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IN THE COURT OF APPEALS OF IOWA

ROBERT JAMES KNUPP,	)	
Petitioner-Appellant,	)	Filed September 25, 1986 103
vs.	)	6-188 85-903
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Des Moines County (No. CL 1954-0284), R. David Fahey, Judge.

The petitioner appeals from the district court's denial of postconviction relief. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and William L. Dowell, Des Moines County Attorney, for the respondent-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

OXBERGER, C.J.

Petitioner James Knupp appeals from the district court's order denying his application for postconviction relief. He contends that he was denied effective assistance of counsel in the 1980 trial which resulted in his conviction and a sentence to life in prison for first-degree kidnapping.[1] We affirm.

Because the petitioner alleges a denial of his constitutional right to the effective assistance of counsel guaranteed by the sixth amendment, we make an independent evaluation of the totality of the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). This is the equivalent of a de novo review. Id.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must prove by a preponderance of the evidence: (1) that counsel's performance was so deficient as to deprive him of "counsel" within the meaning of the sixth amendment; and (2) that the deficient performance prejudiced the petitioner, thereby denying him a fair trial. White v. State, 380 N.W.2d 1, 3 (Iowa Ct. App. 1985); Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982). Moreover, the petitioner must overcome a presumption of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of represenation. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The ultimate test is whether, under the record as a whole, counsel's performance was within the normal range of competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). With these principles in mind, we now address the merits of this appeal.

The basis of Knupp's contention is that his attorneys rendered ineffective assistance because they discouraged him from accepting the state's offer to plead guilty to a lesser charge. The record discloses that Knupp was charged with first-degree kidnapping after he offered a woman a ride home and then allegedly took her to an isolated spot where he sexually abused her. Knupp

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[1]The conviction was affirmed on direct appeal to the supreme court. State v. Knupp, 310 N.W.2d 179 (1981).

admitted picking the woman up and having sex with her, but contended that it had been consensual.

On the morning of the trial, the prosecution offered Knupp a ten-year sentence if he would plead guilty to the included offense of sexual abuse. Knupp contends that he rejected the offer because his attorneys had previously advised him that a jury would never convict him of first-degree kidnapping or of any offense carrying a penalty greater than ten years. One of Knupp's attorneys, Kent Hutcheson, testified that he "begged" Knupp to accept the offer; Hutcheson stated that although he thought Knupp was telling the truth about the sex act having been consensual, he believed after deposing the victim that she would be an excellent witness and that the outcome of a trial would be uncertain. Knupp's other attorney, Gordon Liles, also denied encouraging Knupp to go to trial. Hutcheson stated that no record was made of the colloquy regarding the plea because the case was being tried to a judge; Hutcheson said he did not feel that he could tell the judge that he recommended accepting the plea offer while at the same time arguing Knupp's innocence without weakening the case.

Although our review is de novo, we give weight to the trial court's findings concerning the credibility of witnesses. Iowa R. App. P. 14(f)(7); Taylor v. State, 352 N.W.2d 683, 687 (Iowa 1984). The postconviction trial court found that Knupp's attorneys had fully advised him of the likely range of sentences if he were to plead guilty to a lesser offense or go to trial. The court concluded that Knupp had not met his burden of proving that he had been denied effective assistance. We find credible evidence in the record supporting the trial court's determination. Hutcheson had previously represented Knupp on several occasions. Hutcheson testified that Knupp ultimately decided to reject the plea offer because he wanted a guarantee of probation, which Hutcheson had told him

was unrealistic. Hutcheson stated that Knuppp overestimated his ability to "get him off" on this charge.

Knupp urges that the testimony of police officer Vernon Eilers, who was present during most of the trial, is additional evidence supporting his contention that his attorneys improperly advised him of the probable outcome of a trial. Eilers testified that during the trial he heard Hutcheson telling Knupp not to worry, and that "they don't have anything." We do not think that Eiler's testimony is indicative of the ineffective performance of the attorneys. These statements cannot be said to refer to the attorneys' advice with respect to the plea, but were more likely offered as personal reassurances.

In conclusion, we do not think that the petitioner has shown that he was denied effective assistance of counsel. Accordingly, the denial of his application for postconviction relief is affirmed.

AFFIRMED.