

IN THE COURT OF APPEALS OF IOWA

No. 7-214 / 96-0560

KATHLEEN KAY GAETA,

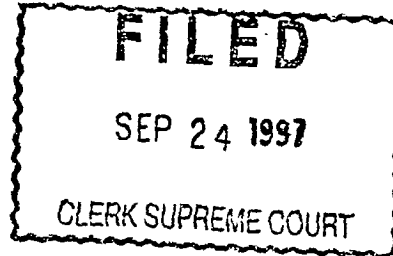
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Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Johnson County, August F. Honsell,
Judge.

Kathleen Gaeta appeals from the district court's denial of her postconviction
relief application. **AFFIRMED.**

Anthony F. Renzo and Michael R. Stowers of Babich, McConnell & Renzo,
P.C., Des Moines, for appellant

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney
General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County
Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

SACKETT, P.J.

Applicant-appellant Kathleen Gaeta appeals from the district court's denial of her application for postconviction relief. She contends her trial counsel was not effective when she advised her to accept a plea agreement and enter an *Alford* plea to first-degree burglary. We affirm.

On March 17, 1992, Gaeta was charged by trial information with first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1991) and possession of a firearm as a felon in violation of Iowa Code section 724.26. The State further contends Gaeta was an habitual offender as defined in section 902.8 because she had two prior felony convictions.

Gaeta allegedly robbed Tim Owen at gunpoint outside Dancer's Bar in Coralville. At the time, Gaeta was on parole following a conviction for robbery. Gaeta claimed Mike Maloney forced her to rob Owen. In statements given following Gaeta's arrest, Maloney denied any involvement in the robbery. Gaeta contends Maloney forced her to commit the crime and seeks to use his actions as the basis of a compulsion defense.

Gaeta had established a relationship with Maloney, who she claims was abusive to her. Maloney spent the night before Gaeta's arrest at her home. Gaeta contends she committed the crime because Maloney threatened both her and her son. Her version of the events surrounding the crime is contradicted by a number of

witnesses and her version of the facts conflicted with the versions of complaining witnesses and investigating officers.

Gaeta's appeal centers around her premise that had her trial counsel, Sharon Mellon, adequately shown her to be a battered woman, she would have been found not guilty of the charge by utilizing the defense of compulsion. Gaeta contends Mellon should have done more investigation, done more to show she was a battered woman, and gone ahead with the trial rather than recommending to her that she accept the plea bargain which provided substantial concessions over the punishment Gaeta would have received had she been found guilty of all the charges leveled against her.

After Gaeta was charged, she requested and the court appointed Mellon as Gaeta's attorney. Mellon had represented Gaeta on a prior criminal charge and in juvenile court. On July 10, 1992, Gaeta asked the court to appoint a different attorney because Mellon advised her to accept the State's plea offer and she questioned the dedication of Mellon and the private investigator hired for her case. Mellon filed a motion to withdraw. The trial court denied the motion.

On July 31, 1992, Gaeta entered an *Alford* plea to the first-degree burglary charge. As part of the plea agreement, the State moved to dismiss the charge against Gaeta for possession of a firearm as a felon. The State also requested Gaeta's sentence run concurrently with her parole revocation. The court sentenced Gaeta to an indeterminate term not to exceed twenty-five years. Gaeta did not file an appeal.

On March 31, 1995, Gaeta filed this application for postconviction relief. She contended she robbed Owen because Maloney threatened harm to her and her son if she did not. She advanced she had a compulsion defense to the crime with which she was charged. She specifically contended Mellon was not effective because (1) she was an inexperienced trial attorney; (2) the expert Mellon selected had no training in the battered woman syndrome; (3) she did not adequately pursue Celcia Dunnington as an expert witness; (4) she used another attorney, Richard Klausner, to persuade Gaeta to plead guilty; and (5) she failed to investigate and interview potential witnesses that Gaeta claims would support her claim she had a compulsion defense.

Following a hearing, the district court denied the postconviction relief application. The district court found Mellon had practiced law for approximately eighteen years and twenty percent of her practice concentrated on criminal law. It concluded Mellon met with Gaeta on several occasions, reviewed police reports, took depositions, retained a private investigator, and contacted Dr. Weinberg to obtain Gaeta's psychological evaluation. The court noted Dr. Weinberg determined Gaeta was attempting to distort the results of her MMPI. Dr. Weinberg believed Gaeta probably had an antisocial personality disorder, but this did not support a compulsion defense. The court also found the private investigator interviewed over one dozen witnesses but was unsuccessful in finding any evidence to support Gaeta's allegations of compulsion. The court further concluded Mellon did not attempt to coerce Gaeta

to plead guilty by requesting Klausner's assistance and Klausner was one of Gaeta's choices to replace Mellon. The court ruled Gaeta's claims were without merit.

The State argues the errors raised by Gaeta were not preserved because she did not address error preservation in her brief and she failed to appeal following sentence.

Gaeta contends the error preservation issue the State now raises was not raised in district court. Alternatively, she argues she is not required to "state the obvious" in order to preserve error on appeal. She contends she did not file a motion in arrest of judgment or a direct appeal because Mellon was not effective. We find it unnecessary to address claims concerning preservation of error because we find Gaeta's claims to be without merit.

The test we apply to a claim of ineffective counsel "is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983) (quoting *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981)). When the claim is grounded on counsel's failure to take some action, the claimant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Hrbek*, 336 N.W.2d 431, 436 (Iowa 1983); *Henderson v. Scurr*, 313 N.W.2d 522, 524 (Iowa 1981). The claimant must satisfy this burden by a preponderance of the evidence, *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980), and rebut the presumption of counsel's competence. *Fryer v. State*, 325 N.W.2d 400, 412 (Iowa 1982).

Billing records show Mellon had nearly thirty phone conferences with Gaeta and met with her about ten times. Mellon took depositions; hired an investigator, a social worker, and a mental health expert; and conferred with a partner and arranged for another criminal defense attorney to evaluate Gaeta's case and talk to her about going to trial.

Gaeta's case presented a number of problems. There was evidence to support the multiple charges filed against her. Her version of the facts was contradicted. She took risks in going to trial that were eliminated by pleading guilty. We have considered all of the claims raised and find them to be without merit. We affirm.

AFFIRMED.