



IN THE COURT OF APPEALS OF IOWA

WILLIAM THOMAS HIGGINS,)

Applicant-Appellant,)

Filed May 30, 1980

vs.)

LOU V. BREWER, Warden of the)
Iowa State Penitentiary, and)
the STATE OF IOWA,)

0-82
2-63331

Respondents-Appellees.)

Appeal from Warren District Court - M. C. Herrick, Judge.

Applicant appeals denial of his application for postconviction relief from his conviction on charges of rape, sodomy, and conspiracy, violations of sections 698.1, 705.1, and 719.1, The Code 1975, asserting he was denied effective assistance of counsel at trial. Affirmed.

James F. Fowler of Wilson, Goodhue & Fowler, Indianola, for applicant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for respondents-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Applicant, William Thomas Higgins, appeals denial of his application for postconviction relief from his conviction on charges of rape, sodomy, and conspiracy, violations of sections 698.1, 705.1, and 719.1, The Code 1975. For reversal, Higgins asserts he was denied effective assistance of counsel at trial because his appointed defense counsel failed to prepare adequately for trial, failed to object properly to certain damaging and inadmissible testimony, and failed to raise certain substantial defenses. We affirm the trial court.

I.

On November 22, 1978, this court affirmed on direct appeal Higgins' conviction of rape, sodomy, and conspiracy, violations of sections 698.1, 705.1, and 719.1, The Code 1975, but found the record inadequate to decide the issue of effectiveness of trial counsel and noted Higgins was not precluded from raising this issue in postconviction relief proceedings. Higgins filed on March 10, 1978, a pro se application raising the issue of effective assistance of trial counsel. Following an evidentiary hearing, the application was denied in an order filed on February 15, 1979.

II.

Higgins contends in his brief and argument he was denied effective assistance of counsel due to a combination of alleged deficiencies in the performance of his trial counsel, William Murray. Counsel's alleged deficiencies were: Lack of preparation for trial; failure to control the admission of damaging or inadmissible testimony; and failure to raise several possible defenses. We do not find Higgins was denied effective assistance of counsel in violation of his sixth amendment right to counsel.

Our scope of review in a proceeding brought under the Uniform Postconviction Procedure Act (chapter 663A, The Code 1979) is ordinarily correction of errors of law, not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when the post-conviction applicant asserts, as here, violation of constitutional safeguards, we make our own evaluation of the circumstances. Id.; Lawson v. State, 280 N.W.2d 400, 401 (Iowa 1979). This is equivalent to a de novo review. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). We consider all the matters presented to the trial court, or which should have been considered by it, and reach our own conclusion on whether a constitutional safeguard was violated. Id.

The postconviction applicant shoulders the burden of proof to establish by a preponderance of evidence a claim of ineffective assistance of counsel. Hinkle, 290 N.W.2d at 30; Kellogg, 288 N.W.2d at 563; State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). The issue presented is whether under all the circumstances the counsel's challenged performance was within the range of normal competency. Kellogg, 288 N.W.2d at 563; State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); Veverka, 271 N.W.2d at 750; Cleeson v. State, 258 N.W.2d 330, 332 (Iowa 1977). Such proof must include an affirmative factual basis demonstrating counsel's inadequate representation. Cleeson, 258 N.W.2d at 332.

Our examination should focus on the circumstances facing the attorney and not with the perfect knowledge of hindsight on what might have been a better tactic. Nor will a conviction necessarily be presumptive of ineffective counsel.

[E]ffective assistance of counsel does not mean successful. Rather, it denotes conscientious, meaningful legal representation wherein the accused is advised of his rights and honest, learned and able counsel is accorded reasonable opportunity to perform his assigned task. Improvident trial strategy, miscalculated tactics, mistakes, carelessness or inexperience do not necessarily amount to ineffective counsel.

Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972), quoted in Hinkle, 290 N.W.2d at 30-31.

With these principles in mind, we consider applicant's arguments.

III.

Higgins alleges Murray failed to prepare the case adequately for trial. Higgins points to Murray's failure to move for a continuance to allow more time for pre-trial investigation, failure to file a bill of particulars to discover the specifics of the charges, and his failure to depose a number of State's witnesses before trial. None of these alleged failures were proven sufficiently to establish ineffective counsel.

After conferring with Higgins, Murray decided to go to trial as soon as possible. Murray discovered the county attorney wished to convict Higgins more than any of the other participants in the rape and sodomy incident; he and Higgins were afraid the others might agree to testify against Higgins as part of plea bargains with the county attorney. Although another defendant was able to arrange a plea bargain with the county attorney, Murray was unable to arrange one. Higgins failed to show Murray was

in any way hampered by a lack of time in his trial preparation. Murray's decision to not move for a continuance was reasonable.

The function of a bill of particulars is to provide the defendant with a more specific statement of the particulars of the offense charged to permit the defendant to prepare a better defense. See State v. Willis, 250 N.W.2d 428, 431 (Iowa 1977). Murray testified he did not file a bill of particulars because he had obtained the necessary information concerning the witnesses' testimony by attending an alleged co-conspirator's juvenile hearing on these same charges, discussing the case with the county attorney before receiving a copy of the information, and reading the minutes of the information. At the co-conspirator's juvenile hearing, Murray heard the testimony of the prosecutrix, who was the State's chief witness against Higgins, and of several of the State's collateral witnesses. Murray also talked to Higgins about what each witness listed on the minutes of the information would testify. Knowing the essential details of the rape and sodomy incident and that the State's case turned on the credibility of prosecutrix, Murray considered he had enough information to plan and prepare an adequate defense. We agree.

On the matter of deposing certain witnesses, Murray testified he did not depose anyone because he thought he understood the major allegations and the testimony expected from all major witnesses. Murray testified further that although a few of the answers given were surprising, he anticipated correctly the bulk of the testimony given. Murray planned originally to depose the prosecutrix, but after hearing her testimony at the juvenile hearing decided against it. He based this decision on his concern that deposing the prosecutrix would only give her another opportunity to rehearse her testimony and strengthen what he considered weak points in it and would alert the State to weaknesses in its case. A major part of Murray's trial strategy was to discredit the prosecutrix and her testimony. Hence, his decision not to provide her with an opportunity to polish her testimony and hear his questions was reasonable and within the range of normal competence. We do not find that Murray's strategic decision not to depose certain State witnesses was an indication of incompetent representation. Kellogg, 288 N.W.2d at 563-64.

IV.

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Higgins asserts as a further indication of Murray's ineffective representation his failure to object to or prevent the admission of damaging and inadmissible testimony. Higgins contends Murray should have objected to statements by Kayla Becker and Shelly Wallace on hearsay grounds. Murray, however, chose not to object to these statements because he believed they discredited the prosecutrix. Murray also did not object to prosecutrix's testimony that three of the men with Higgins when he picked her up had tried to rape her earlier on September 10, 1976, because he believed the jury would find it incredulous that prosecutrix would go in a car with three men who had just tried to rape her. Murray's detailed cross-examination of the prosecutrix and recall of her as a defense witness were further attempts to challenge the credibility of her story. Since destroying the prosecutrix's credibility was a key element of Higgins' defense, we can reasonably find no fault with this strategy. Hinkle, 290 N.W.2d at 34.

Higgins also complains of Murray's failure to object properly to the use by the State for impeachment purposes of testimony by a co-conspirator at a juvenile hearing. The record indicates Murray unsuccessfully objected to the manner in which the prosecutor was using the prior testimony, but not to the form of the prosecutor's questions or the admission of the co-conspirator's answers. Apparently, such objections would have been ineffectual since the court was allowing the prosecutor to use the prior testimony to impeach, and any inadmissibility problems due to the form of the questions could have been easily remedied by the prosecutor. Further, Murray likely did not want to emphasize the testimony by repeated objections and the appearance of trying to keep something from the jury. These strategic decisions are also not indicative of ineffective representation. Id.

V.

Lastly, Higgins contends Murray failed to raise several substantial defenses. Murray concluded the unconstitutionality defense provided by State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976) (state may not constitutionally prohibit consensual, non-forceful sodomy between adults), was not available in the context of the non-consensual, forceful nature of this case. Murray's judgment is supported by the failure of this defense when raised by the co-defendants and subsequent caselaw, State v. Coil, 264

N.W.2d 293, 296 (Iowa 1978) (state may constitutionally prohibit certain sexual activity of minors it could not prohibit for adults because of the state's significant interest in regulating sexual activity of minors).

Higgins also contends Murray should have challenged as duplicitous the State's filing both a statutory rape and a sodomy charge. Higgins argues sodomy with a child is included in the definition of statutory rape since "carnally know and abuse" may include oral-genital sexual intercourse, §§ 698.1, 705.1, The Code 1975, and the State should have been forced to elect which count it was pursuing for conviction. Higgins' reliance on State v. Norris, 122 Iowa 154, 97 N.W. 999 (1904), for support is misplaced. In Norris, the supreme court held "that when, to sustain an indictment containing one charge, several like offenses are proven, the state will be required to elect upon which transaction it will rely. [citations]" Id. at 156-57, 97 N.W. at 1000. Here, the rape and sodomy charges were charged in separate counts of the information. Prosecutrix testified Higgins committed one act of sodomy and two acts of sexual intercourse with her. Since only one act of sodomy was alleged, the question of election is not presented. On the rape charge, the two acts were so close in time that election would not have been required. See State v. Alberts, 199 Iowa 815, 819-20, 202 N.W. 519, 521 (Iowa 1925). The decision not to raise these defenses was not ineffective representation. Hinkle, 290 N.W.2d at 34; Kellogg, 288 N.W.2d at 565-66; see State v. Rand, 268 N.W.2d 642, 649 (Iowa 1979).

After reviewing counsel's challenged performance at trial, we conclude it was within the range of normal competence and affirm the trial court.

AFFIRMED.