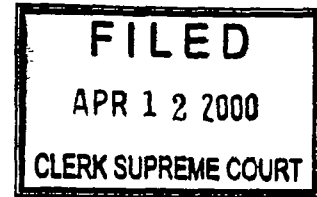


IN THE COURT OF APPEALS OF IOWA

No. 0-97 / 99-622
Filed April 12, 2000



BRUCE EVAN MARTIN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden,
Judge.

On appeal from the denial of his application for postconviction relief,
appellant argues he was denied effective assistance of postconviction counsel.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

~~Thomas~~ J. Miller, Attorney General, Mary Tabor, Assistant Attorney
General, ~~William~~ E. Davis, County Attorney, and Julie Walton, Assistant County
Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

000259

STREIT, P.J.

Bruce Martin claims his postconviction relief counsel was ineffective for failing to offer evidence of his trial counsel's failure to investigate his mental capacity for purposes of supporting a more zealous sentencing argument for concurrent rather consecutive sentences. As we find he suffered no prejudice as a result of his trial counsel's alleged failures, his claim of ineffective assistance of postconviction relief counsel must fail. The conviction is affirmed.

I. Background Facts & Proceedings.

In January of 1998 the defendant, Bruce Martin, pleaded guilty to third-degree sexual abuse, in violation of Iowa Code section 709.4 (1997), and lascivious acts with a child, in violation of Iowa Code section 709.8. Martin was sentenced to ten years on the sexual abuse charge and five years on the lascivious acts charge. The sentences were ordered to run consecutively. Martin did not appeal.

Approximately six months later Martin filed an application for postconviction relief claiming he received ineffective assistance of counsel. He alleged defense counsel forced him to plead guilty, ignored mitigating evidence of his mental condition, refused to file a notice of appeal, and ignored his claim of a *Miranda* violation. The court denied his application.

Martin appeals, claiming his postconviction counsel was ineffective for failing to introduce evidence of his trial counsel's failure to investigate his mental faculties for purposes of mitigating evidence at sentencing.

II. Standard of Review.

Normally, a trial court's denial of an application for postconviction relief is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). If, however, the applicant asserts violations of constitutional safeguards, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

III. Ineffective Assistance of Counsel.

Bruce Martin claims his postconviction counsel was ineffective for failing to offer evidence of trial counsel's failure to investigate his mental faculties for purposes of zealously arguing his sentences for third-degree sexual abuse and lascivious acts with a child should run concurrently rather than consecutively. Because resolution of the underlying ineffective assistance of trial counsel claim will dispatch the pendent claim of ineffective assistance of postconviction counsel, we will only address the merits of the underlying claim.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. With regard to the first prong, Martin must prove the performance of trial counsel was not within the normal range of competence. *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). In evaluating

000101

~~counsel's performance~~, we presume counsel acted competently. See *Risdal*, 404 N.W.2d at 131. The test for prejudice is whether a reasonable probability existed ~~that the~~ outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Martin's claim of ineffective assistance of postconviction counsel must fail, as he cannot establish the requisite prejudice on the underlying ineffective assistance of trial counsel claim. Martin's trial counsel did not present testimonial evidence at the time of sentencing regarding his client's mental abilities. Counsel, however, did adeptly argue his client suffered from some slight mental disabilities and that with structure and proper counseling his client could be rehabilitated. Furthermore, the presentence investigation report provided to the court documented in detail Martin's IQ, his previous treatment experiences regarding sexual issues, and the depth of counseling he had previously received. Finally, trial counsel did obtain mental health reports from Martin's counselor for purposes of an insanity or diminished capacity defense, but found them to be of little value. The court received argument as to Martin's mental abilities and was provided ~~with~~ detailed information of Martin's mental health history. Further argument or additional testimony would not have changed the sentence. The court ran the sentences consecutively to provide Martin with the maximum opportunity to receive treatment while still protecting the public. Additional evidence of his mental health issues would only serve to corroborate the court's

rationale for imposing consecutive sentences. There is simply no evidence nor the slightest possibility that had trial counsel argued with greater vehemence the trial court would have opted for concurrent sentencing. As we have resolved Martin's underlying claim, his claim of ineffective assistance of postconviction counsel must fail. Postconviction counsel cannot be held ineffective for failing to pursue a meritless claim. The conviction is affirmed.

AFFIRMED.

000263