Farnum was guilty.

The question that remains is whether Farnum's counsel failed an essential duty by not objecting to the inadmissable testimony. To prove counsel failed to perform an essential duty Farnum must prove counsel's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). The court will generally presume counsel is competent, and we will not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered trial strategy."

Id. (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95). "The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Kone*, 557 N.W.2d at 102. It is not enough to simply claim counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation would have changed the outcome. *Id.*

Counsel offered three explanations for why she did not object to the challenged testimony. Of the three, only one of her explanations is a reasonable trial strategy. It was defense counsel's overall strategy to characterize the plight of the defendant as an innocent man engulfed by the juggernaut of a criminal justice system driven by the accusations of only one person—the alleged victim. In not objecting to the testimony, trial counsel sought to show the jury how easily the police officer accepted the victim's allegations as truth. For this reason, she allowed the police officer to testify to the jury that he formed an opinion Reinke did not consent to the sex act by talking to Reinke. There was no physical evidence of a forced sex act. Depicting the defendant as a victim—an innocent man who was presumed guilty by the system—was a reasonable trial strategy. The driving force behind counsel's strategy is to persuade to the jury to follow our constitutional principle that a defendant is not guilty of a crime merely because he is accused. Iowa Code § 701.3 (1997); U.S. Const. Amend. 5 (due process); *Taylor v. Kentucky*, 936 U.S. 478 (1978). This is the same principle found in the uniform criminal jury instructions. *See* Iowa Crim. Jury Instruction 100.4 (1988)(presumption of innocence). The strategy is well within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987); *State v. Wilkens*, 346 N.W.2d 16, 19 (Iowa 1984)(trial counsel is to be judged by a standard of reasonable professional competence, even when hindsight shows a strategic decision may have been unwise).

Defense counsel's other explanations for why she did not object are not entirely consistent with this strategy. She testified she did not object to the police officer's testimony because she did not want to delay the trial or aggravate the jurors. She testified she did not object because she did not want to discredit the officer's testimony because she planned to establish facts favorable to Farnum through the officer's testimony. It is not a reasonable trial strategy not to object to inadmissable testimony, under these particular circumstances, because the trial will be delayed and the jury will become impatient. The type of objections counsel could have lodged against the police officer's testimony would not have challenged his credibility or been obstreperous or repetitive to the point of burdening or antagonizing the jury.

Because Farnum's counsel's overall strategy was within the normal range of professional competency, his ineffective assistance counsel claim is denied.

AFFIRMED.