

**IN THE COURT OF APPEALS OF IOWA**

No. 3-014 / 11-1641  
Filed March 27, 2013

**JOHN R. ALLARD,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Wapello County, Lucy J. Gamon,  
Judge.

John R. Allard appeals denial of his application for postconviction relief  
and alleges ineffective assistance of postconviction counsel. **AFFIRMED.**

Robert Breckenridge, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Lisa Holl, Wapello County Attorney, and Ron Kelly, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

**DANILSON, J.**

John R. Allard appeals the district court dismissal of his application for postconviction relief. Allard contends his postconviction counsel committed structural error, and thus rendered ineffective assistance. Because we conclude Allard fails to establish structural error, we affirm.

**I. Background Facts and Proceedings.**

A jury found Allard guilty of assault causing serious injury, domestic abuse assault, and harassment in the first degree. Allard appealed, alleging insufficient evidence for conviction and a habitual offender determination.<sup>1</sup> This court affirmed all convictions.

Allard subsequently filed a petition alleging ineffective assistance of trial and appellate counsel. Allard's application was denied after hearing. Counsel appointed for the instant appeal filed a motion to withdraw, alleging frivolous appeal, which was denied under the recent change to Iowa Rule of Appellate Procedure 6.1005(1).

In his application for postconviction relief, Allard alleged his trial counsel was ineffective because he allowed the alleged victim to testify as to hearsay statements including prior bad acts, failed to introduce a psychiatric report regarding the witness's mental illness, and failed to object to opinion testimony that photographic evidence depicted blood. Allard also claimed his counsel on direct appeal was ineffective by failing to raise a speedy trial claim as a result of the 170-day delay between his jury trial and hearing on habitual offender status.

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<sup>1</sup> Allard's appellate defender did not raise ineffective-assistance-of-counsel or speedy-trial claims.

In the instant appeal, Allard alleges his postconviction counsel was not only ineffective, but so substandard that structural error occurred; thus, he claims prejudice may be presumed. He seeks a new hearing on his application for postconviction relief.

## **II. Scope and Standard of Review.**

Generally, we review postconviction proceedings for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). Applications that raise an ineffective-assistance-of-counsel claim present a constitutional challenge, which we review de novo. *Id.* Allard has a statutory right to effective assistance of counsel on his application for postconviction relief. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011) (citing *Dunbar v. State*, 515 N.W.2d 12, 14-15 (Iowa 1994) for the proposition that Iowa Code section 822.5 “provides a right to counsel in postconviction relief proceedings which necessarily implies “effective assistance”). Although the right is statutory in origin, we still apply a de novo review. *Id.*

## **III. Discussion**

If postconviction counsel is ineffective, the applicant may raise an ineffective-assistance claim in an appeal from the postconviction court’s denial of his application for relief. *Dunbar*, 515 N.W.2d at 16.

To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted from the failure. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Fountain*, 786 N.W.2d 260, 265–

66 (Iowa 2010). The claim fails if either element is lacking. *Strickland*, 466 U.S. at 697, 700; *Fountain*, 786 N.W.2d at 266. Accordingly, we need not determine whether counsel's performance was deficient before examining the prejudice prong of an ineffectiveness claim.

To establish prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; accord *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 694; accord *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008).

Allard argues that his postconviction counsel was so substandard that structural error occurred, namely that there was no meaningful adversarial testing of his claims; and thus, prejudice should be presumed. Allard must overcome a strong presumption that his counsel performed within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); see also *Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011).

Our supreme court recently addressed structural error in *Lado*:

Structural errors are not merely errors in a legal proceeding, but errors "affecting the framework within which the trial proceeds." We have recognized structural error occurs when: (1) 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.

Under these circumstances, “[n]o specific showing of prejudice [is] required” as the criminal adversary process itself is “presumptively unreliable.”

....

. . . In sum, when a structural error occurs in a proceeding, the underlying criminal proceeding is so unreliable the constitutional or statutory right to counsel entitles the defendant to a new proceeding without the need to show the error actually caused prejudice.

804 N.W.2d at 252 (finding a presumption of prejudice appropriate where a postconviction applicant was constructively without counsel by virtue of his attorney’s failure to seek a continuance to prevent dismissal of a postconviction relief action) (citations and footnote omitted) (emphasis added).

Unlike *Lado* where counsel took no action at all and the defendant was denied a hearing resulting in a dismissal, Allard was afforded a hearing. His postconviction counsel raised several of trial counsel’s alleged deficiencies through direct examination of Allard, including: (1) failure to object to witness Grant’s testimony, which included hearsay statements and information regarding prior bad acts; (2) failure to object to admission of photographic evidence and opinion testimony; and (3) failure to object to the delay in the habitual offender status proceeding. Postconviction counsel Mitchell also made at least one objection to the State’s evidence, engaged in discussions with the State and court regarding the issues, presented arguments in resistance to the State’s objections, asked the court to consider each of the allegations in Allard’s very specific petition, agreed with the State regarding submission of transcripts of the

trial and habitual offender proceeding, participated in cross-examination, presented a closing argument, and filed a brief.

Allard alleges his postconviction counsel failed to provide “meaningful” adversarial testing of the State’s arguments. However, he identifies no meritorious claim that postconviction counsel should have raised or raised more effectively. Perhaps Allard would have liked a more zealous advocate, but he was not constructively without counsel.<sup>2</sup>

#### **IV. Conclusion.**

We conclude no structural error occurred. Because the postconviction hearing was adequately reliable, Allard’s claim of ineffective assistance fails.

**AFFIRMED.**

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<sup>2</sup> We note that counsel lacked a non-frivolous argument to advocate with zeal.