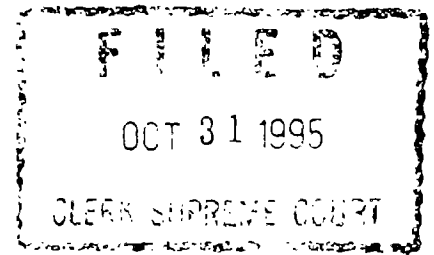


IN THE COURT OF APPEALS OF IOWA

No 5-445 / 94-1795



DALE ROYER,

Appellant.

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Story County, Joel E. Swanson, Judge.

Royer appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ.

HUTINK, J.

Dale Eugene Royer appeals the district court's denial of his application for postconviction relief. Royer contends the district court erred in not granting his application for postconviction relief on the basis that his trial and appellate counsel did not adequately protect his rights for a change of venue. We affirm.

Dale Royer, a former graduate student at Iowa State University, was convicted in 1987 of two counts of first-degree murder and one count of first-degree arson in connection with the deaths of two small children by fire at the home of Dr. Deepinder Sindhu, a professor at Iowa State. The supreme court reversed his conviction due to the district court's improper jury instruction regarding lesser included offenses and remanded the case for a new trial. Having moved for a change of venue in the first trial, Royer renewed his motion for a change of venue for the second trial, citing adverse pretrial publicity as his reason for requesting the venue change. The district court denied the motion.

A second jury found him guilty of all charges, and Royer appealed. A divided court of appeals affirmed his conviction, and further review was denied. Royer then filed the present application for postconviction relief, claiming he received ineffective assistance of both trial and appellate counsel. Specifically, Royer alleged his trial counsel should have argued more vigorously for a change in venue. Royer noted the scores of articles in the local Ames paper, *The Des Moines Register*, and the national

USA Today, regarding his case. The district court, however, denied his application. Royer appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

Royer claims that trial counsel was ineffective in her efforts to obtain a change of venue for his second trial. He asserts that trial counsel breached her duty by not making an adequate motion for a venue change following alleged adverse publicity between his first and second trials. Although his attorney renewed a previous motion for a change of venue, Royer argues that she should have pursued a change of venue more vigorously. In short, Royer claims that while his attorney should have drafted a new motion for a change of venue, she was ineffective in that she simply renewed a previously denied motion.

We find the failure of Royer's attorney to file a new motion for a change of venue does not constitute a breach of duty. The decision to pursue a change of venue is a matter committed to the professional judgment of the trial lawyer. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). A failure to seek a change of venue does not reflect on competency, nor is it indicative of ineffectiveness. *Id.* A defendant seeking a change of venue must show either (1) publicity attending the trial that is so pervasive and inflammatory that prejudice must be presumed or (2) actual prejudice on the part of prospective jurors. *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990).

Royer has shown neither pervasive and inflammatory publicity nor juror prejudice. He, therefore, has not demonstrated that it would have been appropriate for his attorney to draft a new change of venue motion. Royer's attorney drew the court's attention to the venue issue by renewing the motion she had filed for the previous trial. We find that this was appropriate in that the record before us does not show sufficient publicity between the first and second trials to warrant the need for a newly drafted motion. Although Royer has pointed to the existence of publicity prior to his first trial, he has not shown evidence of any adverse publicity between his first and second trials. As a result, he has pointed to no publicity that would have led a reasonably competent attorney to vigorously pursue a change of venue for the second trial.

Royer has also failed to show actual jury prejudice. At trial, the parties conducted a thorough and lengthy voir dire which resulted in the elimination of several

prospective jurors for cause, leaving a large pool of potential jurors who had no opinion about the case or expressed willingness to put their opinions aside and decide the case on the evidence. Thus, it is unlikely that a new motion for a change of venue would have been granted on the grounds of actual prejudice. We find that Royer's attorney exercised sound professional judgment in her decision not to file a new motion for a change of venue, and, as a result, did not breach her duty.

Even if there had been a breach of duty on the part of Royer's attorney, we find that any such breach did not result in prejudice to the defendant. Because Royer has shown no basis on which the district court should have granted a change of venue motion, Royer has not successfully demonstrated that his attorney's failure to file such a motion resulted in prejudice. Moreover, he has not shown to a reasonable probability that a trial in a different county would have produced a more favorable result. We find that Royer was not prejudiced by his attorney's failure to file a new change of venue motion.

We determine any other issues Royer may have raised are either covered by this opinion or are without merit. We affirm the decision of the district court in its entirety.

AFFIRMED.