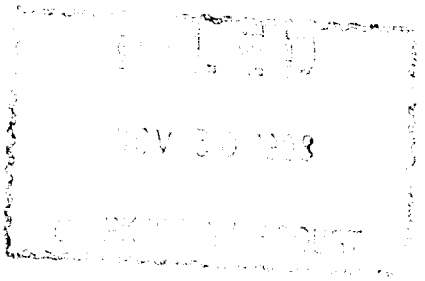
IN THE COURT OF APPEALS OF IOWA

No. 8-417 / 97-1797
Filed November 30, 1998



STATE OF IOWA,
Appellee,

vs.

JOY THERESA RANDOLPH,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

The defendant appeals from her conviction for second-degree fraudulent practices. **AFFIRMED.**

Jeffrey M. Ireland of Eells & Sovern Law Offices, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Hall, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ. Mahan, J., takes no part.

STREIT, J.

Joy Randolph appeals her conviction for second-degree fraudulent practices, claiming her trial counsel was ineffective. We affirm.

In June 1995, Joy Randolph applied for public assistance in Black Hawk County for herself and her two minor children, Chantelle and Travelle. She received Family Investment Program (FIP) benefits, food stamps, and medical benefits worth about $426 per month. An employee of the Department of Human Services (DHS), Kim Knapek, informed Randolph she needed to report all changes in her living circumstances within ten days. At that time Randolph was living in Waterloo.

In August 1995, Randolph took the children to live with her sister in Arkansas. Randolph and her boyfriend traveled around the country. The boyfriend's mother forwarded Randolph's mail to her. In September 1995, Randolph enrolled the children in school in Arkansas. Randolph continued to receive welfare benefits in Iowa until December 9, 1995, when she advised DHS she was moving out of state. Randolph now lives in Arkansas.

Randolph was charged with fraudulent practices in the second degree, in violation of Iowa Code section 714.10. At her trial, Randolph testified she only removed her children temporarily from the state, and intended to bring the children back to Iowa once she was reinstated in her former job. A jury found her guilty of second-degree fraudulent practices. She was given a suspended sentence and placed on probation.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *Bettis v. State,* 547 N.W.2d 635, 637 (Iowa App. 1996).

Randolph first contends she received ineffective assistance due to her counsel's failure to file a motion for adjudication of law points. She claims her counsel should have sought a determination whether she was eligible to receive public assistance benefits when her children were only temporarily absent from the state.

Only purely legal questions are appropriate for resolution by a motion to adjudicate law points. *State v. McCright,* 569 N.W.2d 605, 608 (Iowa 1997). Here, the question whether the children were temporarily absent from the state was a question of fact. We determine a motion to adjudicate law points would not have been appropriate under the circumstances of this case. Randolph has failed to show she received ineffective assistance of counsel on this ground.

Randolph next claims she received ineffective assistance because her trial counsel did not propose proper jury instructions to the court. She asserts defense counsel should have presented an instruction which specifically addressed whether she would be eligible for public assistance if the children were temporarily absent from the state.

The court gave a jury instruction based on Uniform Jury Instruction 1400.25.[1] Randolph has not shown that, even if other jury instructions had been proposed, the district court would have accepted them. A reviewing court cannot predicate error on speculation. *State v. Douglas,* 485 N.W.2d 619, 625 (Iowa 1992). We could only speculate whether the court would have adopted the proposed instructions, especially since the court indicated a reluctance to depart from the uniform instructions. Randolph has failed to show she received ineffective assistance of counsel on this ground.

Finally, Randolph contends she received ineffective assistance because her trial counsel failed to mitigate expenses. The State presented two witnesses from Arkansas who testified Randolph's children were enrolled in school there. As part of her sentence, the court assessed the costs of transporting these witnesses to Iowa to Randolph. Randolph asserts her trial counsel should have stipulated to the testimony introduced by these witnesses in order to mitigate expenses. We find the decision not to stipulate to the testimony of the two Arkansas witnesses was a strategic one. By

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[1] The jury instruction read:

INSTRUCTION NO. 11.

The State must prove both of the following elements:

1. Between the 4th day of September, 1995, and the 2nd day of January, 1996, the defendant concealed facts or circumstances affecting her entitlement to financial assistance.

2. She did the acts with the intent to defraud.

If the State has proved both of the elements, the defendant is guilty. You must then determine the degree of Fraudulent Practice as explained to you in Instruction No. 12. If the State has failed to prove either of the elements, the defendant is not guilty.

having the witnesses present at the criminal trial, defense counsel was able to cross-examine them in an attempt to bolster Randolph's claim she only placed the children in Arkansas temporarily. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *State v. Kone,* 557 N.W.2d 97, 102 (Iowa App. 1996).

AFFIRMED.