

IN THE COURT OF APPEALS OF IOWA

No. 7-236 / 06-1066
Filed May 23, 2007

RICKY SHORT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Bobbi M. Alpers,
Judge.

Ricky Short appeals the district court's dismissal of his application for
postconviction relief. **AFFIRMED.**

J. David Zimmerman, Clinton, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney
General, Michael L. Wolf, County Attorney, and Liz Srp, Assistant County
Attorney, for appellee State.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Ricky Short appeals the district court's denial of his application for postconviction relief. Ricky claims his trial counsel was ineffective for failing to give timely notice of a defense witness.

I. Background Facts and Prior Proceedings

In January 2004 the State filed a trial information charging Ricky with two counts of sexual abuse in the third degree. In a bench trial, the State presented evidence that Ricky lived with his mother, Hazel Short, and B.S., his twelve-year-old nephew. B.S.'s twelve-year-old friend spent the night at the Short household in June of 2003. At trial, both boys testified that Ricky removed their shorts and performed an oral sex act on each of them that evening. The boys testified that Hazel was asleep in another room during the incident.

Ricky claimed the sexual abuse never occurred. He testified that the door was open the entire time the boys were in the room and that Hazel was sitting just outside the door. Ricky attempted to call Hazel as a witness to corroborate his claim that the sexual abuse never occurred, but the State objected, claiming it had not been given notice she would be called as a witness. The district court noted depositions had already been taken and ruled Hazel was excluded as a defense witness.

The court found Ricky committed the sex acts and found him guilty of two counts of third degree sexual abuse. Ricky appealed, claiming: (1) the district court abused its discretion in excluding Hazel as a defense witness, (2) his trial counsel was ineffective in failing to exclude evidence of Short's sexual orientation, and (3) his trial counsel was ineffective for failing to give timely notice

for the use of Hazel as a witness. Our court affirmed the judgment and conviction, but preserved the latter claim for postconviction relief. *State v. Short*, No. 04-0912 (Iowa Ct. App. June 15, 2005). Ricky filed an application for postconviction relief. Following an evidentiary hearing, the district court denied the application. The court concluded Ricky's trial attorney did not breach an essential duty and also found there was no reasonable probability the outcome of the criminal trial would have been different but for the performance of Ricky's trial counsel. This appeal followed.

II. Scope of Review

We ordinarily review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts claims of a constitutional nature, our review is de novo. *Id.* Thus, we review claims of ineffective assistance of counsel de novo. *Id.*

III. Analysis

Ricky must demonstrate both ineffective assistance and prejudice to prevail on his claims that trial counsel was ineffective. *Id.* at 142. Both elements must be proven by a preponderance of the evidence. *Id.* To establish the first prong, Ricky must prove his counsel performed below the standard demanded of a reasonably competent attorney. *Id.* If he meets his burden to prove his counsel breached an essential duty, Ricky must also establish that the breach caused prejudice. *Id.* at 143.

The specific allegation presented for postconviction relief is that Ricky's trial attorney failed to provide timely notice to the State that Hazel would be

called as a witness. The court's decision necessarily turned on what Hazel told Ricky's trial counsel and when she said it.

At the postconviction relief hearing, Ricky's trial counsel said she met Hazel on multiple occasions when Ricky came to talk about his case. At some point, Hazel told her she was home on the night of the incident. Hazel said she was sitting at the dining room table next to the room where the incident allegedly occurred, she did not notice the door ever being closed, and she could not see directly into the room. Hazel told trial counsel there had been an argument between Ricky and one of the two boys in the hours leading up to the alleged incident. Trial counsel also testified that Hazel was taking a large number of prescription medications at the time of the incident. Trial counsel's postconviction testimony did not reveal when Hazel told trial counsel about her recollection of the incident.

Hazel also testified at the postconviction hearing. Beyond the statements noted above by Ricky's trial counsel, Hazel goes further to claim she told trial counsel that she could view the interior of the room during the alleged incident and saw no sexual activity.¹ However, Hazel also explicitly states the *first* time she spoke with Ricky's trial counsel about her observations was on a Saturday, two days before Ricky's trial.

Upon our review of the record, we cannot find Ricky's trial counsel failed to perform an essential duty when she did not list Hazel as a trial witness. Hazel specifically states that the first time she told trial counsel about her personal

¹ Trial counsel denies Hazel ever told her she could see the interior of the room during the alleged incident.

observations of the alleged incident was on the eve of trial. Therefore, Hazel did not tell trial counsel about her observations until it was too late to include her on Ricky's witness list. See Iowa R. Crim. P. 2.13(4) ("If the defendant has taken depositions . . . and does not disclose to the prosecuting attorney all of the defense witnesses (except the defendant and surrebuttal witnesses) at least nine days before trial, the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the state from undue prejudice, order the exclusion of the testimony of any such witnesses."). Trial counsel attempted to call her as a witness anyway, but the court properly sustained the State's objection and excluded her testimony. We find no breach of duty here.

Ricky failed to prove his trial counsel breached an essential duty; therefore we affirm the district court's decision to deny his application for postconviction relief. See *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (recognizing failure to prove breach of essential duty is fatal to ineffective-assistance-of-counsel claims).

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent. I find that Short's counsel was ineffective and he was prejudiced. I would reverse and remand for new trial.

Short's trial attorney sought to call Short's mother as a witness but was precluded from doing so because she failed to provide a timely notice the witness would testify. The attorney had visited with Short's mother on numerous occasions over a period of months following the incident and at some point decided to call her as a witness. The majority has determined that the failure to file the required notice was not ineffective assistance because Short's mother had not told the attorney what her testimony would be in sufficient time to file the notice. Apparently the attorney attempted to call Short's mother at trial because it was decided she would do more good than harm and she was one of only four witnesses to the alleged incident. Short's trial attorney had ample opportunity to interview the woman carefully and file the required notice. Short's counsel failed to perform an essential duty.

Furthermore, Short has shown prejudice. The district court, in finding Short guilty, relied on the testimony of three witnesses, Short and the two complaining witnesses. The court found the complaining witnesses more credible than Short. The testimony of Short's mother would have contradicted the complaining witnesses' testimony and could have shown a reasonable doubt.