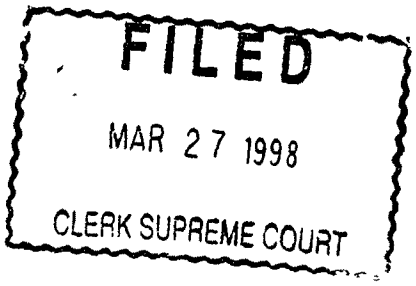
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IN THE COURT OF APPEALS OF IOWA



No. 7-776 / 97-550

TYREL H. SACKETT,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Decatur County, Gary G. Kimes, Judge.

On appeal from the denial of his application for postconviction relief, the applicant, Tyrel Sackett, claims his trial and appellate counsel were ineffective in numerous respects. **AFFIRMED.**

Unes J. Booth of Booth Law Firm, Osceola, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Virginia Barchman, Assistant Attorneys General, and Carol Clark, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

On appeal from the denial of his application for postconviction relief, the applicant claims his trial counsel was ineffective in numerous respects and his appellate counsel was ineffective in failing to raise ineffective assistance of counsel on appeal.

Background facts. Tyrel Sackett was convicted of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1991) and lascivious acts with a child in violation of Iowa Code section 709.8(1). This court affirmed the convictions in *State v. Sackett*, 499 N.W.2d 312 (Iowa App. 1993). The child victim, age eleven, testified that Sackett, her mother's lover, touched her vagina with his fingers on various occasions referred to by Sackett as "daddy-daughter" time. There were also other instances of sexual abuse wherein Sackett would touch the victim inappropriately and the victim was expected to reciprocate touches.

Sackett filed an application for postconviction relief which was denied.

Scope of review. Proceedings under Iowa Code Chapter 822 are civil actions at law, ordinarily reviewed on error. However, when there is an alleged denial of constitutional rights, we make our own evaluation of the totality of the circumstances in a de novo review. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989).

Ineffective assistance of counsel. In order for Sackett to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the

evidence that 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Sackett must establish under the first prong of this test that counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Sackett must prove but for counsel's error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; *see Strickland v. Washington*, 466 U.S. 668, 694 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

Iowa Code section 822.8 (1997) provides that grounds for relief not raised in the direct appeal may not form the basis for a subsequent postconviction relief application, unless the court should find a "sufficient reason" exists for the waiver. A claim of ineffective assistance of counsel may be raised for the first time in a postconviction proceeding if the applicant establishes by a preponderance of the evidence sufficient reason for not having raised the issue previously *and* also establishes actual prejudice resulting from the alleged errors. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996) (citing *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991)). Ineffective assistance of appellate counsel would provide "sufficient reason" to permit the issue of ineffective trial counsel to be raised after appeal. *Sims v State*, 295 N.W.2d 420, 422 (Iowa 1980).

A. Appellate counsel. Sackett argues appellate counsel, Ahmet Gonlubol, was ineffective in failing to raise the issue of ineffective assistance of trial counsel on appeal. We agree with the district court's conclusion:

> Sackett's bare allegation that [appellate counsel] Gonlubol's failure to raise or preserve the issue of ineffective assistance of trial counsel resulted in actual prejudice is insufficient as a matter of law. Sackett must do more than merely plead or allege actual prejudice, rather, Sackett must demonstrate that appellate counsel's failure to raise or preserve the issue of ineffective assistance of trial counsel resulted in actual prejudice.

Moreover, Gonlubol testified, "An ineffectiveness claim is extremely—it's an extremely big hurdle to overcome, and just a mere allegation . . . is not going to get you anywhere, especially when I had two issues I thought were very decent." Our supreme court has recognized that "most experienced appellate lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint. Highly competent appellate lawyers assign only the strongest points and rely on them for reversal." *Cuevas v. State*, 415 N.W.2d 630, 633 (Iowa 1987).

We do not find Sackett established by a preponderance of the evidence a "sufficient reason" necessary to overcome the waiver provision pursuant to Iowa Code section 822.8. *See Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981) (warning that "postconviction relief is not a means for relitigating claims that were

or should have been properly presented at trial or on direct appeal."). We accordingly affirm on this issue.

B. Trial counsel. Sackett argues trial counsel, Halversen, was ineffective in several respects. We need not determine whether counsel's performance was deficient before examining whether the defendant suffered prejudice as a result of the alleged deficiencies; "[i]f it is easier to dispose of an ineffectiveness claim on the lack of sufficient prejudice . . . that course should be followed. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Whitsel v. State*, 439 N.W.2d 871, 873 (Iowa App. 1989). Thus, stated differently, it is not necessary that a court deciding an ineffective assistance claim address both components of the inquiry if an applicant makes an insufficient showing on one. *Whitsel*, 439 N.W.2d at 872.

We note most of the complaints regarding Halversen's decisions regarding discovery (obtaining assistance of a medical expert, reciprocal discovery obligations) and motion filings (pursuant to Iowa Rule of Evidence 412) are related to Halversen's trial strategy and tactics. In examining Halversen's testimony regarding his various rationales adduced in the record, we are not convinced his performance was in any way deficient and cannot therefore find Halversen breached an essential duty owed to Sackett. Improvident strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066,

80 L. Ed. 2d at 695 (concerning counsel's method of investigating a particular case, the Court stated: "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation.").

Moreover, counsel's actions are usually based in part on information supplied by the defendant and, consistent with this view, the Iowa Supreme Court has recognized that the duty to investigate and prepare a defense is not limitless. *Whitsel*, 439 N.W.2d at 873. We are also mindful that the courts should "strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700.

Perhaps most significant to our analysis, however, is the fact that Sackett is unable to prove the prejudice prong. That is, he failed to show that but for trial counsel's alleged error, the outcome would have been different. There is overwhelming evidence in this case, independent of counsel's actions, that establishes Sackett's guilt.

Having carefully reviewed all other arguments properly before us on appeal, we affirm the district court's denial of postconviction relief and uphold Sackett's convictions.

AFFIRMED.