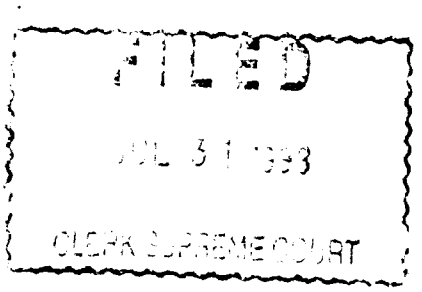
IN THE COURT OF APPEALS OF IOWA

No. 8-267 / 97-0400



RICKY J. MOSES,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

Ricky Moses appeals from a district court ruling denying his application for postconviction relief following his conviction of second-degree sexual abuse and first-degree burglary. **AFFIRMED.**

John A. Stitely of Wilson, Matias & Stitely, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ. Mahan, J., takes no part.

SACKETT, P.J.

Applicant-appellant Ricky J. Moses was tried and convicted of first-degree burglary and second-degree sexual abuse following the rape of a fifteen-year-old girl in her home. His conviction was affirmed by this court in an unpublished opinion. *State v. Moses*, 548 N.W.2d 186 (Iowa App. 1995). He subsequently filed a petition for postconviction relief alleging he did not have competent representation at his trial. The district court denied his application and this appeal follows. We affirm.

To succeed on a claim of ineffective assistance of counsel, appellant must show the ineffectiveness of his trial counsel resulted in actual and substantial disadvantage to the course of his defense. *See State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). Ineffective assistance is measured by whether trial counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result. *See Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption counsel performed competently. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Defendant bears the burden of proving by a preponderance of the evidence: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986) (Wolle, McGiverin, Schultz, and Neuman,

JJ., dissenting) (considered en banc). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. *State v. Risdal*, 404 N.W.2d 130, 132 (Iowa 1987).

Appellant's first contention is his trial attorney should have made further inquiry of a juror who was dismissed. The juror, after initial selection, became aware she was distantly related to the victim of the rape. Appellant contends his trial counsel should have then moved for a mistrial, and if that were not successful, he should have interviewed the juror more thoroughly than was done. Appellant's claimed prejudice is the dismissed juror may have tainted the opinions of the other jurors.

The juror returned to court after a lunch break shortly after she was selected. She said she had seen a woman who was a relative by marriage outside the courtroom. The woman recognized the juror and told her she was there because her granddaughter had been raped. The juror was examined in chambers outside the presence of the other jurors. On questioning, the juror said she was by herself during the conversation and she did not talk to other jurors about the conversation. The juror was excused and alternate jurors were drawn and seated. This record does not support appellant's claim of prejudice. We affirm on this issue.

Appellant's second claim is his trial attorney did not spend enough time talking to him or his alibi witnesses prior to trial. Appellant does not advance how his

defense would have been enhanced had his trial attorney spent more time talking to him or his alibi witnesses. He does not contend there was undiscovered favorable evidence. Appellant has failed to show his trial attorney breached any essential duty and also failed to show any prejudice.

This court, on direct appeal, though finding the trial court abused its discretion in excluding certain evidence, found appellant not prejudiced by the testimony. The trial court determined there was overwhelming evidence of appellant's guilt and said:

> The evidence of defendant's guilt is overwhelming. The victim positively identified Moses as the attacker. Additionally, DNA testing demonstrated semen consistent with semen samples taken from defendant.

Appellant having failed to meet his burden, the district court is affirmed.

AFFIRMED.