

IN THE COURT OF APPEALS OF IOWA

No. 16-0630
Filed November 22, 2017

JACK LEONARD HAYS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Jeanie K. Vaudt, Judge.

An applicant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Karmen R. Anderson of The Law Office of Karmen Anderson, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Kyle P. Hanson, Assistant Attorney General, for appellee State.

Considered by Vogel, P.J., Potterfield, J., and Scott, S.J. Mullins, J., takes no part.

PER CURIAM.

Jack Hays appeals the district court's denial of his application for postconviction relief (PCR). He asserts the district court judge should have recused herself from hearing his postconviction matter because she worked for the attorney general's office at the time his direct appeal was pending. He also asserts his PCR counsel provided ineffective assistance by failing to be prepared for the PCR trial, resulting in structural error.

I. Background Facts and Proceedings.

Hays was convicted of three counts of second-degree sexual abuse and one count of first-degree burglary. See *State v. Hays*, No. 11-0669, 2012 WL 4513885, at *1 (Iowa Ct. App. Oct. 3, 2012). The facts of the underlying criminal case are not pertinent to this PCR appeal and need not be repeated here. See *id.* at *1–4. In July 2013, Hays filed a PCR application raising a number of constitutional claims. He also filed motions to recuse the PCR judge in light of the judge's employment with the attorney general's office at the time Hays's direct appeal was pending. The court denied the recusal motions. The matter proceeded to trial on December 21, 2015, and the PCR court issued a decision denying the application on March 22, 2016. Hays filed a posttrial motion to amend and enlarge, which was denied by the PCR court. Hays now appeals.

II. Scope and Standard of Review.

Our review of the district court's denial of a recusal motion is for an abuse of discretion. See *State v. Millsap*, 704 N.W.2d 426, 432 (Iowa 2005). "The court abuses its discretion when its decision is based on untenable grounds or it has acted unreasonably. 'A ground or reason is untenable when it is not supported by

substantial evidence or when it is based on an erroneous application of the law.”

Id. (citations omitted).

Our review of a claim of ineffective assistance of postconviction counsel is *de novo*. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Recusal.

Hays asserts the PCR court should have granted his motion for recusal because the judge was an attorney with the attorney general’s office at the time his direct appeal was pending and, as such, had privity with the attorneys representing the State against him.¹ In denying the motion, the district court stated it found “no basis” for recusal and concluded it could “be fair and impartial in making the ultimate determination in this case.”

“[W]hen a judge does not recuse himself, the burden is on the party seeking recusal to prove that he should have.” *Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001). “[S]peculation is not sufficient, and ‘[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.’” *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994) (second alteration in original) (citation omitted).

The Iowa Code of Judicial Conduct provides:

(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances:

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¹ On appeal, Hays asserts Judge Vaudt was employed in the criminal appeals division of the attorney general’s office. We note there was no evidence offered at the hearing on this motion that Judge Vaudt was previously employed in the criminal appeals division of the attorney general’s office. At most, Hays’s motion for recusal alleged Judge Vaudt “worked on the second floor, wherein the criminal appeals are handled” and “was working the Assistant Attorney General’s Office while the applicant had filed numerous appeals that were contested by that office.”

(6) The judge:

. . . .

(b) served in governmental employment and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publically expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

Iowa Code of Judicial Conduct 51:2.11. To the extent Hays asserts Judge Vaudt should have disqualified herself based on her work for the attorney general's office, such disqualification is warranted only if she "personally and substantially" worked on Hays's criminal appeal. Hays offered no evidence Judge Vaudt worked on his criminal appeal, but he asserts on appeal he would not have had access to this proof. However, such evidence could have included any public court documents filed in the appeal signed by Judge Vaudt. Due to the lack of evidence Judge Vaudt personally and substantially worked on Hays's criminal appeal while she was employed with the attorney general's office, we conclude the district court did not abuse its discretion in denying Hays's motion for recusal.

IV. PCR Ineffective Assistance.

Hays also asserts his PCR counsel provided ineffective assistance because counsel was not "adequately prepared." In support, Hays points to counsel's statements at a pretrial hearing where counsel stated he had been "brought into this, you know, quite late into the game." Hays claims this statement indicates PCR counsel "had not had sufficient time to prepare for trial." Hays claims "counsel inability to convince the court that he should be granted a continuance" shows counsel's ineffectiveness. He asks that we consider this a structural error or assume he was prejudiced by counsel's actions.

To prove this claim of ineffective assistance of counsel, Hays must demonstrate by a preponderance of the evidence that counsel failed to perform an essential duty and he was prejudiced as a result. See *Lado*, 804 N.W.2d at 251. “An attorney breaches an essential duty when ‘counsel’s representation [falls] below an objective standard of reasonableness.’” *Id.* (alteration in original) (citation omitted). To establish prejudice, Hays must prove “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” See *id.* (citation omitted). However, no proof of prejudice is needed if counsel’s actions or inactions resulted in a structural error—“errors ‘affecting the framework within which the trial proceeds.’” *Id.* at 252 (citation omitted). Such structural errors include:

(1) [when] counsel is completely denied, actually or constructively, at a crucial stage of the proceeding; (2) where counsel does not place the prosecution’s case against meaningful adversarial testing; or (3) where surrounding circumstances justify a presumption of ineffectiveness, such as where counsel has an actual conflict of interest in jointly representing multiple defendants.

Id.

Based on our review of the record, we conclude Hays has failed to prove PCR counsel was ineffective. The statement Hays references in his brief in support of his assertion counsel was not prepared for trial was made by PCR counsel to the court two months before trial as part of an explanation as to why the PCR application had been recently amended and why counsel had filed a clarification of Hays’s pro se claims. It was not made by PCR counsel in a request for a continuance to convey to the court counsel’s unpreparedness. In fact, a review of the PCR docket and of the transcript of the trial reveals no request from

PCR counsel for a continuance of the trial due to a lack of time to prepare. To the contrary, the only request for a continuance was made by Hays himself, not counsel, at a hearing in October, asking for additional time to prepare for trial. The court granted Hays's request, continuing the trial for one month. With respect to counsel, the docket reveals counsel filed a number of motions on Hays's behalf leading up to the trial. Further, the transcript of the trial indicates counsel was prepared and thoroughly presented Hays's claims over the two-day PCR trial. We find no support in the record that counsel was unprepared for trial or that a structural error occurred. Hays does not assert what counsel should have done or how, if at all, the result of the proceeding would have been different if counsel would have performed differently. We therefore deny Hays's ineffective-assistance claim with respect to his PCR counsel.

V. Conclusion.

We conclude the district court did not abuse its discretion in denying Hays's motion for recusal, and we deny Hays's claim of ineffective assistance of PCR counsel. The district court's decision denying Hays's PCR application is affirmed.

AFFIRMED.