

Headline: Sex abuse conviction reversed

Intro: Appeals court finds man did not receive adequate counsel

Byline: Zack Kucharski, Source: The Gazette

IOWA CITY - Prosecutors involved in a 1996 conviction of a man on sexual abuse charges may ask the Iowa Supreme Court to review a Court of Appeals decision reversing his conviction.

The Court of Appeals ruled Wednesday that Carlston F. Donald, 43, did not receive adequate legal counsel before and following his conviction and is entitled to a retrial.

Donald was convicted of second-degree sexual abuse in 1996 on accusations he sexually assaulted a woman near Coralville Lake on March 10, 1995. He is serving the 25-year sentence at the Iowa State Penitentiary in Fort Madison.

State and county prosecutors have 20 days to file for judicial review by the Iowa Supreme Court, Iowa Assistant Attorney General Mary Tabor said.

Donald was found guilty without testimony from the victim and without physical evidence of sexual abuse. The case was based on statements made by the victim to emergency medical staff, Johnson County sheriff's deputies and a former cellmate who testified Donald told him details of the alleged incident.

The Court of Appeals found Donald's trial attorney was inadequate when his lawyer failed to object to the inclusion of testimony by Johnson County sheriff's deputies Michael Sheetz and Robert Dolezal during his trial. The Court of Appeals found the two introduced new facts into the case, including victim statements that Donald threatened to harm her if she reported the incident and that they identified him with first and last name.

"In light of the State's lack of physical evidence and the complete absence of the victim from the trial, the introduction of her statements by two law enforcement officers in order to identify Donald as the perpetrator by his first and last name and to show he was a continuing threat was prejudicial to his case," the ruling stated.

The Court of Appeals ruling also said Donald received inadequate postconviction legal representation in which his counsel determined any appeal would be frivolous and withdrew.

Eric Tindal, who represented Donald in the appeal, said he plans to tell Donald about Wednesday's ruling when he visits him in prison Friday at Fort Madison. "We're fairly optimistic if we get the ability to get this in the trial court and get a fair trial, that he can be acquitted of these charges," Tindal said. "I'm pretty excited about the opinion at this point. It's really a reflection of the injustice which does occur when this kind of case is tried and the only complaining witness to the charge doesn't testify.

"It's very, very tough to get a fair defense when you can't cross-examine that person and challenge the allegations that they're making," Tindal said.

The Iowa Attorney General's Office will consult carefully with county attorneys, Tabor said. Donald, who had a February 2009 release date, will remain incarcerated during this period, she said.

Anne Lahey, who prosecuted the original case, said she could not comment about the specific details of the case because of the possibility of a retrial if the Iowa Supreme Court declines judicial review or affirms the Court of Appeals decision.

Lahey did, however, acknowledge the difficulty of reconstructing such a case for retrial.

"It always very difficult a number of years after to go back and retry issues," Lahey said. "It's something we will have to consider."

Wednesday's ruling was the latest twist in an already winding case.

Donald was arrested following a police chase in Iowa City. He led officers on a chase through downtown Iowa City but stopped about a block from the Johnson County Jail and then tried to flee on foot.

After charges were filed, Lahey and others were unable to find the alleged victim in the case who had moved to South Carolina. Several trips were made to try to escort the victim to Iowa for depositions and the trial. Unable to find her, the state dismissed the kidnapping and sex abuse charges claiming it needed more time.

The second-degree sexual abuse charge Donald was later convicted of was refiled about seven months later as Donald was preparing for release from custody in connection with the chase.

While Donald contended this marked prosecutorial misconduct and violation to his right to a speedy trial, the Court of Appeals did not rule on that claim.

IN THE COURT OF APPEALS OF IOWA

No. 4-361 / 03-1087

Filed August 11, 2004

CARLSTON FREDERICK DONALD,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

Applicant-appellant Carlston Donald appeals the district court's decision denying him postconviction relief following his conviction and sentence for second-degree sexual assault under Iowa Code sections 709.1(1), 709.3(1), and 702.17 (1995). **REVERSED AND REMANDED.**

Eric Tindal of Nidey Peterson Erdahl & Tindal, Williamsburg, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

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

SACKETT, C. J.

Applicant-appellant Carlston Donald appeals the district court's decision denying him postconviction relief following his conviction and sentence for second-degree sexual assault under Iowa Code sections 709.1(1), 709.3(1), and 702.17 (1995). On appeal Donald claims the district court erred in (1) concluding his Sixth Amendment confrontation and fair trial rights were not violated; (2) failing to consider prosecutorial misconduct in determining his speedy trial rights were not violated; and (3) finding he was not prejudiced by the admission of hearsay testimony. We reverse and remand.

I. BACKGROUND FACTS AND PROCEEDINGS

In 1995 Donald was charged with first-degree kidnapping, willful injury, second-degree sexual assault, and eluding arrest. According to testimony in the postconviction hearing, following the arrest of Donald there was reason to believe the alleged victim's life was in danger. The alleged victim, Rosalind Lee, moved to a domestic violence shelter. Lee received help in moving to South Carolina. The Victim's Rights Coordinator in the Johnson County Attorney's Office testified she arranged the trip and contacted a local church which paid her bus fare. The prosecutor kept in contact with Lee and twice made airline reservations for Lee to return to Iowa for depositions. Lee did not appear either time. The prosecutor went to South Carolina in an attempt to escort Lee back. The prosecutor made contact with Lee, but when she arrived to pick her up, Lee did not answer her door. The prosecutor attempted to reschedule the flight, but was still unable to find Lee. A representative of the Domestic Violence Intervention Project then went to South Carolina to escort Lee back for trial but also was unable to contact her. All attempts to bring Lee back to Iowa were unsuccessful, and the State dismissed all

charges except the attempt-to-elude charge, alleging more time was required to gather evidence. On June 29, 1995 Donald pled guilty to the attempt-to-elude charge and was sentenced to 320 days in jail.

On January 25, 1996 at about the time Donald was to be released from jail, the State re-filed the second-degree sexual abuse charge. During the subsequent jury trial, the State introduced testimony from Iowa City Police Officer Debora Petersen, who responded to Lee's 911 call; emergency room nurse Barbara Heck, who treated Lee; Dr. Charles Huss, who also treated Lee; and Johnson County Deputy Sheriffs Michael Sheetz and Robert Dolezal, who interviewed Lee approximately two hours after she arrived at the hospital. Petersen, Heck, Huss, and Sheetz testified that Lee told them she rejected the sexual advances from someone named "Charleston," "Carlton," or "Carlston," and that he responded by making her stand in cold water and snow for an extended period of time and also by penetrating her vaginally with something cold which felt like steel and was possibly a gun.

Lee was not present at trial. The State's case against Donald was based on statements Lee made to others, as there was no testimony from other witnesses, nor was there physical evidence that Lee was sexually abused. The State sought to prove its case through testimony of Petersen, Heck, Huss, Sheetz, and Dolezal as to statements made by Lee, and through testimony by Steven Taylor, a cell-block mate of Donald's, who testified Donald told him he had beat a woman up, "had her naked," and "made her think he was going to drown her." Taylor also testified Donald claimed he "shoved a gun into [the woman's] vagina." All these witnesses were available to the State at the time the case was initially dismissed.

The jury convicted Donald of second-degree sexual abuse, and he was sentenced to twenty-five years in prison. Donald's appellate counsel determined any appeal by Donald was frivolous and filed a motion for leave to withdraw under current Iowa Rule of Appellate Procedure 6.104. Appellate counsel sent Donald a brief outlining potential issues for appeal. Those issues included (1) whether sufficient evidence supported the verdict; (2) whether defendant's motion to dismiss should have been granted based on his speedy trial rights; (3) whether the trial court's ruling on a then-rule 412 ("rape-shield")

challenge was erroneous; (4) whether testimony was properly admitted at trial as “excited utterance” testimony; and (5) whether Donald’s sentence was an abuse of discretion. Donald responded by requesting a twenty-day extension to file a response to counsel’s 6.104 motion. The supreme court granted Donald an additional twenty days. He never responded. The supreme court dismissed his appeal on March 20, 1997, and procedendo issued on April 4, 1997. Donald filed his postconviction application on February 24, 2000.

II. SCOPE OF REVIEW

We review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). When the applicant’s constitutional rights are implicated, we review de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

We review ineffective assistance of counsel claims de novo. *Osborn*, 573 N.W.2d at 920. To establish a claim of ineffective assistance of counsel, defendant must demonstrate, by a preponderance of the evidence, both that his trial counsel failed to perform an essential duty and that prejudice resulted from that failure. *State v. Smothers*, 590 N.W.2d 721, 722 (Iowa 1999). We may dispose of the claim if defendant fails to demonstrate either element. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). To sustain his burden of proof with respect to the duty element, defendant must overcome the strong presumption that counsel’s actions were reasonable under the circumstances and fell within the normal range of professional competency. *Smothers*, 590 N.W.2d at 722. Miscalculated trial strategies and mere mistakes in judgment generally do not rise to the level of ineffective assistance of counsel. *Ledezma*, 626 N.W.2d at 143. Thus, claims of ineffective assistance which involve tactical or strategic decisions of counsel must be examined in light of all the circumstances to determine whether counsel’s actions were a product of strategy or inattention to the responsibilities of an attorney guaranteed defendant under the Sixth Amendment. *Id.*

III. ANALYSIS

A. Preservation

Donald's postconviction claims involve alleged errors at trial. On direct appeal defendant's counsel determined Donald's appellate claims were frivolous and filed a 6.104 motion for leave to withdraw. Appellate counsel sent Donald a letter indicating his decision and advising Donald to write the Iowa Supreme Court Clerk and request another attorney if he disagreed with appellate counsel's conclusions as to the merits of his case. Donald filed a response requesting a twenty-day extension and stating, "Let there be no mistake, I do not want to dismiss my appeal, and do not agree that it is frivolous." The supreme court granted Donald the requested twenty-day extension. He never responded.

The supreme court has articulated the following standard with respect to issues which can be raised for the first time in postconviction proceedings:

When a direct appeal ends in an *unresisted* dismissal under Iowa Rule of Appellate Procedure 6.104, a postconviction relief applicant must comply with section 822.8 and show "sufficient reason" why the applicant's postconviction relief claims were not raised on direct appeal. However, a rule 6.104 dismissal "which is contested or objected to by the [defendant-appellant] does not prevent issues which could have been presented upon direct appeal from being embraced in a petition for postconviction relief" under section 822.8.

Manning v. State, 654 N.W.2d 555, 561 (Iowa 2002) (citations omitted).^[1]

In deciding whether Donald must show "sufficient reason" for failing to raise his claims on direct appeal, we must determine whether he resisted his appellate counsel's 6.104 motion. Donald's letter to the Clerk clearly resists the motion, but Donald failed to provide any substantive resistance after being granted a twenty-day extension to do so. The supreme court has refused to impute an appellate counsel's decision to forego an appeal, which a defendant resists, to the defendant, reasoning that appellate counsel cannot waive grounds for postconviction relief contrary to the desires of the client. *Bugley v. State*, 596 N.W.2d 893, 896-97 (Iowa 1999). When a 6.104 motion is not resisted, however, the court has reasoned that counsel's decision not to raise grounds on direct appeal is properly transformed into the decision of the applicant. *Id.*

