

IN THE COURT OF APPEALS OF IOWA

No. 7-290 / 96-888

000279

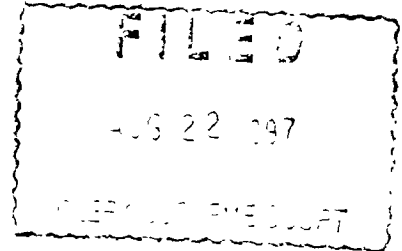
TROY A. SEARS,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, James R. Havercamp,
Judge.

Troy Sears appeals a district court ruling denying his application for
postconviction relief. **AFFIRMED.**

Tracey E. Conner, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, William E. Davis, County Attorney, and Michael J. Walton, Assistant
County Attorney, for appellee.

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

CADY, J.

This is an appeal by Troy Sears from a district court ruling denying his application for postconviction relief. Sears claims he did not receive effective assistance of trial and postconviction counsel. We affirm on our review.

Sears was convicted of three counts of second-degree sexual abuse following a jury trial. The convictions were based on acts of oral sex and fondling involving three children. Sears was sentenced to three terms of confinement not to exceed twenty-five years. The convictions were affirmed on appeal.

Sears filed an application for postconviction relief. He claimed his trial counsel was ineffective for a variety of reasons, including he failed to protect his right to a speedy trial. Sears also claimed appellate counsel was ineffective for, among other things, failing to raise on direct appeal trial counsel's failure to protect his right to a speedy trial.

The postconviction court denied Sears' petition for relief. It found trial counsel was not ineffective for failing to protect Sears' right to a speedy trial because there was good cause for the forty-eight-day delay which was attributable to Sears. Based on its finding that trial counsel was not ineffective for failing to raise the speedy trial issue, it further concluded appellate counsel was not ineffective for failing to raise the issue on appeal. It denied all other claims raised by Sears, including the failure of his trial counsel to thoroughly examine all potential witnesses and explore all defenses,

the failure of his trial counsel to present evidence of his homosexuality, and the failure of his appellate counsel to request oral argument. In particular, Sears claimed trial counsel should have retained an expert witness to testify generally about sex abuse accusations made by children.

On appeal, Sears claims the case should have been dismissed because good cause did not exist for the speedy trial delay and he was prejudiced by the delay. He further claims trial counsel was ineffective for failing to protect his rights to a speedy and fair trial. He claims postconviction counsel should have contacted an expert witness to determine what specific testimony could have been presented at trial to aid in his defense.

Our review of postconviction proceedings involving claims of violation of constitutional rights is equivalent to a de novo review. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). To prevail on a claim of ineffective assistance of counsel, an applicant must establish counsel failed to perform an essential duty and prejudice resulted. *Id.*

We first address the claim by Sears that the district court should have dismissed the trial information under the speedy trial rule. This claim was not preserved for our review. It was not raised at trial, on appeal, or in the postconviction petition. *See* Iowa Code § 822.8 (1995). Instead, the district court found good cause for the delay in the context of resolving the claim whether counsel was ineffective for

failing to ~~assert~~ Sears' speedy trial right at trial and on appeal. Thus, the issue preserved for appeal is whether trial and appellate counsel were ineffective for failing to raise the speedy trial issue.

Under all the circumstances of the case, Sears failed to show his trial counsel was duty bound to bring the case to trial within the ninety-day speedy trial period or to move to dismiss the trial information after the ninety-day speedy trial deadline passed. First, the record shows the case was not tried within the ninety-day deadline because Sears' trial counsel was engaged in plea bargaining negotiations with the prosecutor and confronted a considerable amount of indecision by Sears concerning trial strategy and the plea bargaining negotiations. Moreover, Sears concurred with each continuance of trial and never told his attorney he wanted a speedy trial.

We presume counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable judgment. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984). Counsel for Sears was experienced in criminal cases and testified he would not have continued the trial beyond the speedy trial deadline if it would have had adverse consequences to Sears. Under all ~~the~~ circumstances, we conclude Sears failed to establish ineffective assistance of trial counsel for failing to raise the speedy trial issue. Likewise, the ineffective assistance of appellate counsel must fail.

We ~~also~~ reject the claims by Sears that his trial counsel was ineffective for failing to ~~introduce~~ evidence of Sears' homosexuality and for failing to offer an expert witness to explain the reasons children may falsely report sexual abuse accusations. Sears' trial counsel testified he believed evidence of Sears' sexual preference could be harmful to his defense. Reasonable tactical decisions by counsel do not support claims of ineffective assistance of counsel. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Furthermore, a claim of ineffective assistance of counsel cannot be based on speculation. Sears offered no testimony at the postconviction hearing to establish admissible expert testimony would have been favorable to his defense. We preserve the ineffective assistance of postconviction counsel claim of failing to investigate the proposed trial testimony of an expert witness. The record is inadequate for us to resolve this issue on this appeal.

We have carefully considered all issues raised and preserved by Sears. We affirm the decision of the district court.

AFFIRMED.