

IN THE COURT OF APPEALS OF IOWA

No. 2-961 / 11-1494
Filed February 27, 2013

TYRONE SMITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

A postconviction relief applicant contends that his original trial counsel was ineffective in failing to seek dismissal of the charges against him on speedy trial grounds. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

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

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Tyrone Smith was found guilty of several crimes. See *State v. Smith*, No. 08-0865, 2009 WL 2952036, at *1 (Iowa Ct. App. Sept. 2, 2009). On appeal, Smith raised a number of issues, including a contention that his trial attorney was ineffective in failing to seek dismissal on speedy trial grounds. *Id.* This court affirmed Smith's judgment and sentence, and preserved the speedy trial issue for postconviction relief. *Id.* at *5.

Smith proceeded to raise the issue in an application for postconviction relief. Following a hearing at which Smith and his trial attorney testified, the district court denied the application.

This appeal followed. The right is set forth in Iowa Rule of Criminal Procedure 2.33(2)(b) as follows:

If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

Pertinently for this case, if a defendant withdraws a waiver of the speedy trial right, "the defendant must be tried within ninety days from the date of withdrawal unless good cause to the contrary be shown." *State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981).

The trial record reveals that Smith executed a written waiver of his right to a speedy trial but, a day later, changed his mind and filed a pro se withdrawal of the waiver. Smith failed to serve the document on the prosecutor. When his attorney learned of the filing, she talked to Smith about the reasons for executing

the written waiver and, for approximately three months, proceeded as if the waiver were still in place.

In time, the State moved for a continuance of trial. By this time, more than ninety days had elapsed from the date Smith filed his pro se withdrawal of his speedy trial waiver.

At a hearing on the State's motion, Smith's attorney advised the court that Smith objected to the delay. She reasserted Smith's right to a speedy trial, and the court formally acknowledged Smith's withdrawal of his written speedy trial waiver. The case proceeded to trial within ninety days of this formal acknowledgment but not within ninety days of Smith's pro se filing.

Smith contends his trial attorney was ineffective in failing to insist on having him tried within ninety days of his pro se filing or in seeking dismissal when he was not brought to trial within that timeframe. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (setting forth the elements for proof of an ineffective-assistance-of-counsel claim); *State v. Utter*, 803 N.W.2d 647, 653 (Iowa 2011) (“[T]o provide reasonably competent representation when a criminal defendant asserts his or her speedy trial rights, counsel must ensure that the State abides by the time restrictions established in Iowa Rule of Criminal Procedure 2.33. Counsel’s failure to do so amounts to a failure to perform an essential duty.”). On our de novo review, we are not persuaded by this contention. *See Utter*, 803 N.W.2d at 651 (setting forth the standard of review).

As noted, Smith failed to serve the document withdrawing the waiver of his speedy trial right. See Iowa R. Civ. P. 1.442(1)¹ (stating “every written motion including one which may be heard ex parte” must be served on each of the parties in a case.). That omission precluded the court from taking action on the document. See Iowa R. Civ. P. 1.442(7) (“Action shall not be taken on any paper until a certificate of service is filed in the clerk’s office.”). While Smith’s attorney could have quickly rectified the omission upon learning of it, she testified that she did not because Smith “wanted witnesses deposed” and Smith “told [her] several times that he believed the depositions would establish that there were some pretty significant differences between the witnesses’ account[s].” She further stated that, as the original speedy trial deadline approached, she did not feel it was in Smith’s best interests to rush toward trial without having all the depositions taken and “without being thoroughly prepared.” She acknowledged Smith was not happy with the delays and would have preferred to have everything done within ninety days. However, in her opinion, “[h]e understood ultimately that there was a reason why things needed to happen in the time frame that they did.”

It is apparent that Smith’s attorney decided not to immediately follow up on Smith’s pro se withdrawal of his speedy trial waiver in accommodation of his desire to have witnesses deposed for trial. Her strategic decision to pursue discovery rather than insist on the speedy trial deadline that would have run from the time of Smith’s pro se filing was well within the scope of her authority. See

¹ Iowa Rule of Criminal Procedure 2.34(2) provides that “[s]ervice and filing of written motions, notices, orders and other similar papers shall be in the manner provided in civil actions.”

State v. LeFlore, 308 N.W.2d 39, 41 (Iowa 1981) (“Defense counsel acting within the scope of his or her authority may waive [the speedy trial] right on the defendant’s behalf without the defendant’s express consent.”).

We conclude Smith’s attorney did not breach an essential duty in failing to insist on trial within ninety days of Smith’s pro se filing and in failing to seek dismissal when trial did not take place within that timeframe. For that reason, we agree with the district court that his ineffective-assistance-of-counsel claim must fail.

We affirm the district court’s denial of Smith’s postconviction relief application.

AFFIRMED.