

IN THE COURT OF APPEALS OF IOWA

No. 0-452 / 09-0853
Filed September 9, 2010

DANIEL LADO,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Applicant appeals the district court's dismissal of his petition for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, John Judisch, Assistant County Attorney, and Celine Gogerty, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Eisenhauer and Mansfield, JJ. Tabor, J. takes no part.

SACKETT, C.J.

Applicant, Daniel Lado, appeals the district court's dismissal of his application for postconviction relief. Following the State's motion for summary judgment and a hearing on the motion, the district court dismissed the application for want of prosecution. Lado contends the failure to timely proceed with the action was a result of ineffective assistance of counsel. We affirm and preserve Lado's claim for additional postconviction relief proceedings.

I. BACKGROUND AND PROCEEDINGS. Lado pleaded guilty to dependent adult abuse in July of 2006. Pursuant to a plea agreement, a sex abuse charge was dismissed. The court imposed a ten-year prison sentence, suspended it, and placed Lado on probation for two years. In January 2007, following an evidentiary hearing, Lado's probation was revoked and his prison sentence was reinstated. Lado did not file a direct appeal from the revocation but filed several requests asking the court to reconsider his sentence. All of these requests were considered and denied.

Lado then challenged the revocation by filing an application for postconviction relief on May 9, 2007.¹ Along with his application for postconviction relief, Lado requested appointment of counsel. The case stalled

¹ His application contended the revocation was in error because, among other things, his failure to attend treatment was not because he refused to go, but because his therapist postponed the appointment. He also claimed there was confusion in the terms of his probation. Specifically, he claimed he was only to be placed on the adult abuse registry and not required to register as a sex offender. He also added that he had difficulty understanding the revocation hearing because he did not speak English very well. These claims were also made in Lado's previous requests for reconsideration of his sentence.

until the application for counsel was brought to the court's attention nearly eighteen months after the postconviction relief petition was filed.

On November 5, 2008, the district court appointed counsel for Lado and ordered counsel to confer with Lado within sixty days and advised counsel and Lado the case was under a rule 1.944 dismissal notice.² On December 10, 2008, within the sixty days, the court-appointed counsel requested permission to obtain a copy of Lado's case file at State expense. Counsel made no application for continuance. On January 7, 2009, the court granted counsel's request ordering the Polk County clerk of court to copy the file and transcripts at State expense.

On January 9, 2009, the State filed a motion for summary judgment and dismissal. It claimed there was sufficient evidence to support the revocation and the application should be dismissed because the action had not been tried within the time limits required by Iowa Rule of Civil Procedure 1.944. Lado's counsel asked for additional time to respond but made no application for reinstatement as

² Rule 1.944 requires dismissal of a case if no action is taken for an extended period of time. It provides in part,

1.944(1) It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.

1.944(2) All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be tried prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in rule 1.442 of the docket number, the names of parties, counsel appearing, and date of filing petition. The notice shall state that such case will be subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte.

provided for under Iowa Rule of Civil Procedure 1.944(6). The matters came on for hearing on March 18, 2009. Lado was represented by counsel at the hearing and the court noted counsel was prepared to resist the State's motion for summary judgment. The hearing was not transcribed. On May 6, 2009, the court issued an order dismissing Lado's application for post conviction relief. The district court found the case was dismissed by operation of rule 1.944. It determined Lado and his counsel had received adequate notice the case would be dismissed by operation of law if no action was taken before December 31, 2008. The court found no basis to reinstate the case and ordered that the application be dismissed. Lado now appeals contending the dismissal under rule 1.944 was a result of ineffective assistance of counsel.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. We evaluate ineffective assistance of counsel claims de novo, evaluating the entire record and the totality of the circumstances. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). To establish a claim of ineffective assistance of counsel, Lado must prove "(1) his attorney's performance fell outside a normal range of competency (2) resulting in prejudice." *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We presume counsel is competent and the applicant must prove counsel's performance was deficient by a preponderance of the evidence. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). To show prejudice the applicant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Collins*, 588 N.W.2d at 402 (citations omitted). If the record is

not adequate to make these evaluations, we may preserve the claim for further postconviction relief proceedings. *State v. Smith*, 573 N.W.2d 14, 22 (Iowa 1997). “[P]reserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim.” *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

The order appointing Lado’s counsel informed both Lado and his counsel that dismissal for want of prosecution was nearing. While it is possible that counsel could advance some excuses for failing to seek continuance of the case and then failing to seek its reinstatement, we cannot conceive any valid excuse for this failure. The delay by the court in the appointment of counsel in all probability would have justified a continuance and may have justified a reinstatement under the same facts if the motion were made. Counsel’s failures resulted in Lado losing his day in court on his postconviction application and his opportunity to make his challenges to the revocation of his probation heard. See *Lamphere v. State*, 348 N.W.2d 212, 215-16 (Iowa 1984) (finding counsel ineffective when attorney allowed his client’s appeal to be dismissed for failure to prosecute, did not seek to have the appeal reinstated, and did not tell client the appeal had lapsed until a year later because it was tantamount to withdrawing from the case and abandoning the appeal without first protecting his client’s rights). We conclude Lado has proved counsel breached an essential duty by failing to seek a continuance to prevent dismissal under rule 1.944.

Lado must also prove he was prejudiced by this breach. We cannot determine whether there is a reasonable probability that the result of the proceeding would have been different had counsel sought a continuance. Deciding this issue requires further development of the record. We therefore preserve for a further postconviction action for consideration of Lado's claim that he was prejudiced by his attorney's failure here.

AFFIRMED.