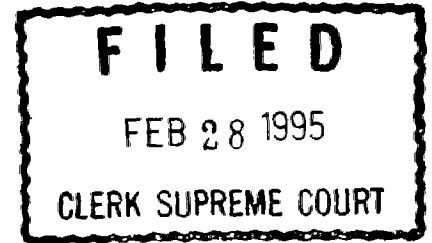


IN THE COURT OF APPEALS OF IOWA

No. 4-490 / 93-1256



LEONARD REED,
Appellant,
vs.
STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Scott County,
Edward B. deSilva, Judge.

Reed challenges the order denying his application for
postconviction relief. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for
appellant.

Bonnie J. Campbell, Attorney General, Julie H. Brown,
Assistant Attorney General, William E. Davis, County
Attorney, and Realff Ottesen, Assistant County Attorney,
for appellee.

Considered by Donielson, C.J., and Sackett and Cady,
JJ.

CADY, J.

This appeal requires us to decide whether Leonard Reed is entitled to a new trial based on ineffective assistance of trial counsel and newly discovered evidence. We conclude he is not entitled to a new trial, and affirm.

Reed was convicted by a jury of sexual abuse in the second degree and child endangerment. The trial was held in January 1989. The victim of the sexual abuse was Reed's two-year old daughter. She told her mother following a weekend visit with Reed that "daddy hurt me down there." The statement was subsequently related by the mother to an examining physician. The trial court allowed the mother and doctor, over objections by trial counsel, to testify to the statement.

Two physicians, Dr. Ozaki and Dr. Vermeer, examined the victim and opined at trial that she had been sexually abused. Their opinions were based in part on the size of the opening of the victim's vagina. Other signs of abuse included thickening of the victim's hymen, a vaginal tear and the history given by the victim's mother.

At the time of trial, the accepted medical research indicated the standard size of the vagina opening of a two-year-old infant was four millimeters. The victim's opening measured five millimeters. Since the trial, a number of medical studies have shown that the size of the opening into the vagina varies, and alone, is no longer considered a reliable indicator of sexual abuse.

Dr. Ozaki testified at the post-conviction relief hearing that the opinion she expressed at trial would not be altered by the new studies because the victim had other physical signs of sexual abuse. Her quantum of doubt was also unchanged.

On the eve of trial, Reed attempted to accept a plea agreement which would have allowed him to plead guilty to the misdemeanor child endangerment charge in exchange for the dismissal of the felony sexual abuse charge. The trial judge refused to accept the plea agreement. He held it was untimely under a local rule, and felt the evidence did not justify dismissal of the charge. The state had offered the plea agreement months earlier. At a pretrial conference about three weeks before trial, the trial judge refused to make a pretrial ruling on the admissibility of the hearsay statements of the victim.

Following Reed's conviction, the trial court sentenced him to serve a term of incarceration on both offenses. The judgment and sentences were affirmed on appeal.

Reed claimed at his postconviction hearing that his trial counsel was ineffective in advising him on the plea agreement and in failing to obtain a pretrial ruling on the admissibility of the hearsay statements. He also claimed the new medical studies constituted "newly discovered evidence."

I. Scope of Review and Presentation of Claims

The scope of review in a postconviction relief action is for errors at law. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989). When constitutional issues are raised, however, we review de novo. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984).

The state initially argues that Reed waived his claims by not first raising them on direct appeal See Earnest v. State, 508 N.W.2d 630, 632 (Iowa 1993). This argument was not presented to the court at the postconviction relief hearing, and is not properly presented on appeal.

II. Ineffective Assistance of Counsel

To establish ineffective assistance of trial counsel, a defendant must show counsel failed to perform an essential duty and prejudice resulted. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Since we conclude Reed did not satisfy the prejudice element of the ineffective assistance test, we do not address the standard of care rendered by trial counsel.

From our review of the record, it is clear Reed was made aware of the plea agreement well in advance of trial and discussed the proposal with his trial counsel. It is also clear trial counsel told Reed he believed the hearsay statements would be inadmissible, and without the hearsay evidence there was limited evidence to establish guilt. At the same time, Reed was given no assurances. Moreover, Reed steadfastly maintained his innocence and was not interested in a plea agreement until the eve of trial.

Furthermore, the trial judge refused to make a pre-trial ruling on the admissibility of the hearsay statements, and refused to allow Reed to enter a plea under the plea agreement for reasons in addition to its untimeliness. Thus, Reed was not prejudiced by the failure of his attorney to file a pre-trial motion or the timing of the attempted plea. We are unable to find credible evidence in the record to support a reasonable probability that the outcome would have been different if trial counsel had filed a formal pretrial motion or urged Reed to accept the plea agreement earlier in the proceedings.

III. Newly Discovered Evidence

Claims of newly discovered evidence in postconviction relief cases have three elements: the evidence could not have been discovered earlier in the exercise of due diligence, the evidence is material and not cumulative, and the evidence would probably change the result of the trial. Cornell v. State, 430 N.W.2d 384, 386-87 (Iowa 1988). Motions for new trial based on newly discovered evidence are looked upon with disfavor. Id.

We conclude Reed has failed to show the new evidence would probably change the result if given a new trial. The new evidence would not change the opinions of the expert witnesses, nor alter the strength of their opinions.

We affirm the district court.

AFFIRMED.