

IN THE COURT OF APPEALS OF IOWA

No. 7-771 / 06-0187
Filed November 15, 2007

LEWIS B. THOMPSON III,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Defendant appeals district court decision denying his application for postconviction relief. **AFFIRMED.**

Marc A. Elcock and Tara M. Elcock of Elcock Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Lewis B. Thompson III appeals the district court decision denying his application for postconviction relief. We affirm.

I. Background Facts and Prior Proceedings

On August 20, 2001, the State charged Thompson with possession of a controlled substance (third offense) as a habitual offender. Thompson did not waive his right to a speedy trial, and he was assigned a November 5 trial date. The trial was later continued to December 12 where, after a jury trial, Thompson was convicted of the charged crime. He was sentenced to an indeterminate term of imprisonment not to exceed fifteen years, but the prison term was suspended and he was placed on probation and assessed a fine. Our court affirmed the conviction, but vacated the imposed fine. Thompson's probation was subsequently revoked, and he was ordered to serve the previously suspended prison sentence.

Thompson filed an application for postconviction relief (PCR) in September of 2004. He was appointed counsel, and his new counsel filed an amended application raising the additional claims that his trial and appellate counsel were both ineffective because neither raised a speedy trial violation. The district court denied his application for postconviction relief

Thompson appeals, claiming his trial counsel was ineffective when she did not file a motion to dismiss once the ninety-day speedy trial period had lapsed. He also claims his appellate counsel was ineffective for not pursuing a speedy trial claim on direct appeal.

II. Standard of Review

Iowa appellate courts typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, where the applicant asserts claims of a constitutional nature, our review is de novo. *Id.*

III. Merits

To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). "To prove the first prong, the defendant must overcome the presumption that counsel was competent." *Id.* To prove the second prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). If the defendant is unable to prove either prong, the ineffective-assistance claim fails. *Bear v. State*, 417 N.W.2d 467, 472 (Iowa Ct. App. 1987).

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.

Iowa R. Crim. P. 2.33(2)(b).

Based on this rule, Thompson contends his jury trial should have started no later than November 19, 2001. As his trial did not begin until December 12, 2001, he claims his trial counsel was ineffective because she did not file a motion to dismiss for a violation of his right to a speedy trial.

At the PCR hearing, Thompson's trial counsel stated she did not make such a motion because Thompson had agreed to a continuance. In late October

trial counsel told Thompson she had an unavoidable scheduling conflict for the November 5 trial date. She gave Thompson two options: she could either (1) ask for a continuance or (2) have another attorney from her office handle the trial on the scheduled date. At that time, Thompson was not in police custody, and he was aware that the State would be recommending a prison sentence. Thompson opted for the continuance because he wanted to “stay out as long as possible” so that he could spend more time with his son. When asked whether she specifically discussed a speedy trial waiver, trial counsel replied:

Did I say to Mr. Thompson, “Are you willing to waive your rights to a speedy trial?” No, I did not use those words. The fact that I asked him if he had any objections to a contin[uan]ce and he said that he did not, that he wanted to stay out as long possible so he could spend time with his son, indicated to me that I could continue it for as long as possible. As long as he remained out, that would make him happy.

And I would further state I’ve been an attorney for over 20 years in the public defender’s office, and it’s been my experience that when my clients are out of custody, they want to stay out as long as possible when they are aware that the prosecutor is asking for prison time.

The State also offered into evidence the notes that trial counsel wrote contemporaneously during her discussion with Thompson. These notes corroborate her testimony that Thompson did not object to the continuance and he wanted to stay out of custody as long as possible.

Thompson testified that he never gave his trial counsel permission to ask for a continuance.

Because the district court has a firsthand opportunity to hear the evidence and view the witnesses, we give deference to the district court’s credibility findings, but are not bound by them. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa

2001). After hearing testimony from both Thompson and his trial counsel, the district court concluded that trial counsel's "recitation of what took place rings truer than Thompson's." Upon our de novo review of the record, we find the court's credibility findings are fully supported by substantial evidence. We conclude Thompson agreed to a continuance and told his trial attorney that he wanted to stay out as long as possible to spend time with his son. Accordingly, trial counsel could not have made, in good faith, a motion to dismiss for a speedy trial violation because she knew her client had eagerly agreed to continue the trial. Thompson has failed to prove his trial counsel breached an essential duty.

Beyond his broad statement that the failure to ask for a dismissal "constituted an unjust result," Thompson presents no argument as to why counsel's alleged breach of an essential duty prejudiced his case. There is nothing to suggest that Thompson would not have had his trial on November 5 had his attorney not asked the court for the continuance.¹ Therefore we find Thompson has also failed to prove there is a reasonable probability that, but for trial counsel's alleged unprofessional errors, the result of the underlying proceeding would have been different.

Because we find his trial counsel was not ineffective for failing to file a motion to dismiss, we also find his appellate counsel was not ineffective for failing to raise this issue on direct appeal.

AFFIRMED.

¹ Trial counsel did not file a formal motion for continuance. The continuance request was made during an unreported status conference.