

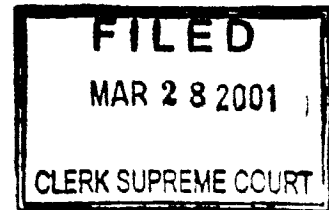
IN THE COURT OF APPEALS OF IOWA

No. 1-058 / 99-1136
Filed March 28, 2001

BERNARD ROSE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Buchanan County, George L. Stigler, Judge.

On appeal from the denial of his application for postconviction relief, the appellant argues the district court erred in failing to find he had been prejudiced by his appellate counsel's failure to challenge criminal proceedings that occurred during his absence. **AFFIRMED.**

Joel T. Niebaum of the Kellogg Law Firm, Missouri Valley, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines and Virginia Barchman, Assistant Attorneys General, and Allan W. Vanderhart, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Appellant Bernard Rose appeals the district court's denial of his application for postconviction relief. Appellant claims ineffective assistance of trial counsel for failing to represent his right to be present in a pre-trial meeting between counsel and the judge or in the resulting pre-trial meeting between the judge and two of the State's witnesses. Appellant claims he did not waive his right to raise this claim in a postconviction proceeding because he received ineffective assistance of appellate counsel as well. We affirm.

On October 29, 1993, a jury found Bernard Rose guilty of three counts of sex abuse in the third degree, a violation of Iowa Code sections 709.1(1) and 709.4(2)(c)(3) (1993). On November 29 of that year he was sentenced to three consecutive ten-year prison terms. The defendant's appeal was denied as frivolous. In his application for postconviction relief Rose raised several claims, including ineffective assistance of trial and appellate counsel for failing to represent and appeal his right to be present at all stages of his trial. Rose claimed that he should have been present in two pre-trial meetings held by the judge. At the first of those meetings, the State's attorneys discussed with the judge and Rose's attorney that they had discovered that Rose had been telephoning State witnesses in order to urge them not to testify in the upcoming trial. The State had just learned that the witnesses, although under subpoena, were refusing to testify. All parties present at that first meeting agreed to a pre-trial meeting between the judge and the two witnesses. At the second meeting the judge advised the witnesses of their duties under subpoena and asked them if they intended to testify. They replied that they would not testify.

Contrary to their statements the witnesses did eventually testify. The jury returned guilty verdicts.

Defendant appealed, but his appeal was dismissed as frivolous pursuant to Iowa R. App. P. 104. In his application for postconviction relief Rose claimed, among other things, that his absence from the pre-trial meetings was reversible error and that he was rendered ineffective assistance by both trial and appellate counsel. The postconviction court denied the appellant's application for relief, determining that Rose's absence from the pre-trial meetings was not prejudicial. Although it found no prejudice had resulted, the postconviction court did find that Rose's claim of ineffective assistance of appellate counsel was valid: According to the court, instead of seeking removal from the case for its frivolousness, the appellate counsel should have argued on appeal that the trial counsel rendered ineffective assistance in failing to represent Rose's right to be present at the pre-trial meetings.

Appellant Rose now appeals that ruling. He claims that the postconviction court erred in determining that no prejudice resulted from his not being invited to attend the two pre-trial meetings. We affirm.

In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant ordinarily must show that his claim was preserved for review by being made on direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence "sufficient reason" or "cause" for not having raised the issue on direct appeal, as

well as prejudice resulting from the alleged errors. *Id.* Ineffective assistance of appellate counsel may provide sufficient reason or cause. *Id.*

Our review of a postconviction relief action can be for errors at law or de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-5 (Iowa 1999). When the action implicates constitutional issues the court's consideration is in the nature of a de novo review. *Id.* Ineffective assistance of counsel claims invoke a constitutional challenge and are therefore reviewed de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

To prevail on an ineffective assistance of counsel claim the appellant must show that his attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

We affirm the postconviction court's denial of relief. The appellant failed to establish that the failure of trial counsel to represent his right to be present was prejudicial to the outcome of the trial. A criminal defendant has a right to be present at all stages of his trial. *State v. Gruber*, 281 N.W.2d 636 (Iowa 1979), *State v. Snyder*, 223 N.W.2d 217 (Iowa 1974). That the appellant's lawyer was present for the first pre-trial meeting in this case is irrelevant; a defense counsel may not waive a defendant's right to be present at a critical stage of a criminal proceeding without consultation and approval from the client. *State v. Hempton*, 310 N.W.2d 206 (Iowa 1981). However, the privilege of presence is not guaranteed when the presence would be useless. *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L. Ed. 2d 631, 647 (1987).

The appellant argues that the outcome of the trial would have been different if he had not been excluded from the pre-trial meetings. He claims that his presence likely would have altered the witnesses' choice to testify against him, or that, having attended the meeting, he would have been "sufficiently impressed with their resolve" so as to have accepted a plea bargain for concurrent sentences.

Very simply, the appellant's claims are mistaken and have no support in the record. The appellant argues he had a right to be present at all critical stages of his case. We do not dispute that. The effect of his presence at the meetings, he claims, would have been to alter what he believes was a resolve on the part of the witnesses to testify against him. As the postconviction court noted, neither the law nor common sense could possibly justify our finding in favor of a defendant whose complaint on appeal is that the trial court should have afforded him an opportunity to intimidate and coerce the witnesses before they testified against him. Further, the record shows that the witnesses were resolute during their meeting with the judge, but, contrary to appellant's mistaken belief, they were resolved *not* to testify against him. The witnesses did not need the appellant's presence to feel pressure not to give their testimony. They were under sufficient self-imposed pressure, so much so that the record shows they refused to comply with their subpoenas and left the chambers crying, distressed by the prospect of fines and jail time for their decision not to testify.

The appellant further claims that, had he seen the "resolve" of the witnesses (resolve, he believes, to testify), he would have been persuaded to accept the plea bargain. Again, the appellant misunderstands the facts. At the

end of the meeting the witnesses in fact *refused* to testify, even at the risk of fines and jail time. Under the appellant's own reasoning, had he been present at the meetings, he would *not* have accepted the plea bargain. After the meeting, if he were present, he would have had to conclude there was no need to plea bargain; the witnesses were refusing to build a case against him. It is not clear why the witnesses, at some point after the meeting, changed their minds and did eventually testify. One thing is clear, however: the decision of the witnesses to testify was not a result of their meeting with the judge. In spite of his claim, illogical as it is, Rose's absence from the meetings had no bearing on the testimony of the witnesses or the subsequent outcome of the trial. The postconviction court was correct to determine that no prejudice resulted from the defendant's absence at the pre-trial meetings.

The appellant's argument is based on the presumption that, had he been able to exert some sort of influence over the witnesses, they would not have testified and there would have been little evidence at trial against him. Again, the appellant is mistaken. Even if the defendant could have used legal means to alter the witnesses' willingness to testify (about which we have serious reservations), he would not have succeeded in excluding the substance of their testimony from the trial. Under Iowa R. Evid. 804(a)(2) and (b)(1), when witnesses under subpoena are unwilling to testify, their prior depositions are admissible evidence, qualifying as exceptions to the hearsay rule. The witnesses in this case were under subpoena. Their depositions had already been taken. Whether the witnesses were physically present or not at trial, their accounts of the defendant's conduct would have been included in the evidence submitted to

the jury. And whether the evidence was in the form of depositions or testimony, the jury would have had virtually the same substantive information to consider. We have no reason to imagine the verdict would have turned out any differently. Given the illogical arguments of the appellant and their inconsistency with the facts, we see no tenable claim that the defendant was prejudiced by his absence at the pre-trial meetings.

We affirm the postconviction court's denial of relief to the appellant on his claim that he was rendered ineffective assistance of trial and appellate counsel.

AFFIRMED.