IN THE COURT OF APPEALS OF IOWA

No. 8-175 / 07-0534
Filed April 30, 2008

LUCINDA GILLAM,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

The applicant appeals from the district court's denial of her application for postconviction relief. **AFFIRMED.**

Matthew McDermott of Belin Lamson McCormick Zumbach Flynn P.C., Des Moines, for appellant.

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

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Lucinda Gillam appeals from the district court's order denying her postconviction relief application. Upon our review of the record and arguments of the parties, we affirm.

I. Background Facts and Proceedings.

Following a jury trial, Gillam was convicted of first-degree robbery in August 2002 and sentenced to a prison term not to exceed twenty-five years. The fighting issue in Gillam's trial was whether she was aware beforehand that a gun was going to be used in the robbery of a convenience store, or that she only believed the participants (herself included) were going to steal cigarettes from the store. Testimony from Gillam, other participants in the crime, and jailhouse informants both supported and contradicted Gillam's claim that she was not aware of the gun. She did admit, however, that she planned with others at least to steal products from the store. Gillam's direct appeal was dismissed as frivolous, and procedendo issued in August 2003. Gillam filed a postconviction relief application in July 2005, raising several issues involving her trial and conviction, none of which are now on appeal. After hearing on the postconviction application, the district court denied Gillam's application and request for a new trial in March 2007. She appeals from her postconviction relief action, claiming for the first time ineffective assistance of postconviction counsel for failing to raise ineffective assistance of trial and appellate counsel claims.

II. Scope and Standards of Review.

Postconviction relief proceedings are generally reviewed for correction of errors at law. *Millam v. State*, __ N.W.2d __, __ (Iowa 2008) (citing *Ledezma v.*

State, 626 N.W.2d 134, 141 (Iowa 2001)). However, ineffective-assistance-of-counsel claims are constitutional in nature, and as such, our review is de novo. *Id.* We give weight to the lower court's determination of witness credibility. *Id.*

III. Issues on Appeal.

Gillam's sole issue on appeal is whether her postconviction counsel was ineffective for failing to raise an ineffective assistance argument against her trial and appellate counsel for a constitutional violation of her right to the presumption of innocence. Gillam argues her trial counsel's repeated reference to her pretrial incarceration when examining the jailhouse informants created indicia of guilt, like appearing before the jury in prison attire; violated her constitutional right to the presumption of innocence; and amounted to a violation of duty that prejudiced her case. The State counters that Gillam's ineffectiveness claim is untimely under Iowa Code section 822.13 (2005), having first been raised on appeal in August 2007 more than three years after procedendo issued in August 2003, or alternatively that trial counsel engaged in a reasonable strategy given the circumstances of Gillam's case.

In order to prevail on a claim of ineffective assistance of counsel, the applicant must prove, by a preponderance of the evidence, that trial counsel failed to perform an essential duty and the applicant was prejudiced thereby. *State v. Williams*, 695 N.W.2d 23, 28-29 (Iowa 2005). Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma*, 626 N.W.2d at 143. However, "strategic decisions made after a 'less than complete investigation' must be based on reasonable professional judgments which support the particular level of

investigation conducted." *Id.* (quoting *Strickland v. Washington,* 466 U.S. 668, 690-91, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984)). Our supreme court has stated:

> [W]e measure the attorney's performance against "prevailing professional norms." As such, we begin with the presumption that the attorney performed competently. Moreover, we avoid second-guessing and hindsight. Instead, we scrutinize each claim in light of the totality of the circumstances. In the end, the inquiry is transformed into an individualized fact-based analysis.
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> Considering the standard of reasonableness utilized in determining ineffective assistance claims, ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment. Clearly, there is a greater tendency for courts to find ineffective assistance when there has been "an abdication-not an exercise-of ... professional [responsibility]." Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. Thus, claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma, 626 N.W.2d at 142-143 (citations omitted).

We assume without deciding the statute of limitations issue[1] that Gillam's claim is timely raised and proceed to the merits. Although subpoenaed to testify in the postconviction action, Gillam's trial counsel did not appear to explain his actions in 2002. However, we believe the record is sufficiently developed to address Gillam's ineffectiveness claim and determine that trial strategy necessitated the examination of jailhouse informants. Gillam cites no case law

[1] Although Gillam's postconviction action was timely filed in 2005, she first raised the present ineffectiveness claims on appeal from that timely application. This occurred after the passage of the limitation deadline, in an appeal proof brief filed in August 2007. To simply preserve her ineffectiveness claim for filing a second postconviction action clearly beyond the deadline would be an exercise in futility and waste of judicial resources.

from Iowa or the United States Supreme Court that mentioning a defendant's pretrial incarceration is an absolute constitutional violation under which prejudice is presumed. In light of the totality of her case's circumstances, a vigorous examination of jailhouse informants to highlight their motivations for lying was one of the only strategies available to defend Gillam. The evidence against her was sufficient for a conviction of second-degree robbery due to her admission that she willingly participated in the robbery of the convenience store and "cover up" of the crime, especially following the appearance of the gun. Several witnesses, including fellow participants in the planning and subsequent stages of the crime, testified supporting Gillam's claim she had no knowledge of the gun. Other witnesses, including the jailhouse informants, testified Gillam either knew about the gun beforehand or stated after the robbery she knew they would use a gun. Examination of these jailhouse informants and what they overheard would necessarily involve Gillam's presence in jail. At least one of the jailhouse witnesses bolstered Gillam's lack of knowledge of the weapon and testified Gillam should not be in jail. We cannot say this strategic decision amounted to ineffectiveness of her trial counsel. In addition, neither appellate nor postconviction counsel was under a duty to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). We therefore affirm denial of Gillam's postconviction relief application.

AFFIRMED.