

**IN THE COURT OF APPEALS OF IOWA**

No. 8-309 / 07-0520  
Filed May 29, 2008

**DAVID A. PETITHORY,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,  
Judge.

The applicant seeks postconviction relief from his convictions for involuntary manslaughter, child endangerment, possession of a controlled substance, three counts of neglect of a dependent person, and domestic abuse assault causing bodily injury. **AFFIRMED.**

Don L. Williams of Law Office of Don L. Williams, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer, J., and Beeghly, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**BEEGHLY, S.J.****I. Background Facts & Proceedings**

David Petithory and Amy Champoux were the parents of Brooklin, who was born in February 2002. Both parents have a history of methamphetamine abuse. Petithory used methamphetamine in the evening on February 12, 2003, and spent the night playing video games. He then fell into a deep sleep the next day, February 13, 2003.

During the afternoon, Champoux left to run errands, and asked Petithory to give Brooklin and her three-year-old sister, K.C., a bath. Petithory placed Brooklin in a bath seat and turned on the water. He fell asleep in the hallway. Petithory awoke when K.C. started screaming. He found Brooklin face down in the water, and the tub overflowing. Brooklin sustained irreversible brain damage due to oxygen deprivation, and she died on March 23, 2003.

Following a bench trial, Petithory was convicted of involuntary manslaughter, child endangerment, possession of a controlled substance, three counts of neglect of a dependent person, and domestic abuse assault causing bodily injury.<sup>1</sup> He was sentenced to twenty-seven years in prison. Petithory's convictions were affirmed by the Iowa Court of Appeals, *State v. Petithory*, No. 03-1679 (Iowa Ct. App. Dec. 8, 2004), and the Iowa Supreme Court, *State v. Petithory*, 702 N.W.2d 854 (Iowa 2005).

Petithory filed a petition for postconviction relief, claiming he received ineffective assistance of counsel during his criminal trial. He claimed counsel

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<sup>1</sup> The charge of domestic abuse assault causing bodily injury arose from a separate incident between Petithory and Champoux involving an argument over who was going to clean the house.

was ineffective of the following grounds: (1) failing to retain investigators and experts; (2) failing to advise him of the risks of testifying at a bond review hearing; (3) failing to object to alleged prosecutorial misconduct; and (4) failing to properly object to Exhibit 31. The district court denied Petithory's request for postconviction relief. He now appeals.

## **II. Standard of Review**

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

## **III. Merits**

**A.** Petithory claims he received ineffective assistance due to defense counsel's failure to adequately investigate the case. He asserts defense counsel should have hired a specialist to reconstruct the incident which led to the death of Brooklin. He states, "[s]uch investigation may have provided facts beneficial to Appellant."

It is not enough for a postconviction applicant to assert that defense counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "The applicant must state the specific ways in which counsel's

performance was inadequate and identify how competent representation probably would have changed the outcome.” *Id.* An applicant must “propose what an investigation would have revealed or how anything discovered would have affected the result obtained below.” *Id.*

State investigators filled the bathtub in Petithory’s home and found it took eight minutes to fill the tub, with the water fully turned on. Petithory does not allege that an independent investigation would have come to a different result, or if a different result were reached, how that would have changed the outcome of the case. We conclude Petithory has failed to show he received ineffective assistance of counsel on this ground.

**B.** Petithory contends defense counsel should have investigated media coverage and surveyed the jury pool to determine whether a motion for change of venue should have been filed. He asserts that if defense counsel had performed these actions he might have decided to move the trial to a different location and try the case before a jury instead of a judge.

Defense counsel testified at the postconviction hearing that he was receiving media contacts from all over the State, and he believed it would have been hard for Petithory to find an unbiased jury within Iowa. Furthermore, he stated that based on the charges in the case, he made the strategic decision that Petithory would benefit from having the case tried to a judge instead of a jury. Generally, improvident trial strategy, miscalculated tactics, and mistakes in judgment do not amount to ineffective assistance of counsel. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006).

We conclude Petithory has failed to show he received ineffective assistance due to counsel's failure to further investigate a change of venue in this case. Petithory voluntarily waived his right to a jury trial. Based on the facts in this case involving the death of a child and the use of illegal drugs, defense counsel's strategy of having the case heard by a judge instead of a jury does not constitute ineffective assistance of counsel.

**C.** Petithory asserts defense counsel should have hired an expert to refute the testimony of the State's experts on the effect of methamphetamine usage. Petithory does not set forth what he believes such an expert could have found, or how it would have differed from the testimony presented by the State's experts. We conclude Petithory has failed to present the specific ways he believes counsel's performance was inadequate. *See Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999). He has not stated how the testimony of a defense expert would have changed the outcome of the case. *See Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000).

For these reasons, he has failed to show ineffective assistance due to defense counsel's failure to hire an expert on the issue of how methamphetamine affected Petithory's behavior.

**D.** Petithory claims he received ineffective assistance due to defense counsel's failure to adequately advise him of the risk of testifying at a bond review hearing. At the postconviction hearing, defense counsel testified he advised Petithory not to seek a bond review hearing because he felt the request would be denied and Petithory's testimony at the hearing could be used against

him at the trial. Petithory decided not to take counsel's advice. Ineffective assistance of counsel on this issue has not been established.

**E.** Petithory asserts defense counsel should have requested a directed verdict on the charge of domestic abuse assault on the ground the State had not shown the incident occurred in Polk County. A motion for directed verdict is not necessary in a bench trial. See *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997). Furthermore, the evidence presented at the trial clearly showed the incident occurred at the parties' home in Des Moines, which is in Polk County. We affirm the district court's decision finding Petithory had failed to show ineffective assistance on this ground.

**F.** In the direct appeal, Petithory claimed he received ineffective assistance due to counsel's failure to object to Exhibit 31, a videotape of Brooklin in the hospital, on the grounds it was unnecessary, improperly prejudicial, and was offered to inflame the passions of the fact finder. *State v. Petithory*, No. 03-1679 (Iowa Ct. App. Dec. 8, 2004). The State argued the evidence was relevant to show the serious injury element of the charge of child endangerment. *Id.* We determined Petithory was unable to show he was prejudiced by the admission of the evidence based on the overwhelming nature of the evidence supporting his convictions. *Id.* We also noted there was less chance of unfair prejudice when the matter was tried to the court. *Id.*

In the postconviction proceedings, Petithory claims defense counsel should have objected to Exhibit 31 on the ground it was cumulative. Champoux testified concerning her understanding of the neurostorms experienced by

Brooklin as a result of near drowning. The videotape showed Brooklin during a neurostorm. Petithory also claims the evidence was unduly prejudicial.

Leaving aside the question of whether defense counsel should have raised a different objection to the exhibit, we have already found Petithory has not shown the result of the proceeding would have been different if defense counsel had successfully objected to the admission of Exhibit 31. See *id.* We conclude Petithory has failed to show the element of prejudice in his claim of ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 685 (1984).

**G.** Petithory claims he received ineffective assistance due to defense counsel's failure to object to alleged prosecutorial misconduct. During the criminal trial, Petithory's mother testified to his character, but also stated Petithory had told her he was not using illegal drugs. The prosecutor asked her, "He lied to you about his drug use, didn't he?" and "And he lied to you about whether or not he was using, didn't he?" Petithory contends these questions constitute prosecutorial misconduct under *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003) (finding it is improper for a prosecutor to ask a defendant whether another witness lied).

We first note that *Graves* had not been decided at the time of the criminal trial in this case. Even under *Graves*, however, we determine Petithory has failed to show he was prejudiced by the two questions asked by the prosecutor in this case. See *Graves*, 668 N.W.2d at 876 (noting that in order to show prosecutorial misconduct, a defendant must show he was deprived of a fair trial).

The impact of these two questions within the context of the entire trial would have been minimal. The case was tried to the bench, and there were no closing arguments, so the issue of “lying” was not raised again.

We conclude Petithory has failed to show ineffective assistance of counsel due to failure to object to alleged prosecutorial misconduct.

**H.** Petithory asserts defense counsel should have filed a motion to suppress certain evidence. This issue was withdrawn during the postconviction hearing. Petithory testified he no longer believed it was inappropriate for defense counsel to withdraw the motion to suppress. The district court did not address the issue, noting it had been waived. On appeal, Petithory does not allege that the motion was improperly withdrawn by postconviction counsel. We conclude this issue has been waived.

**I.** Finally, Petithory claims he is entitled to a new trial based on cumulative incidents of ineffective assistance of counsel. Because we have found Petithory has failed to show ineffective assistance based on any of the grounds raised in this appeal, we conclude he has not shown cumulative error.

We affirm the decision of the district court denying Petithory’s petition for postconviction relief.

**AFFIRMED.**