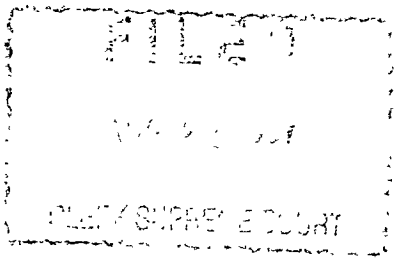
IN THE COURT OF APPEALS OF IOWA 000343

No. 7-231 / 96-1056



GARY ALAN WOOD, SR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, James W. Brown, Judge.

Gary Wood appeals the denial of his application for postconviction relief. **AFFIRMED.**

Richard E. H. Phelps II, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Steve Johnson, County Attorney, and John C. Heinecke, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Gary Wood appeals the denial of his application for postconviction relief. He contends he was denied effective assistance of counsel in his second-degree kidnaping trial.

Gary Wood was convicted, following a jury trial, for second-degree kidnaping. Wood surprised his former girlfriend, Tammra Nell, at her apartment in the early hours of the morning and asked her to go for a ride. Although Wood did not threaten her, she was afraid he would become violent, as he had in the past, if she refused. They drove from Colfax to Newton to Monroe where he stopped the car in front of his parents' house. As he ranted at Nell, he drove away.

At one point Wood put Nell in a headlock and held a gun to her temple. In the country, Wood turned onto a gravel road and stopped. It was still dark. Wood forced Nell from the car and beat her at gunpoint. While Wood was beating Nell, another car came down the road. This passing motorist rescued the woman.

Wood's appeal of his kidnaping conviction was unsuccessful but his ineffective-assistance-of-counsel claim was preserved for postconviction relief. *State v. Wood*, 500 N.W.2d 447 (Iowa 1993).

Wood filed an application for postconviction relief claiming his counsel was ineffective in failing to request Iowa Uniform Criminal Jury Instruction 1000.5:

> A person is "confined" when [his][her] freedom to move about is substantially restricted by force, threats or deception. The person

> may be confined either in the place where the restriction began or in a place to which [he][she] has been removed.
>
> No minimum time of confinement or distance of removal is required. It must be more than slight. The [confinement][removal] must have significance apart from the underlying offense.
>
> In determining whether [confinement][removal] exists, you may consider whether:
>
> 1. The risk of harm to victim was increased.
> 2. The risk of detection was reduced.
> 3. Escape was made easier.

At trial, counsel argued any removal or confinement was incidental to the underlying assault and did not reach the level of kidnaping. Wood now argues the evidence supported this instruction and would have clarified his contention Nell's confinement was part of the underlying assault, not significant apart from it. The post-conviction court concluded Wood's counsel's not requesting the instruction was a reasonable tactical decision to avoid the instruction's statement: "No minimum time of confinement or distance of removal is necessary." The court ruled Wood had not proved ineffective assistance of counsel and denied his application for postconviction relief.

Wood appeals. He contends his counsel was under a duty to request an explanatory instruction on "confinement" and "removal." He argues the jury could not adequately determine whether defendant's acts were sufficient to constitute the offense, or the jury was compelled to find "nonincidental confinement" was sufficient to constitute kidnaping.

When a postconviction applicant asserts an alleged constitutional violation, we resolve the issue by making our own independent evaluation of the totality of the circumstances. *Nims v. State*, 401 N.W.2d 231, 233 (Iowa App. 1986). This is equivalent to a de novo review. *Id.*

The burden of proving ineffective assistance of counsel, by a preponderance of the evidence, is on Wood. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements to demonstrate ineffective assistance of counsel: (1) counsel failed to perform an essential duty, and (2) he was prejudiced by counsel's omission. *Id.* at 564. Wood must overcome the presumption counsel was competent and demonstrate the counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

> A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland v. Washington, 466 U.S. 668, 689, 104 S. Court. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984). To prove counsel's omission prejudiced him, Wood must show his counsel's failure worked to his actual and substantial disadvantage so that a reasonable probability exists that were it not for counsel's error, the result of the proceeding would have been different. *Irving*, 533 N.W.2d at 540.

Wood's trial attorneys testified they did not ask for the uniform jury instruction defining "confinement" and "removal" because of a deliberate trial strategy. Their

jury argument contended the whole incident was an assault and any confinement or removal was incidental to the assault. They concluded the proffered jury instruction stating "no minimum time of confinement or distance of removal is required" would undermine this strategy. Wood's counsel was able to assert his actions were not kidnaping without having to deal directly with the minimum time concept articulated in 1000.5.

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). The effectiveness of counsels' advocacy is not measured by the success or failure of a chosen trial strategy. *State v. Wilkins*, 346 N.W.2d 16, 19 (Iowa 1984). It was Wood's counsel's strategy not to seek the instruction which included the phrase stating "no minimal time [is] required." The failure of this strategy does not mean counsel was ineffective. Clients are disposed to equate competence with success; but a lawyer can only do what the facts and circumstances permit. *State v. Newman*, 326 N.W.2d 78, 795 (Iowa 1982). After a certain course has proven unsuccessful, it is easy to say a different route should have been tried instead. *Id.* This is unfair to counsel, who must make a choice between existing alternatives before the fact. *Id.*

Wood's counsels' strategy was a rational one within the normal range of competency. Their decision to not seek an instruction defining "confinement" and

"removal" was proper. Wood has failed to overcome the presumption his trial counsel was ineffective.

AFFIRMED.