

FILED

MAY 23 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KEITH WAYNE BRUNS,)

Applicant-Appellant,)

vs.)

STATE OF IOWA,)

Resister-Appellee.)

61

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88-256

Appeal from the Iowa District Court for Black Hawk County (No. 62533), William G. Klotzbach, Judge.

Applicant appeals from the denial of postconviction relief after a jury found him guilty of first-degree kidnapping and third-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Public Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Scott Lemke, Assistant County Attorney, for resister-appellee.

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

DONIELSON, P.J.

62

A jury convicted Keith Bruns of first-degree kidnapping and third-degree sexual abuse after hearing testimony from a thirteen-year-old girl that Bruns was the person who forced her into a car at gunpoint and drove her out into the country, where he raped her. This court affirmed the convictions in State v. Bruns, 304 N.W.2d 217 (Iowa 1981), but vacated the sentence on the sexual abuse conviction.

Bruns subsequently applied for postconviction relief, but was denied. On appeal from that denial he now alleges ineffective assistance of both trial and appellate counsel. He faults his trial counsel for inadequate investigation and preparation of his case and specifically for (a) failing to file a properly researched and timely motion for dismissal of the kidnapping charge, based on his contention that the confinement or removal of the victim did not exceed that which is incidental to the commission of sexual abuse; (b) failing to present an alibi defense; and (c) failing to object to his conviction for sexual abuse. He faults his appellate counsel for failing to argue that he was ineffectively represented at trial.

In response, the State asserts that Bruns was competently represented at his kidnapping trial and in any event forfeited any ineffective assistance claim by failing to raise it on direct appeal. The State agrees with Bruns, however, that under the facts of this case third-degree

sexual abuse is a lesser-included offense of first-degree kidnapping and that Bruns' sexual abuse conviction should therefore be vacated.

I. Burden of Proof and Judicial Review. The standards for review in claims of ineffective assistance of counsel are well settled and were recently summarized by this court in Ristau v. State, slip op. 5-523 at 3 (April 25, 1989):

Our ultimate concern in claims of ineffective assistance of counsel 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). We review de novo the totality of circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. 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. State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Risdal, 404 N.W.2d at 132. A finding of prejudice requires proof of a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987).

When a postconviction relief applicant claims ineffective assistance of criminal trial counsel, the applicant assumes the burden to establish by a preponderance of the evidence sufficient reason exists for not having raised the issue on direct appeal. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). Bruns claims

ineffective assistance of appellate counsel in failing to raise the issue of ineffective assistance of trial counsel. The same standards applied to trial counsel competency apply in measuring the competency of appellate counsel. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). The analysis is somewhat circular because in order to determine if prejudice resulted under the two-part Losee test, we must first reach the merits of applicant's ineffective assistance of trial counsel claim.

II. Failure to File Timely Motion to Dismiss Kidnapping Charge. Trial counsel filed a motion to dismiss the kidnapping charge on July 31, 1979, based on the theory the abduction of the victim was incidental to and for the purpose of the sexual abuse. The trial court denied petitioner's motion first, because it was untimely and, second, based on the determination that the intent of Iowa Code section 710.2 was to include kidnapping for the purpose of committing sexual abuse and therefore as a matter of law the motion had no merit. Petitioner claims trial counsel was ineffective in failing to timely file a motion to dismiss. He asserts that if the motion had been properly prepared and thoroughly researched with legal support from other jurisdictions, the trial court would have been in a better position to consider the merits of the motion.

Applicant must first show that failure to timely file a motion to dismiss the kidnapping charge, based on a theory that removal or confinement of the victim was merely incidental to the commission of sexual abuse, amounts to failure to perform an essential duty. We find it does not. The Iowa appellate courts had not considered this issue at the time of applicant's trial, July 31, 1979. The automatic charge of kidnapping based on removal or confinement for sexual abuse was not challenged on appeal until 1981 in State v. Rich, 305 N.W.2d 739 (Iowa 1981). Before State v. Rich, it was generally accepted that defendants who had committed sexual abuse might properly be convicted of kidnapping. See State v. Stevens, 289 N.W.2d 592 (Iowa 1980) (defendant convicted of first-degree kidnapping based on defendant's sexual abuse of victim); State v. Steltzer, 288 N.W.2d 557 (Iowa 1980) (defendant convicted of first-degree kidnapping and second-degree sexual abuse as a result of same incident); State v. Rinehart, 283 N.W.2d 319 (Iowa 1979), cert. denied, 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 2d 775 (1980) (defendant convicted of first-degree kidnapping based on defendant's sexual abuse of victim). Hence, we do not find defense counsel's failure to timely raise the issue amounts to failure to perform an essential duty. Trial counsel's actions in this regard were reasonable under prevailing professional norms.

Further, even if defense counsel failed to perform an essential duty in this regard, Bruns cannot show prejudice resulted. When the issue was first presented in State v. Rich, the court considered substantial case law from other jurisdictions and determined Iowa Code section 710.1 (1979) is "applicable only to those situations in which confinement or removal definitely exceeds that which is merely incidental to the commission of sexual abuse." State v. Rich, 305 N.W.2d at 745. The rule set forth in State v. Rich is that:

Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.

Id.

Bruns cannot show by a preponderance of the evidence that the trial court would have adopted the "incidental confinement or removal" standard (which was not Iowa law at the time), much less concluded that petitioner's confinement and removal of his victim did not exist independent from the sexual abuse, if trial counsel had more adequately prepared the motion to dismiss.

Bruns also complains trial counsel did not request the court to expand the jury instructions relating to the removal and confinement so the jury could have the opportunity to consider whether the removal was incidental to the sexual abuse. As we stated above, this was not the law in Iowa at the time of trial. Therefore, counsel's failure to request such an instruction could not amount to failure to perform an essential duty.

III. Failure to Present an Alibi Defense. Bruns claims he informed trial counsel he had an alibi witness, Craig Riggs. Defense counsel made no attempt to speak to Riggs or obtain his presence at Bruns' trial. Bruns did not produce Riggs as a witness during the postconviction relief hearing, so Riggs' trial testimony is purely a matter of speculation. Complaints about failure to call witnesses should be accompanied by a showing their testimony would have been beneficial. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981). Trial counsel testified Bruns said he thought Riggs was at the store where Bruns worked the night in question. Trial counsel obtained copies of checks written by Riggs on the date of the incident. None were written to the store on that date, so defense counsel excluded Riggs as a possible alibi witness. Under the circumstances, we cannot conclude trial counsel's failure to call Riggs amounted to ineffective assistance of counsel.

IV. Failure to Object to Penalty Imposed. Bruns was convicted of first-degree kidnapping and third-degree sexual abuse. Third-degree kidnapping is a lesser-included offense of first-degree kidnapping. State v. Williams, 334 N.W.2d 742, 743 (Iowa 1983), citing State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982). Therefore, entry of judgment on third-degree kidnapping violated Iowa Code section 701.9 (1979). Bruns did not raise this issue on appeal or in postconviction proceedings. Issues not raised in the postconviction proceeding generally cannot be considered on appeal. Schertz v. State, 380 N.W.2d 404, 412 (Iowa 1985). In any event, Bruns cannot claim he was prejudiced by the entry of judgment on third-degree sexual abuse as he was sentenced to life in prison for kidnapping, his sentence for third-degree sexual abuse was to be served concurrently with the kidnapping sentence, and Bruns has discharged that sentence.

V. Ineffectiveness of Appellate Counsel. We find no merit to applicant's claim of ineffective assistance of trial counsel. Therefore, we cannot find appellate counsel ineffective for failing to raise the issue on appeal.

VI. Totality of the Circumstances. We find no specific error of trial or appellate counsel which amounts to ineffective assistance of counsel. Combined acts or errors may, however, violate the sixth amendment right to effective assistance of counsel. Wycoff v. State, 382

N.W.2d 462, 473 (Iowa 1986). We find trial counsel vigorously defended applicant within the range of normal competency. Applicant's conviction and sentence should stand.

AFFIRMED.