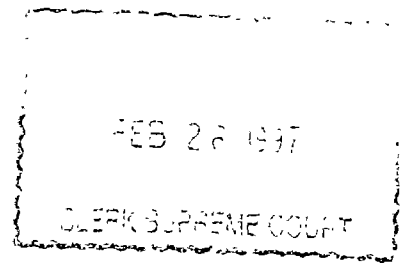


IN THE COURT OF APPEALS OF IOWA

No. 6-785 / 96-0197



000304

JO CARROLL RICH,

Applicant-Appellee,

vs.

STATE OF IOWA,

Respondent-Appellant.

Appeal from the Iowa District Court for Washington County, Robert Bates,
Judge.

The State appeals the district court's granting of Jo Carroll Rich's application
for postconviction relief requesting a new trial. **REVERSED.**

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney
General, and Gerald N. Partridge, County Attorney, for appellant.

Thomas M. Walter and R.E. Breckenridge of Johnson, Hester, Walter &
Harrison, L.L.P., Ottumwa, for appellee.

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

HUITINK, J.

I. Background Facts and Proceedings.

Jo Carroll Rich was convicted of first degree theft following allegations she embezzled cash receipts from her employer. The trial record indicates Rich worked as a bookkeeper for a veterinary clinic in Brighton from 1977 through 1989. Rich's duties included preparation of bank deposits and physical delivery of clinic deposits to the Rubin Savings Bank.

The trial record also includes testimony from an accountant who audited the clinic's books after Rich left the clinic in 1989. He testified his audit disclosed irregularities in the clinic's deposit procedures and that money had been taken from the clinic. A DCI agent assigned to investigate the clinic's resulting criminal complaint testified Rich admitted taking \$10,000 of cash receipts from the clinic. The clinic's banker testified that the clinic's weekly deposits did not ordinarily include cash receipts except for the time Rich was vacationing and following her resignation.

Rich denied taking any money from the clinic or making any contrary admission to the DCI. She also called a number of witnesses verifying her good character.

Rich was convicted as charged. She was sentenced to an indeterminate ten-year term. The district court suspended her prison sentence and ordered community

service and restitution of \$58,780.12. We affirmed the restitution order and preserved Rich's ineffective assistance of counsel claims for postconviction relief.

In this postconviction proceeding, Rich alleges her trial counsel was ineffective in several respects. She cites counsel's failure to secure an independent audit of the clinic's books by a qualified accountant. Rich also claims counsel should have moved to suppress the confession she allegedly made during an interview with a DCI agent. Counsel is also accused of improperly examining a defense witness and failing to prepare adequately for the restitution hearing.

At the postconviction hearing, Rich presented expert testimony by experienced defense counsel indicating trial counsel's performance was inadequate in the particulars Rich alleges. The state's evidence included trial counsel's explanation of his investigation and trial strategy. The state also presented evidence of the cost of retaining an accountant to examine the clinic's books and the probable results of such an audit.

The district court concluded trial counsel's overall performance was below the normal range of competency. The district court noted counsel's failure to make a reasonable investigation to determine the extent of the clinic's losses and counsel's failure to seek suppression of Rich's inculpatory statement to the DCI. Failure to present expert testimony from an accountant and inadequate preparation for the restitution hearing were cited as additional instances of counsel's substandard

performance. The district court granted Rich's request for postconviction relief and ordered a new trial.

On appeal the state contends Rich failed to prove she was denied ineffective assistance of trial counsel. The state cites counsel's reasonable trial strategy and the absence of prejudice resulting from any of Rich's allegations of counsel's unprofessional errors.

II. Standard of Review.

Rich claims she was denied effective representation of trial counsel. Established principles govern our review of Rich's Sixth Amendment claim her counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to Rich's specific claims.

III. Breach of Duty.

Rich's allegations of unprofessional error relating to counsel's decision not to seek suppression of her inculpatory statement carries the greatest potential for prejudice. The district court resolved this issue in Rich's favor by stating:

Too much is riding upon this decision to ignore any remote possibility of success. Even if unsuccessful, the much better approach is to pursue the motion. As attorney Sandre [Rich's expert] stated, sometimes something unexpectantly good happens in your favor.

We are unable to reconcile this assessment with our prior statements regarding counsel's duty to file a motion to suppress defendant's inculpatory statements.

Counsel has no duty to file a meritless motion. *State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994). Moreover, the fact that the postconviction court might, in

retrospect, find a confession inadmissible does not justify a finding of ineffective assistance of counsel. *Kyle v. State*, 364 N.W.2d 558, 562 (Iowa 1985) (citations omitted). Counsel's duty under these circumstances includes the obligation to investigate the prospective merit of a motion to suppress. *Id.* Counsel's decision not to file a motion to suppress following an investigation of its merits is a judgment call protected by a presumption of competence. *Id.*

The record indicates counsel investigated the possibility of filing a motion to suppress Rich's statement to the DCI. His investigation disclosed that Rich's statement was made during an interview conducted in her home. Counsel concluded the motion lacked merit because Rich was not in custody at the time she made the statement obviating any need for the DCI agent to give Rich any Miranda warnings. The record supports counsel's investigatory conclusions. Counsel was also correct in his assessment of the applicable law. *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993)(citations omitted).

Counsel's decision to forego filing a motion to suppress under these circumstances falls well within the range of presumed competency. It was error for the postconviction court to conclude otherwise.

IV. Prejudice.

We need not determine if counsel's performance was deficient in the particulars claimed before examining the prejudice component of an ineffective

assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1985). Our de novo review of the record fails to disclose the required prejudice, we need not address the remainder of Rich's allegations regarding counsel's investigation and trial performance.

Because of our earlier determination, the record includes Rich's confession that she diverted cash receipts from the clinic to her own use. Her confession was corroborated in a number of particulars by her employer, the bank where the clinic's receipts were deposited, and other circumstantial evidence implicating her. Bank employees testified that a number of deposit slips Rich prepared included cash withdrawals. There is also evidence that deposit slips Rich prepared never included cash receipts while those prepared by other clinic employees did. Rich's employers testified that the clinic received cash payments from its customers, and that these cash receipts were supposed to be deposited in the clinic's bank account. Accordingly, we are unable to say that there is a reasonable probability that, but for counsel's remaining unprofessional errors, the result of Rich's trial would have been different.

The judgment of the district court granting Rich a new trial is reversed.

REVERSED.