

IN THE COURT OF APPEALS OF IOWA

No. 1-891 / 10-0518
Filed February 1, 2012

THOMAS DAVIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane,
Judge.

Thomas Davis appeals from the district court order denying his application
for postconviction relief. **AFFIRMED.**

Michael J. Piper of Dickey & Campbell Law Firm, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney
General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant
County Attorney, for appellee State.

Heard by Eisenhauer, P.J., Danilson, J., and Sackett, S.J.*

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

EISENHAUER, P.J.

Thomas Davis appeals from the district court order denying his application for postconviction relief. He contends his trial and postconviction counsel were ineffective in several respects. He also contends the court erred during the postconviction trial by denying his right to effective counsel. Because we find Davis has failed to show his trial counsel was ineffective or was denied his right to counsel, we affirm.

1. Backgrounds Facts and Proceedings. Thomas Davis was charged with and convicted of four counts of sexual abuse in the third degree based on allegations he sexually abused A.D. between March 1 and September 15, 2005. A.D. was fourteen years old at the time the abuse occurred. In 1999, Davis had pled guilty to lascivious acts with a minor. The victim in the earlier case was also A.D.

Before the third-degree sexual abuse trial, Davis filed a motion in limine seeking to exclude evidence of prior acts of sexual abuse he committed against A.D. The district court ruled A.D. was allowed to testify regarding the prior acts committed against her. The court also held Davis's own statements regarding the acts were admissible, but not evidence regarding his prior charge, guilty plea, and conviction. No other evidence of Davis's prior acts was admissible.

Davis was sentenced to a term of imprisonment not to exceed twenty-five years on each count of sexual abuse, with the sentences running concurrently. He also received a special sentence pursuant to Iowa Code section 903B.1 (2005), committing him to the custody of the Iowa Department of Corrections for life. Davis appealed, arguing the evidence of his prior abuse of A.D. should not

have been admitted because it was not relevant and highly prejudicial. He also argued the jury instruction advising the jury regarding its use of such evidence was confusing. This court affirmed Davis's convictions in *State v. Davis*, No. 06-1496 (Iowa Ct. App. Dec. 28, 2007).

On December 11, 2008, Davis filed an application for postconviction relief, which was amended May 13, 2009. Trial on the application was heard November 23, 2009. The district court denied the application and dismissed it with prejudice. Davis appeals.

II. Scope and Standard of Review. We generally review the denial of an application for postconviction relief for the correction of errors at law. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). Where constitutional error is alleged, our review is de novo "in light of the totality of the circumstances and the record upon which the postconviction court's rulings was made." *Id.*

III. Ineffective Assistance of Counsel. Davis contends his trial and postconviction counsel each rendered ineffective assistance in several regards.

To succeed on a claim of ineffective assistance of counsel, Davis must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted from the failure. See *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010). The first element is proved if it is shown counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Trial counsel's performance is measured objectively by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances. *Id.*

In order to prove prejudice, Davis must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” See *id.* Davis “need only show that the probability of a different result is ‘sufficient to undermine confidence in the outcome.’” See *id.*

A. Trial counsel.

Davis contends his trial counsel was ineffective in a number of respects. Specifically, he argues counsel was ineffective (1) in failing to depose key witnesses; (2) in failing to call key witnesses at trial; (3) in failing to consult with and retain an expert in child psychology and child abuse victims to review A.D.’s counseling and psychiatric files and testify at trial; (4) in failing to interview, depose, and investigate the professionals and service-providers involved in the child-in-need-of-assistance case regarding A.D. and call them to testify; (5) in failing to obtain his employment records to investigate his whereabouts at the time the alleged abuse occurred; (6) and in failing to properly advise him as to the risks of going to trial, the potential sentence he was facing, and the advisability of accepting a plea offer.

Davis complains his trial counsel failed to depose A.D.’s best friend, her boyfriend, and his roommate at the time the abuse was alleged to have occurred. He argues counsel should have then called those witnesses to provide exculpatory evidence at trial. The district court found Davis “failed to demonstrate what those witnesses would have testified had they been called at trial” and therefore “failed to show how their testimony would have changed the outcome.” We agree. Davis makes nothing more than speculative claims calling these witnesses would have elicited exculpatory evidence that would have

changed the outcome of trial. He does not state what evidence would have been elicited had they testified or how it would have changed the outcome of trial. The speculative nature of his claims does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred.

We likewise find Davis has not shown his counsel was ineffective in failing to depose and call as a witness at trial his Intra Family Sexual Abuse Program counselor, Dr. Huston. Davis's trial counsel testified at the postconviction hearing he did not want to make the focus of Davis's trial his prior conviction for lascivious acts with a minor. Counsel made the strategic decision not to call Dr. Huston, which would have opened the door for testimony regarding the risk of recidivism by sex offenders. To the extent Dr. Huston was able to testify regarding Davis's participation in the IFSAP, this evidence was available at trial through Davis's testimony. We have the benefit of Dr. Huston's testimony from the postconviction proceedings. This testimony bolsters counsel's strategic decision not to call him as a witness. Dr. Huston said he would have testified that sex offenders "say all the right things and then go on to reoffend." We cannot find counsel's strategic decision not to call Dr. Huston resulted in ineffective assistance of counsel. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (holding trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance).

Davis argues his trial counsel was ineffective in failing to retain a child psychology expert to testify at trial regarding victims of child sexual abuse. Specifically, he claims trial counsel should have investigated potential experts regarding child sexual abuse and, in particular, instances of new reports of abuse

by children who have been previously abused. He fails to show any studies of new reports exist or to explain how the testimony of an expert witness would have changed the outcome of his trial.

We also reject Davis's claim his trial counsel was ineffective in failing to depose and obtain testimony from providers involved in the juvenile court proceedings that resulted from Davis's abuse of A.D. His only claim is a "thorough investigation would have included conversation with Davis' [sic] juvenile court trial counsel to investigate any other rehabilitation Davis had participated in." Davis does not state how the outcome of trial would have changed had counsel made this inquiry.

Davis claims counsel was also ineffective in failing to obtain his employment records in order to investigate his whereabouts at the time the alleged abuse occurred. The trial information alleged the crimes occurred over a period of time from March 1 through September 15, 2005. The jury instructions also encompassed the same period of time. Davis failed to present employment records at the postconviction hearing. Because the content of these records is unknown, we cannot determine whether they would have changed the outcome of trial. Davis has failed to show he was prejudiced by counsel's failure.

Finally, Davis argues his trial counsel was ineffective in failing to properly advise him of the risks of going to trial, the sentence he potentially faced if found guilty, and the advisability of accepting a plea offer. At the postconviction hearing, Davis's trial counsel testified it was his custom to advise his clients of the possible penalties they faced. Counsel also testified he specifically recalled Davis was adamant he would not entertain any plea offers and firmly rejected

them. Counsel also testified he and Davis discussed his decision to testify and the possible repercussions of his testimony. Davis has failed to show counsel breached an essential duty.

All of Davis's claims suffer from the same shortcoming; his evidence at the postconviction hearing fails to show how more competent representation would have changed the outcome of his trial. See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) ("When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. . . . The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome."). Because Davis failed to show his trial counsel breached an essential duty and he was prejudiced as a result of that failure, he has not established his trial counsel was ineffective.

B. Postconviction counsel.

David next contends his postconviction counsel was ineffective in several respects: (1) in failing to present evidence regarding expert child abuse victim testimony and how it would have impacted the outcome of his trial; (2) in failing to present evidence of how other witnesses would have testified at his trial; (3) in failing to those witnesses and present any relevant testimony at his hearing; (4) in failing to introduce his employment records at trial; (5) and in failing to elicit testimony from his trial counsel regarding any discussions of *Alford* pleas with him.

Essentially, Davis attacks his postconviction counsel's performance for failing to present evidence to show the requisite prejudice necessary to establish

his trial counsel was ineffective as outlined by the postconviction court and recounted above. Because the record is not fully developed with regard to these matters, any claims of ineffective assistance of postconviction counsel should be addressed in possible future postconviction proceedings.

IV. Denial of Right to Counsel by the Postconviction Court. Finally, Davis contends the postconviction court denied him his right to counsel during the postconviction hearing. At the hearing, Davis participated from prison via conference call. At the end of the direct examination of his trial counsel, Davis asked to speak to his postconviction counsel in private. The postconviction court denied the request, stating the facilities could not accommodate the request because there was only one phone line and, even if counsel picked up the phone to hear Davis privately, counsel's responses would have been heard by all in attendance in the courtroom. The court then stated, "I don't know how I can conduct without everybody leaving this room. And I'm not leaving my courtroom." Davis did not object and was told by the court he could ask questions of the witness. After his attorney cross-examined trial counsel, Davis asked a series of questions. Davis argues the court could have called a recess to allow Davis and his counsel to confer in private.

We conclude Davis has not shown his right to counsel was denied by the postconviction court's ruling. Postconviction proceedings are civil actions. *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996). Because an inmate does not have a right to be present at a civil trial, Davis did not have a right to attend the postconviction hearing. *Id.* Although due process requires "fundamental fairness" in the postconviction proceedings, we find Davis was accorded the

fundamental fairness due to him. See *id.* at 826 (finding an applicant was afforded fundamental fairness where he received advance notice of the hearing and telephone conference, was represented by counsel at the hearing, and was given an opportunity to present testimony orally by telephone). Davis also provides us with nothing as to what he wished to speak with counsel about or how the outcome of the postconviction hearing would have been different if he had been able to speak with his attorney.

Because Davis failed to prove he was denied counsel, we affirm.

AFFIRMED.

Danilson, J., concurs; Sackett, S.J., concurs specially.

SACKETT, S.J. (concurring specially)

I concur with the majority opinion but write separately to express my concern that Davis's request to speak privately with his attorney by telephone was denied. I recognize the limitations of the Polk County Courthouse may make it inconvenient to honor such a request, but certainly it was not impossible. Yet the failure to allow Davis's simple request for a private communication with his attorney suggests more concern with efficiency than with fairness. The majority has correctly denied relief on this record finding there is no evidence here to prove Davis's request for the communication would have rendered a different result. However, it is difficult to understand how under the circumstances here Davis could have made such a record. If there is evidence to support his claim, he should not be foreclosed to do so in further postconviction proceedings.