

IN THE COURT OF APPEALS OF IOWA

No. 1-416 / 10-1170
Filed June 29, 2011

HOWARD S. RUSSELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his convictions for second-degree sexual abuse, lascivious acts with a child, and indecent exposure. **AFFIRMED.**

Jeremy J. Gray of Newman Law Office, P.C., Forest City, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.**I. Background Facts & Proceedings.**

Howard Russell was convicted of sexual abuse in the second degree, in violation of Iowa Code sections 702.1(3) and 709.3(2) (1999); lascivious acts with a child, in violation of section 709.8; and indecent exposure, in violation of section 709.9. The State alleged Russell had engaged in sexual contact with his grandson, D.M. Russell's convictions were affirmed on direct appeal.¹ *State v. Russell*, No. 02-0946 (Iowa Ct. App. Sept. 24, 2003).

On April 25, 2005, Russell filed an application for postconviction relief. He later amended his petition to claim he received ineffective assistance due to counsel's failure to adequately cross-examine the alleged victim. At the postconviction hearing Russell testified that during the criminal trial he questioned counsel's failure to ask D.M. any questions. Russell testified he was told, "you sit there and be quiet." Defense counsel denied making this statement to Russell.

The district court denied Russell's application for postconviction relief. The court noted it "paid particular attention to the credibility of the parties and the witnesses as revealed by their appearance and demeanor." The court concluded, "It is quite evident from the record that the decision not to cross-examine a seven-year-old boy regarding his allegations of molestation at the hands of his grandfather was a deliberate strategic one." The court also

¹ Russell's sentences had been enhanced pursuant to Iowa Code section 901A.2(1) (2001). The court of appeals determined chapter 901A did not apply, and the case was remanded for resentencing. *State v. Russell*, No. 02-0946 (Iowa Ct. App. Sept. 24, 2003).

concluded Russell had not shown he was prejudiced by counsel's performance. The court determined Russell had not shown ineffective assistance of counsel. Russell appeals the district court's decision denying his request for postconviction relief.

II. Standard of Review.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume representation by counsel is competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

III. Merits.

Russell claims he received ineffective assistance because defense counsel failed to cross-examine D.M. He points out there are various discrepancies between D.M.'s testimony at trial and his statements during his deposition. Russell states the entire prosecution depended upon the credibility of D.M. and defense counsel should have attempted to undermine D.M.'s credibility through cross-examination.

D.M. was seven years old at the time of the criminal trial. Defense counsel could well have made a strategic decision not to "go after" this young child by questioning him about the differences between his testimony at trial and at his deposition. Furthermore, despite aggressive questioning during the

deposition, D.M. did not change his essential statements about what happened with Russell. If defense counsel brought up prior inconsistent statements in the deposition, the State would have been able to rebut using prior consistent statements from the same deposition.²

There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance. *Heaton v. State*, 420 N.W.2d 429, 431 (Iowa 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984)). We should resist the temptation to second-guess counsel's performance after there has been a conviction. *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S. Ct. 1388, 1403, ___ L. Ed. 2d ___, ___ (2011). An applicant must show counsel failed to act reasonably considering all of the circumstances. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 674.

"[A]n attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel." *State v. Wilkins*, 346 N.W.2d 16, 18 (Iowa 1984). Just because there has been a lack of success in a particular strategy does not mean there has been ineffective assistance of counsel. See *Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998). Strategic decisions made after a "thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *State v. Fountain*,

² In addition, there was a videotape of D.M.'s statements to an interviewer. In ruling on a motion in limine, the district court ruled the videotape was inadmissible, "except for the possible purpose of rebuttal." By not cross-examining D.M., defense counsel foreclosed the possibility that the videotape would be admitted.

786 N.W.2d 260, 266 (Iowa 2010) (quoting *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001)).

We agree with the district court's conclusion, "It is quite evident from the record that the decision not to cross-examine a seven-year-old boy regarding his allegations of molestation at the hands of his grandfather was a deliberate strategic one." There is no evidence this decision was made based on inattention, rather than tactics. See *Ledezma*, 626 N.W.2d at 143. Russell has not shown defense counsel's strategy fell outside the broad scope of a reasonably competent attorney. See *id.* We conclude Russell has failed to show he received ineffective assistance due to counsel's failure to cross-examine the child victim in this case.

We affirm the decision of the district court denying Russell's application for postconviction relief.

AFFIRMED.