IN THE IOWA COURT OF APPEALS

STATE OF IOWA,) Filed May 26, 1981

Plaintiff-Appellee,) 1-100
64132

vs.

FILED
MAY 26 1981
CLERK SUPREME COURT

RICHARD FRANCIS GEAR, JR.,

Defendant-Appellant.

Appeal from Polk District Court. Louis A. Lavorato, Judge.

Defendant appeals his conviction of sexual abuse in the second degree in violation of sections 709.1 and 709.3, The Code. AFFIRMED.

John P. Roehrick and Ray Sullins, of Roehrick, Lavorato, Schuster, Sullins & Hassel, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Michael K. Jordan, Assistant Attorney General for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Richard Francis Gear, Jr., appeals his conviction for sexual abuse in the second degree in violation of sections 709.1 and 709.3, The Code. In a motion for retrial defendant contends that he received ineffective assistance of counsel at trial. After a full hearing the trial court overruled the motion. [1] We affirm.

Since defendant asserts a constitutional violation, we make an independent evaluation of the totality of the circumstances. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. Id.

The sixth amendment of the United States Constitution guarantees criminal defendants the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L.Ed.2d 799, 804 (1963). The sixth amendment is made obligatory on the states by the fourteenth amendment to the United States Constitution. Id. The right to counsel means the right to effective assistance of counsel. McMann v. Richards, 379 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14, 25 L.Ed.2d 763, 773 n.14 (1970); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974); State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). The test for judging the quality of representation accorded a criminal defendant who challenges the competency of his attorney is whether in all the circumstances counsel's performance was within the range of normal competency. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Defendant has the burden of proving ineffectiveness of counsel. Veverka, 271 N.W.2d at 750; State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978). In order to sustain his burden defendant must establish by a preponderance of the evidence, Sims, 295 N.W.2d at 423; Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977), an affirmative factual basis demonstrating counsel's inadequacy of representation, Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976). Defendant is confronted with a presumption that counsel is competent, and he must overcome the presumption in order for an ineffective assistance of counsel claim to lie. Sims, 295 N.W.2d at 423.

Defendant contends that the failure of trial counsel, Robert Rigg, to call certain

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[1] Defendant was convicted August 23, 1979. He filed a motion for new trial on September 5, 1979, claiming ineffective assistance of counsel at trial. The motion was overruled on October 10, 1979, on which date defendant filed a notice of appeal to the Supreme Court. The case was transferred to us for consideration on March 27, 1981.

witnesses to testify constitutes ineffective assistance. Defendant did not present trial counsel with a list of three witnesses until after the close of evidence. At that time Rigg ascertained from defendant what the substance of the witnesses' testimony would be. Rigg decided not to have Miss Craig testify concerning the victim's prior sexual conduct with other men because he considered it inadmissible and thought that its introduction might lead to a mistrial. In light of Iowa R. Crim. P. 20(5) Rigg's qualms were reasonable. Rigg decided not to have Miss Thompson testify that the victim told her that a sexual assault had not occurred, because Thompson's testimony could easily be rebutted by a lab report which established sexual contact. Rigg, however, did persuade the trial court to reopen the evidence to obtain the testimony of Mr. Hayes, the third witness on defendant's list, because Rigg felt that Hayes' testimony was important to defendant's misidentification defense. Rigg exercised reasonable professional judgment in deciding not to have Craig or Thompson testify.

Defendant also contends that Rigg's failure to call other witnesses constituted ineffective assistance. The victim testified that she bit her assailant on the arm. At the time the offense was investigated defendant was found to have marks on his arm. Rigg did not call defendant's mother or brother-in-law to testify, whose testimony would have indicated that defendant's marks were caused by a burn instead of a bite. Defendant's mother's testimony also would have indicated that defendant was at home during the early morning hours of July 11, 1978, when the offense occurred. Rigg also failed to call a dentist to testify, who would have stated that he could not identify the marks on defendant's arm as bite marks. The trial court found that the testimony of defendant's mother and brother-in-law was cumulative to other evidence already in the record. In the hearing on the motion for retrial Rigg testified that the dentist also could not identify the marks on defendant's arm as not being bite marks and stated that the dentist's testimony therefore would have no value.

Defendant contends that Rigg ineffectively assisted defendant for his failure to introduce a laboratory report that would have shown that none of defendant's hairs were found on the victim or in her bed after she was attacked. At the hearing Rigg explained that a police officer had orally testified that the hair found in the victim's bed was dissimilar to that of defendant's. Rigg stated that he therefore did not feel that admission of the laboratory report would have added anything to the record not already

in it.

The review of professional performance is to be made, not with 20/20 hindsight, but in the light of the press of trial and trial preparation. Kellogg v. State, 288 N.W.2d 561, 566 (Iowa 1980). We shall not allow our inquiry to degenerate into a postmortem, microscopic dissection of each desperate effort of counsel to save a terminal case. Hinkle, 290 N.W.2d at 30. Rigg's decisions fell within the range of normal competency.

Defendant contends that the trial court erred during the hearing on the motion for retrial in permitting Rigg to testify that he thought that a certain statement of Miss Thompson would have had no probative value had it been made at trial. Since in a hearing on an ineffective assistance claim an attorney whose effectiveness is questioned has the right to defend and explain his trial tactics, see Kellogg, 288 N.W.2d at 566; State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978), he has a right to state that he did not produce a witness at trial because he felt that the resulting testimony would have had no probative value. Even assuming that the trial court erred in permitting Rigg's opinion of the probative value of Thompson's testimony, we disregard Rigg's opinion in our de novo review and still conclude that Rigg did not provide defendant with ineffective assistance.

AFFIRMED.