

IN THE COURT OF APPEALS OF IOWA

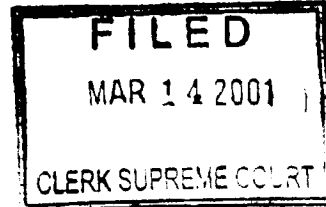
No. 1-074 / 00-0109

Filed March 14, 2001

TEX ALLEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Jack Levin, Judge.

Applicant appeals from the district court order denying his application for postconviction relief. He contends his conviction must be reversed because (1) the complaining witness was intimidated by an attorney who wanted the applicant sentenced to prison, (2) his trial counsel was ineffective in failing to call an expert witness, and (3) his appellate counsel was ineffective in failing to raise his ineffective-assistance claim involving an expert witness on direct appeal.

AFFIRMED.

Thomas J. Clarke, Jr. of Isaacson & Clarke, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

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

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SACKETT, C.J.

Appellant Tex Allen appeals from the district court's denial of his application for postconviction relief. Appellant claims that one of the State's witnesses in his trial proceeding was intimidated into testifying against him and was relying on false information supplied by an adversary of the appellant when doing so. Appellant claims that he did not waive his right to raise the issue of witness tampering because evidence of it was not available until after the direct appeal was concluded. Appellant further claims that he had ineffective assistance of counsel at trial. He argues he did not waive his right to raise this claim because his appellate counsel failed to raise the issue of ineffective assistance of trial counsel on direct appeal. We affirm.

Tex Allen practiced hypnotherapy in Windsor Heights, Iowa, when charges of sexual exploitation by a counselor, a violation of Iowa Code section 709.15(2) (1995), were brought against him. The charges stemmed from allegations that Allen, who had advertised himself as "a professional who listens and cares," sexually abused a client he had been treating. A jury found Allen guilty. On direct appeal, Allen raised several claims, including claims of ineffective assistance of counsel. These claims were rejected. *See State v. Allen*, 565 N.W.2d 333, 336-40 (Iowa 1997). Allen subsequently filed for postconviction relief, again claiming ineffective assistance of counsel, as well as newly-discovered evidence of witness tampering.

The postconviction court rejected his claims. Allen now appeals that ruling. He claims that during the trial a former acquaintance of his, George

Apland, from whom he became estranged, contacted and intimidated Sherry Frederick, the victim in the case and a witness for the State. Information relating to the alleged witness-tampering by Aplan is, according to appellant, newly-discovered and thus a basis for postconviction relief.

Any claim not properly raised on direct appeal may not be litigated in a postconviction proceeding unless there is showing of sufficient reason or cause for not raising it previously, as well as a showing of actual prejudice resulting from the alleged error. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Newly-discovered evidence satisfies the sufficient reason requirement. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994). In order to establish a claim of newly-discovered evidence, the defendant bears the burden of showing 1) that the evidence was discovered after the verdict; 2) that it could not have been discovered earlier in the exercise of due diligence; 3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and 4) that it would probably have changed the result of the trial. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991); *State v. McGhee*, 280 N.W.2d 436, 442 (Iowa 1979).

Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). We apply an abuse of discretion standard when reviewing the postconviction court's ruling on newly-discovered evidence. See *State v. Smith*, 573 N.W.2d 14 (Iowa 1997). In order to show an abuse of discretion, we must show that the court exercised its

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discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Pratt v. Piper*, 500 N.W.2d 716 (Iowa Ct. App. 1993).

The postconviction court found that contacts between Aplan and the witness, Sherry Frederick, appeared to have occurred after the conviction of the defendant. Having occurred after the verdict, these contacts could not have qualified as witness tampering and are therefore immaterial to the issues in the case. The postconviction court's finding is supported by the evidence. The only evidence the appellant offers to establish his case is the deposition of Sherry Frederick, who admittedly cannot remember when she spoke with Aplan. She is only able to testify that the time she first spoke with Aplan was, "I don't know if it was right out of – after one of the trial things or depositions. I don't remember exactly when" The postconviction court had the opportunity to evaluate the testimony of Aplan in light of the appellant's accusation. In the postconviction hearing Aplan testified that he did contact the witness, but he did so after the defendant's conviction. Furthermore, even if Aplan had contacted her during the trial, Ms. Frederick makes no claim that he tried to influence her testimony. The appellant's entire case of witness tampering rests on some vague statements by Sherry Frederick and the appellant's own speculation. Essentially the evidence boils down to Sherry Frederick's word against Aplan's. Aplan denies adamantly that he spoke with Sherry Frederick before the verdict. Ms. Frederick admits she does not really know when she first talked to Aplan. We defer to the postconviction court's credibility judgments. We conclude that the postconviction court did not abuse its discretion by rejecting the appellant's

witness-tampering claim and ruling that the “newly-discovered evidence” of Sherry Frederick’s contact with George Apland would not have affected her testimony in any way and could not have caused the defendant any prejudice in his trial.

The appellant further claims ineffective assistance of both trial and appellate counsel. He argues that his trial counsel was ineffective because he failed to produce an expert witness who would support the appellant’s (then defendant’s) claim that Sherry Frederick was subject to hallucinations and was very possibly hallucinating when she believed she was being touched sexually by the defendant. He argues that his appellate counsel was ineffective for failing to raise the issue of the ineffectiveness of the trial counsel on direct appeal.

Before an ineffective assistance of counsel claim can be raised in a postconviction relief proceeding, defendant must establish by a preponderance of the evidence “sufficient reason” for not raising the issue in his direct appeal. See *Hinkle v. State*, 290 N.W. 2d 28, 31 (Iowa 1980); *Armento v. Baughman*, 290 N.W.2d 11, 13 (Iowa 1980). Ineffective assistance of appellate counsel would provide “sufficient reason” to permit the issue of ineffective trial counsel to be raised in a postconviction proceeding. See *Hinkle*, 290 N.W.2d at 31. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 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). Appellant is confronted with a presumption that counsel is competent, which he must overcome in order for an ineffective assistance of counsel claim to lie. *McQueen v. Swenson*, 490 F.2d 201, 216 (8th Cir.1974). Appellant must shoulder the burden of proof to establish by a preponderance of the evidence, *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980), including an affirmative factual basis, *Cleeson v. State*, 258 N.W.2d 330, 332 (Iowa 1977), that trial counsel provided ineffective assistance.

The appellant does not meet the required burden of proof to establish ineffective assistance of trial counsel. He proffers very little evidence to overcome the presumption that trial counsel was competent. Appellant claims that he submitted evidence to the postconviction court that an expert would have testified that Sherry Frederick was subject to hallucinations and that she may once have "suffered" from schizophrenia. But a mere assertion that a defense expert might have testified that Sherry Frederick was in fact hallucinating instead of being molested does not overcome the presumption that trial counsel was competent. Courts routinely defer to strategic choices made by lawyers. See *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). Even "miscalculated tactics" and errors in judgment do not necessarily amount to ineffective assistance of counsel. *Id.* Appellant offers no reasoning, let alone persuasive reasoning, to convince us that the exclusion of such expert testimony was anything other than a strategic choice by his attorney.

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Further, we question what verdict-changing prejudice could have resulted from excluding such expert testimony at trial. At best the expert testimony would have discounted Sherry Frederick's claim as to what her experiences were when under the appellant's "hypnosis." But the testimony could do nothing to alter the effect of the rest of the evidence that implicated the appellant at trial. Upon his first meeting Sherry Frederick, the appellant hugged her. The appellant served alcohol during "therapy," a service for which he did not always seek compensation, and which would last for upwards of eight hours, sometimes until two in the morning. Another of the appellant's clients testified that she too was sexually molested during her "therapy" session. The appellant himself testified to his own use of tarot cards. And there is tape-recorded evidence of the appellant's very sexual and personal approach to facilitating "relaxation." The appellant has not offered evidence either to overcome the presumption that his counsel was effective, or to establish sufficient prejudice that would alter the outcome of the trial. We affirm the postconviction court's decision to deny the appellant postconviction relief on his claim that he was rendered ineffective assistance of counsel.

AFFIRMED.

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