

IN THE COURT OF APPEALS OF IOWA

No. 9-834 / 08-1457
Filed January 22, 2010

DALE WHITE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge.

Dale White seeks postconviction relief alleging ineffective assistance of trial counsel. **AFFIRMED.**

William Monroe, Burlington, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce McDonald, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

In this postconviction relief action, Dale White contends his trial attorney was ineffective during his first trial by failing to object to the prosecutor's improper questioning and by representing him while operating under a conflict of interest. White contends his trial attorney in his second trial was ineffective while cross-examining the victim. Finding no error, we affirm.

I. Background Facts and Proceedings.

On April 19, 2005, Dale White assaulted his wife Katherine, threatened her, and attempted to force her to have sexual intercourse. Later that day Katherine's adult daughter/White's stepdaughter took a photograph of Katherine's bruised neck; however, Katherine did not call the police.

Another argument occurred on April 20, 2005, and White again assaulted Katherine. Katherine and the couple's thirteen-year-old son, Robert, left the house. White's actions while Katherine and Robert were attempting to enter their car resulted in Katherine leaving without Robert. After driving away, Katherine contacted the police.

In August 2005, White's first trial resulted in two convictions based on the April 20 events: (1) willful injury causing bodily injury; and (2) child endangerment. The court declared a mistrial on the charge based on the April 19 events—assault with intent to commit sexual abuse causing bodily injury.

After conviction but before the September 2005 sentencing hearing, White wrote a letter asserting he was denied effective counsel by his trial attorney, Curtis Dial, due to a conflict of interest. White claimed Dial should not have

represented him because he previously represented Robert in a 2002 child in need of assistance proceeding (CINA). White and Dial dispute whether they discussed the juvenile court proceedings when Dial began his representation of White in 2005.

At the time of the sentencing hearing, the State had filed additional minutes regarding the retrial of the assault charge. These minutes listed stepdaughter Heather as an additional witness. Because Dial had more contact with Heather than with Robert during the prior CINA action and because White was now complaining about Dial's representation being a conflict, Dial indicated his willingness to withdraw from representing White during the retrial.

The court pronounced sentence for the first trial's convictions and appointed Clinton Boddicker to represent White on retrial. White's October 2005 second trial resulted in a conviction of assault with intent to commit sexual abuse causing bodily injury.

On direct appeal, White raised ineffective assistance of counsel claims. We affirmed his convictions and preserved the ineffective assistance claims. *State v. White*, No. 06-736 (Iowa Ct. App. Oct. 11, 2006). Attorneys Dial and Boddicker testified at the January 29, 2008 postconviction trial. The postconviction court ruled White failed to establish his claims of ineffective assistance of counsel and this appeal followed.

II. Standard of Review.

White seeks postconviction relief asserting three claims of ineffective assistance of counsel. To be successful, White must show (1) counsel failed to

perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). White's inability to prove either element is fatal. See *In re C.M.*, 652 N.W.2d 204, 207 (Iowa 2002). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

III. First Trial: Graves Violation.

White alleges Dial, his counsel at the first trial, was ineffective in failing to object when the prosecutor questioned White about other witnesses' veracity in violation of *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003) (holding "were-they-lying" questions are improper). "It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth." *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006).

During White's cross-examination by the prosecution, the following exchanges occurred without objection:

Q. Mr. White, are we to assume from your testimony that your wife and your son got together and concocted this story? A. They have to have.

Q. Tell the jury how that is possible when Deputy Hunold interviewed your wife by the side of the road and interviewed your son before your son had a chance to speak to your wife? A. I don't know what they did. I don't know what kind of a story that he took from them when he was --

Q. They didn't make up any story, did they? A. I don't know if they did or not.

Q. Both your wife and your son came in here and testified that on the 20th you told them to get out, you were going to destroy everything in the house; you deny saying that? A. Yes. Why would I want—want to destroy stuff that I paid for.

The supreme court clarified the *Graves* rule in *State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006): "It is not so much the fact that the prosecutor suggests the defendant is untruthful . . . [i]nstead, it is the use of the word "liar" itself, as

this court found it to be ‘inflammatory’ and ‘improper.’” The prosecution can attempt to tarnish defendant’s credibility or boost the credibility of the State’s witnesses—“such tactics are not only proper, but a part of the prosecutor’s duty.” *Id.* at 556.

Utilizing these principles, the district court ruled:

The court will first address whether the questions of the prosecutor were an effort to have [White] comment upon the truthfulness of other witnesses. The prosecutor asked . . . “Mr. White, are we to assume from your testimony that your wife and son got together and concocted this story?” The focus of that question was not whether Robert and Katherine were lying. Instead, the focus was whether they had somehow conspired together to claim [White] had committed these crimes. The prosecutor then goes on to inquire of Mr. White about how Robert and Katherine could have together come up with this story when they had not even talked to each other prior to being interviewed by law enforcement officers. This does not appear to be the type of questioning on the veracity of another witness that the holding in *Graves* was designed to protect against. Based upon a review of case law, it is clear that this court, as well as many other courts in the state of Iowa, have heard examination of witnesses where witnesses are specifically asked whether another witness “was lying” while on the witness stand or being interviewed by law enforcement officers. That is not what happened here.

After our de novo review, we agree with the district court. Accordingly, White has not established trial counsel failed to perform an essential duty by failing to object. See *State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005) (holding trial counsel had no duty to make a meritless motion).

IV. First Trial: Conflict of Interest.

White alleges Dial “labored under a conflict of interest that prevented [him] from receiving effective assistance of counsel.” White argues the conflict was due to Dial having represented Robert and his two stepdaughters in a 2002 CINA

case concerning White's actions towards his stepdaughters. White raised the alleged conflict after conviction and before sentencing and claimed Dial "shouldn't have been my lawyer in the first place."

At the sentencing hearing, Dial explained he had acted as the guardian ad litem in the juvenile court for Robert and his two stepsisters and stated: "I don't believe anything occurred with Robert in that case." Dial recalled having more contact with White's stepdaughters than with Robert during the CINA proceeding. The sentencing court's questioning revealed: "Q. [W]as there anything in the CINA case that you learned that made it difficult for you to represent [White] in this case? A. No, your Honor." The court determined there was no reason to delay sentencing.

At the postconviction hearing Dial was also questioned about his representation. There Dial noted by the time he was representing White, he was not representing anyone in the CINA case and the CINA case was over. Additionally, Dial stated he did not believe he had a conflict of interest in representing White because the two cases "were completely separate proceedings." Further, Dial testified his having received all the documents in the juvenile file did not make cross-examination of Robert difficult. Specifically, Dial testified:

My recollection of the CINA case is that we didn't do hardly anything with Robert. Robert wanted to have contact with his dad. No one thought Robert was in any danger with his dad. And I don't remember anything in the juvenile case really occurring with Robert. Robert wasn't the person that we were concerned about in the juvenile case.

The legal principles applicable to White's conflict-of-interest claim are described in *State v. Watson*, 620 N.W.2d 233, 238 (Iowa 2000):

If there is no indication that the trial court knew or should have known of an actual conflict, and defendant made no objection to his representation, then the defendant . . . must prove that his counsel rendered ineffective assistance by proving that an actual conflict adversely affected counsel's performance.

Subsequently, in *Pippins v. State*, 661 N.W.2d 544, 546 (Iowa 2003), the court ruled defense counsel's earlier representation of the witness/victim in an unrelated civil case was not a conflict. The prior representation had ended "approximately three years ago" and without a continuing relationship between defense counsel and the victim, there were "no divergent interests" between the victim and the defendant placing counsel "under inconsistent duties." *Pippins*, 661 N.W.2d at 549 (stating defendant consented to the representation knowing of the conflict).

The *Pippin* court noted conflict "cases turn on the concepts of 'divided loyalties' . . . or 'divergence of interests.'" *Id.* at 549. The court recognized the "lack of a continuing attorney-client relationship has caused other courts to reject claims of conflict." *Id.* "[T]here was not a continuing relationship between the defense counsel and the victim," and the *Pippins* court concluded: "There are, therefore, no divergent interests that could provide a basis to claim a Sixth Amendment violation." *Id.* at 550.

Pippins is also instructive on the appropriate standard of review. While our review is de novo, "[a] determination of whether a conflict exists is a mixed question of fact and law." *Id.* at 548. Whether the facts show a conflict of

interest “is a matter for trial court discretion,” and review is for an abuse of discretion. *Id.*

The postconviction court denied White relief and ruled there was no conflict of interest. The court explained:

Many conflict cases, of course, exist when an attorney represents multiple parties or a party and another principal in the same legal action. That is not what is suggested in this case. In this case it is suggested that there is a conflict because Dial represented one of the witnesses in this case in previous litigation against [White]. . . .

There was no continuing relationship between Dial and Robert. In 2005, Dial had no allegiance or loyalty to Robert as an attorney, nor is there anything in the record to indicate that Dial had learned anything from his representation of Robert that adversely affected his ability to represent [White]. Dial’s representation of Robert in 2002 did not place him under any inconsistent duties during his representation of [White]. As a result, the court concludes that there was no conflict of interest.

Although there was no continuing relationship here between attorney Dial and the witness, thirteen-year-old Robert, the nature of Dial’s previous representation of Robert and of the 2002 juvenile court litigation distinguish this case from *Pippins*. Unlike *Pippins*, Dial’s prior representation of Robert was not in a “totally unrelated civil case.” Dial was the child witness’s guardian ad litem, not just his counsel, in a juvenile court proceeding in which Robert was adjudicated a child in need of assistance because of White’s violent actions in the family home.

In this situation, however, considering the mixed question of fact and law, we conclude the trial court was within its discretion in deciding no conflict existed given the passage of time since attorney Dial first represented Robert.

Accordingly, we find no abuse of discretion and conclude White's rights to a conflict-free counsel were not violated.¹

V. Second Trial: Ineffective Assistance in Conducting Cross-Examination.

White's second trial on the charge of assault with intent to commit sexual abuse was based on the events of April 19, 2005. Prior to trial, the parties agreed to White's motion in limine to not allow evidence about the April 20 events. These events formed the basis of White's convictions for willful injury and child endangerment at the first trial. White claims his counsel rendered ineffective assistance when his cross-examination of Katherine subsequently enabled the prosecution to utilize evidence previously disallowed by his motion in limine.

During the trial, White's attorney attempted to impeach Katherine and show her trial testimony concerning the timing of the April 19 assault was inconsistent with her April 20 written statement to the police. After the attempted impeachment, the trial court ruled there could be no evidence "concerning the convictions or the trial of [the first] case," but the court allowed the State to "go into what her mental state may have been at the time that she gave that statement." The court cautioned the prosecutor: "[Y]ou're going to be limited as to what occurred and what her state of mind would have been based upon what

¹ Because we find no conflict existed, we need not address the factual dispute concerning whether Dial discussed the CINA representation when he first met with White. It is undisputed White raised no objection until the sentencing process. Also, because White cites no authority for his assertion the associate court's and prosecutor office's knowledge of the CINA proceeding should be imputed to the district court, we will not address it. See *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008).

occurred. I don't want any mention of other charges." The jury heard testimony about the events of April 20.

At the postconviction hearing, attorney Boddicker explained his strategy was to attack Katherine's credibility concerning the attempted sexual assault on April 19 by showing she had not immediately reported the incident to police. Boddicker stated he did not intend to open the door to testimony about the April 20 events by his questions.

The postconviction court ruled Boddicker's decision to impeach Katherine "was clearly a trial strategy. It may have been miscalculated in retrospect, but such a miscalculation or mistake in judgment does not rise to the level of ineffective assistance of counsel."

White has a heavy burden when attempting to prove his counsel's cross-examination constituted ineffective assistance. Iowa recognizes "a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). "Moreover, we avoid second-guessing and hindsight." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Additionally, "[m]iscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Id.* at 143.

After our de novo review, we conclude Boddicker's attempted impeachment constitutes a trial strategy, which we will not second-guess. There was no breach of duty because counsel's questioning did not fall outside the broad scope of conduct of a reasonably competent attorney.

Finally, we have considered all issues presented and those not discussed are deemed to be without merit.

AFFIRMED.