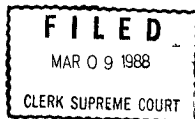


IN THE COURT OF APPEALS OF IOWA



RAYMOND THEODORE FREIE, JR.,)

Petitioner-Appellant,)

Filed March 9, 1988

vs.)

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STATE OF IOWA,)

Respondent-Appellee.)

7-536
86-1842

Appeal from the Iowa District Court for Hancock County (No. 15,529),
J. W. Frye, Judge.

Petitioner appeals from a judgment in the district court denying his applica-
tion for postconviction relief. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl and James
W. Ramey, Assistant Attorneys General; and Ted Hovda, County Attorney,
for respondent-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Petitioner appeals from a judgment in the district court denying his application for postconviction relief. We affirm.

Petitioner Raymond Theodore Freie, Jr. was convicted of murder in the first degree and on January 4, 1982, was sentenced to life imprisonment. Freie seeks postconviction relief on the ground that he received ineffective assistance of trial counsel. Freie hired attorney Richard P. Minette when he became a suspect in the murder of Lanny Casper. Minette had limited experience in felony cases, but had represented Freie in a domestic matter. Freie maintained he was innocent and was enthusiastic about taking a lie detector test. Minette advised Freie he did not have to take the test, leaving the choice up to Freie. Before the test Minette and the county attorney signed a stipulation that the results might be offered into evidence. After the test, the examiner's opinion was that Freie was not truthful as to relevant facts.

Freie was charged with Casper's murder a few days after the test. Another attorney, B. Michael Dunn, was employed to assist in Freie's defense. A lie detector examination was arranged before a different examiner, but the results of this test were not satisfactory to Freie. Freie testified at the trial that he lied to the examiner at the time of the first lie detector test. On Freie's postconviction claim, the district court points out that the opinion of the examiner was only that Freie had lied as to relevant facts and that Freie subsequently admitted that he had lied during the examination. The court concluded that Freie failed to show that his trial counsel failed to perform essential duties and, thus, did not show there was ineffective assistance of counsel.

Postconviction relief actions pursuant to Iowa Code Chapter 663A are law actions and are ordinarily reviewed only on error. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). However, when there is an alleged violation of

a constitutional safeguard, we will make an independent evaluation of the totality of the circumstances under which the postconviction ruling was made. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984); Thomas v. State, 316 N.W.2d 182, 183 (Iowa App. 1981).

Freie's argument for postconviction relief is that his attorney was ineffective in permitting him to submit to the polygraph examination under a stipulation that unfavorable results could be offered by the State at trial, without first conducting a private polygraph examination. Two attorneys testified at the postconviction proceedings that they would never stipulate the results of such a test into evidence unless they had already independently tested the client. Freie claims that Minette's performance fell below the minimum standard of competence. Freie stated that he was prejudiced because his entire defense depended upon his credibility, and the results of the lie detector examination brought his credibility into question.

Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985). We presume counsel was competent; a postconviction petitioner has the burden of proof to establish by a preponderance of the evidence that counsel was ineffective. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). To establish an ineffectiveness claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performing prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984). We abide by the Strickland standard. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). Improvident trial strategy, miscalculated

tactics, or mistakes in judgment do not necessarily amount to ineffective counsel.

Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980).

We do not find that Freie was denied effective assistance of counsel. Attorney Minette advised Freie that polygraphs are not foolproof; that if he failed the test, the results could be used against him; and that if he was lying, he should "back out" of the test. Freie voluntarily took the test and stipulated to its admissibility after being advised of the risks. The stipulation provided that Freie understood he was under no legal obligation to take the polygraph test. Miranda warnings were given to Freie prior to taking the test. We do not find Minette's performance was deficient. Minette cannot be charged with being ineffective for believing his client who maintained he was innocent and insisted on taking the polygraph examination. Counsel did not break an essential duty by failing to insist that Freie take a private polygraph examination. Neither do we find that Freie was prejudiced by the alleged deficient performance. Other evidence tended to show Freie was lying.

We affirm the conviction.

AFFIRMED.