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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CLIFFORD JOHN DAVLIN, SR.,	)	
Petitioner-Appellant,	)	Filed April 23, 1986
vs.	)	6-13 85-299
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Montgomery County (No. 16434) - E. F. Hanson, Judge.

Petitioner appeals the order denying his application for postconviction relief on the ground he was denied effective assistance of counsel at his trial on the charge of second degree sexual abuse in violation of Iowa Code section 709.3. **AFFIRMED.**

Verd R. Bailey of Davidson & Bailey, P.C., Clarinda, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Elizabeth E. Ciebell, Assistant Attorney General, for respondent-appellee.

Considered by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

Petitioner, Clifford J. Davlin, appeals the order denying his application for postconviction relief on the ground he was denied effective assistance of counsel at his trial on the charge of second degree sexual abuse in violation of Iowa Code section 709.3. He contends trial counsel was ineffective in several respects: (1) in failing to attack the credibility and competency of the complaining witness and in failing to call an expert to testify as to effects of drugs on the complaining witness; (2) in lacking the experience to handle a case of this serious nature; (3) in failing to depose the doctor who examined the victim, in failing to challenge his credentials at trial, (4) in failing to properly prepare for trial by insufficient time spent and lack of investigation done; (5) in using improper and inappropriate trial tactics; (6) in failing to object to certain testimony of the sheriff, deputy sheriff, and the investigating D.C.I. agent; and (7) in failing to conduct an independent expert examination of the State's expert.

The State contends petitioner's ineffective assistance claim has been waived by operation of Iowa Code section 663A.8 because petitioner failed to raise it on direct appeal.

In November, 1981, Davlin was convicted of sexual abuse, second degree, of a 17-year-old young woman, and was sentenced to a period of incarceration not to exceed 25 years. Appeal was taken, and assigned to the appellate defender's office. No briefs were filed. The appeal was dismissed under Iowa Rule of Appellate Procedure 104. Davlin was incarcerated. Thereafter, application for postconviction relief was filed. Hearing was held, at which Davlin, his trial counsel and the county sheriff testified. The trial court denied petitioner's application for postconviction relief.

At trial, counsel brought out the complaining witness's psychological and medical history. At the hearing, trial counsel testified he had considered attacking

the competency and credibility of the complaining witness and believed he had introduced the effects of the drugs she was using into evidence. The postconviction judge held he had adequately investigated the possibility and made a reasonable tactical decision to engage in a vigorous cross-examination instead.

At trial, the doctor who examined the victim testified that tests performed by him indicated intercourse within 72 hours. Although he did not depose this witness, counsel testified he did informally interview the doctor prior to trial. The postconviction judge ruled it would have been pointless for counsel to object to this testimony. In other words, any error was harmless.

The postconviction court also ruled petitioner's contention as to insufficient preparation time and lack of investigation done to be groundless. Counsel's office calendar showed 82.25 hours of pretrial time spent on the case including seven personal conferences with petitioner and 32 telephone conversations. The county jail record of outgoing telephone calls showed petitioner made 44 pretrial outgoing calls to counsel reaching him 28 times. Counsel's log showed four office conferences and 18 telephone conferences with petitioner's common law wife who served as a message courier between them.

Davlin's complaint that counsel should have appointed an expert witness to detail the effects of drugs on the complaining witness is counterbalanced by defense counsel's testimony he investigated the possibility and concluded such testimony would not be helpful to the defense. Defense counsel's decision not to depose any witnesses other than the complaining witness was premised on the fact counsel knew the witnesses and the content of their testimony. The postconviction court noted he knew them all and interviewed them informally.

Davlin's objection to counsel's trial tactics was met by defense counsel's testimony he operated in accordance with an alibi theory of defense in determining which witnesses to call. The postconviction court ruled counsel conducted himself

in accordance with that theory. The judge noted the defense premised on the theory that the sex acts were consensual would have been a viable defense but it was rejected by defendant.

The postconviction court wrote: "The State's evidence in this case was overwhelming - seldom do we see a case of this type where all of the evidence falls into place so perfectly."

I.

The procedural issue we must initially address involves Iowa Code section 663A.8 which provides, in relevant part:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

The State contends Davlin failed to raise his claims on direct appeal and is therefore barred from raising his postconviction claims because he did not state a sufficient reason for not raising such defenses on direct appeal. Davlin did not raise the issues on direct appeal because his direct appeal was dismissed pursuant to Iowa Rules of Appellate Procedure 104 which involves dismissal of nonmeritorious appeals. The question posed is whether a dismissal of a direct appeal pursuant to Rule 104 operates under section 663A.8 to preclude consideration of a postconviction application.

We find this case is governed by Stanford v. Iowa State Reformatory, 279 N.W.2d 28 (Iowa 1979), where a defendant was convicted, applied for a direct appeal, and counsel withdrew from the case pursuant to Rule 104. Stanford was allowed to pursue postconviction relief. The distinguishing factor is that the defendant in Stanford resisted the dismissal, whereas the record does not indicate

Davlin resisted his dismissal. See Id. at 33-34. The Stanford court held "that a rule [104] dismissal which is contested or objected to by the appellant does not present issues which could have been presented upon direct appeal from being embraced in a petition for postconviction relief under section 663A.8." Id. at 34 (emphasis added). We find no evidence in the record that Davlin contested or objected to the dismissal. However, because the State did not raise this procedural bar at the postconviction proceeding, we find the State is barred from raising Stanford on appeal. Thus, the State waived its right to claim Davlin's claims are barred.

We now proceed to address the merits. To prevail on an ineffective assistance of counsel claim on a postconviction relief appeal, petitioner must establish: (1) that counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment, and (2) that the deficient performance so prejudiced the defense as to deprive the petitioner of a fair trial. State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). It is not necessary that "a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the petitioner makes an insufficient showing on one. Strickland, ___ U.S. at ___, 104 S.Ct. at 2069-70, 80 L.Ed.2d at 699; accord Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). A petitioner is not entitled to perfect representation, but only to that which is within the range of normal competency. State v. Halstead, 362 N.W.2d 504, 508 (Iowa 1985); Karasek v. State, 310 N.W.2d 190, 191-92 (Iowa 1981). With these rules in mind, we address the merits of this appeal.

First, petitioner claims trial counsel was ineffective for failing to attack the credibility and competency of the alleged victim when she testified. The alleged victim was a 17-year-old girl who ran away from her Florida home, had

been institutionalized, and was on medication which could cause delusions. Petitioner claims that had his counsel emphasized these character defects, he would have been acquitted. We disagree.

Trial counsel did raise such defects in the alleged victim's credibility, albeit not as vehemently petitioner would have liked. Trial counsel did bring out the alleged victim had been institutionalized, that she was on medication and had mental problems. We cannot find trial counsel was ineffective in his examination of the alleged victim. In the same vein, petitioner claims an expert witness should have been called to testify to the adverse consequences, such as hallucination, which can result from taking the medication which petitioner used. Trial counsel, acting well within his capacity to exercise discretion in matters of trial strategy, chose not to call an expert because he discovered the alleged victim was not taking any medication at the time the incident occurred. See Taylor, 352 N.W.2d at 685; Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1980); Hinkle v. State, 296 N.W.2d 28, 30-31 (Iowa 1980); See also State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982). We find no error on this issue.

Second, petitioner maintains that because trial counsel had been practicing law for less than two years at the time of trial and had never handled a case involving a charge as high as second degree sexual abuse, counsel's inexperience resulted in ineffective assistance. The petitioner is precluded from raising this charge because it was not raised at the postconviction hearing and cannot be raised for the first time on appeal. See Snethen v. State, 308 N.W.2d 11, 15-16 (Iowa 1981). In any event, there was no merit to this claim.

Third, petitioner contends trial counsel should have deposed the doctor who examined the victim because the doctor was not qualified as an expert who testified as to the life of spermatozoa which was circumstantial evidence that corroborated the alleged victim's version of the events.

Even though no authority is cited in petitioner's discussion of this issue, we choose to address the merits. See Iowa R. App. P. 14(a)(3). Trial counsel did interview the doctor before trial and determined his testimony was not particularly damaging because it did not identify the spermatozoa as petitioner's. Nonetheless, trial counsel, on cross-examination, brought out that spermatozoa has a life span of 72 hours which meant that intercourse could have occurred possibly two days before the alleged incident. Trial counsel's performance in this regard was not outside the range of normal competency.

Fourth, petitioner attacks trial counsel for failing to spend sufficient time with petitioner to prepare for trial and lack of investigation by failing to take sufficient depositions. While the appropriateness of the amount of time spent with petitioner and dates and quality of such contacts is disputed, we cannot find trial counsel was ill-prepared in any manner. See generally Schrier v. State, 347 N.W.2d 657, 662 (Iowa 1984); State v. McCray, 231 N.W.2d 579, 581 (Iowa 1975).

Fifth, petitioner asserts the trial tactics of counsel were deficient, particularly involving an incident before trial where counsel became annoyed at petitioner for failing to be frank and truthful during their prior discussions.

Even though no authority was cited on this issue, we address the merits. Iowa R. App. P. 17(a)(3). Trial counsel testified that given the State's overwhelming evidence, petitioner should plead guilty or attempt to establish a consent theory defense. Counsel advised petitioner he thought the alibi defense was not particularly persuasive. Despite such advice, petitioner elected to pursue his alibi defense. Any incident involving a dispute between counsel and petitioner does not appear to rise to the level of hampering counsel's ability to represent petitioner effectively.

Sixth, petitioner claims counsel's failure to object to testimony from law enforcement officials that when petitioner was arrested "he was hiding in the attic" was prejudicial because it indicated petitioner was attempting to elude the authorities because he had done something wrong.

When the authorities began to search petitioner's house, his wife informed them petitioner was out of state. After finding petitioner in the attic behind a chimney, his wife claimed petitioner was in the attic looking for C.B. radio equipment. The first time reference was made to petitioner hiding in the attic, counsel did move to have such remark stricken. When the remark was subsequently made, counsel chose not to object. While we have trouble believing petitioner was not hiding in the first place, we still conclude such statements, even if unfounded, were isolated and did not unnecessarily prejudice his defense given the overwhelming evidence of his guilt.

Finally, petitioner submits counsel should have independently evaluated the State evidence because the doctor's testimony on intercourse was subject to attack and a neutron activation test could have been performed to determine if a stain on a shirt which tended to link petitioner to the crime was actually spermatozoa.

We have already discussed the doctor's testimony and found no prejudicial error regarding counsel's handling on such matter. Rather than confront the doctor's testimony with another expert's testimony which could have indicated undue importance should be placed on the doctor's testimony to the jury, counsel opted to let the testimony stand on its own merits. As to the testing, counsel did pursue this option, but, upon being informed by two experts such a test would be useless due to the age of the specimen, decided to forego this avenue. We cannot find any deficiency in counsel's treatment of this issue.

Even had any of these asserted errors led us to find counsel was ineffective for failing to perform an essential duty, we certainly would not have found any prejudice resulted to petitioner because the case against was very strong. Given that petitioner required counsel to only pursue the alibi defense, none of the asserted errors, individually or collectively, would have been sufficient to satisfy the prejudice component.

For these reasons, the postconviction court's determination is affirmed.

AFFIRMED.