FILED
APR 23 1991
CLERK SUPREME COURT

177

IN THE COURT OF APPEALS OF IOWA

No. 1-024 / 90-743

JOHN FRANK ROTH,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Cedar County, Max R. Werling, Judge.

Appellant appeals district court decision denying postconviction relief based upon alleged ineffective assistance of counsel. **AFFIRMED.**

Thomas J. O'Flaherty, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General; Richard J. Bennett, Assistant Attorney General; and Lee W. Beine, County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J.

John Roth was convicted of first-degree murder in 1985. On direct appeal, this conviction was affirmed by the Iowa Supreme Court. State v. Roth, 403 N.W.2d 762 (Iowa 1987).

Roth later challenged his conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and Roth has appealed.

Roth contends his attorney in the 1985 criminal trial rendered ineffective assistance in two respects. First, Roth complains the attorney was acting under a conflict of interest because he was also representing one of the State's witnesses on unrelated criminal and civil matters. Second, Roth complains that the attorney failed to request the appointment of co-counsel, after an initial co-counsel was discharged from the case because there had been an insufficient showing of a need for two attorneys.

I.

We first address the standard by which we measure claims of ineffective assistance of counsel. Since the petitioner is alleging that his constitutional right to a fair trial was violated, we make an independent evaluation of the totality of the relevant circumstances; this is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984), citing, State v. Wilkens, 346

N.W.2d 16, 18 (Iowa 1984); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

II.

The State initially contends the issues raised in this postconviction proceeding cannot be considered because they were not raised on direct appeal and thus were waived. It is well settled that postconviction proceedings are inappropriate for presentation of issues which have not been properly preserved:

> Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. . . . We will not ordinarily allow a defendant to claim in postconviction proceedings that the trial court erred on issues that were not properly presented for our review on direct appeal

Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981); Iowa Code § 663A.8 (1989). In this respect, our supreme court has held that a postconviction applicant cannot obtain review of issues of this type unless it is demonstrated by a preponderance of the evidence: (1) that sufficient reason or cause exists for not having raised them on appeal; and (2) that actual prejudice resulted from the claimed conflict. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984).

As noted, to obtain the relief requested, Roth must first demonstrate by a preponderance of the evidence that sufficient reason or cause existed for not raising the

issue on appeal. In this regard, ineffective assistance of counsel may satisfy the "sufficient reason" of section 663A.8. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984). But to establish a claim of ineffective assistance of appellate counsel, the postconviction relief applicant must show: (1) that counsel's performance was so deficient as not to be functioning as counsel guaranteed by the sixth amendment; and (2) that the deficient performance prejudiced the defense. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987).

Representation by counsel is presumed to be competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In Roth's postconviction hearing his appellate counsel, who was different than his trial counsel, testified he did not raise the issues of ineffective assistance of counsel because the record did not reflect the claims made by defendant. Additionally, he testified he considered all of the issues and raised those issues which he felt had the greatest chance of success.

In reviewing the record, it is evident appellate counsel chose not to raise these issues as they were, in his professional opinion, frivolous claims. Iowa courts have recognized an appellate lawyer can reasonably decide not to press a particular issue on appeal, even though the issue is not frivolous. An attorney does not render

ineffective assistance in making a professional judgment as to the strength of an argument. "Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal." Kane v. State, 436 N.W.2d 624, 627-28 (Iowa 1989), citing Cuevas v. State, 415 N.W.2d 630, 633 (Iowa 1987). We are not prepared, under the circumstances here, to brand defense counsel as rendering ineffective assistance.

We also note petitioner has not presented any evidence, other than his bald assertion of prejudice, which would suggest actual prejudice existed. With regard to actual prejudice:

> It is not sufficient that the applicant demonstrate the errors created a possibility of prejudice, he or she must shoulder the burden of showing they worked to his or her actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.

Polly v. State, 355 N.W.2d at 855.

We have thoroughly reviewed the evidence and we find nothing to indicate the defendant was prejudiced. The petitioner suggests he was prejudiced by his attorney's representation of both him and a State's rebuttal witness. However there is no evidence to suggest the attorney was representing the two concurrently. Additionally, in reviewing the testimony given by the rebuttal witness, we find the testimony to be totally inconsequential with regard to petitioner's case and his ultimate conviction.

III.

The petitioner's second claim involves the trial attorney's failure to request co-counsel. The postconviction court rejected this claim, finding the petitioner failed to provide evidence which would indicate co-counsel was necessary. Petitioner also failed to raise this issue on direct appeal. We apply the policies set forth above with regard to ineffective assistance of counsel. In doing so, we fail to see any reason why appellate counsel would have raised this issue on appeal. We further fail to see any evidence which would support a claim of ineffective assistance of counsel. This claim is completely lacking in merit. The record clearly shows there was no need for a second attorney to be appointed. Petitioner failed to show any prejudice due to the absence of the second attorney. We affirm the trial court in all respects.

AFFIRMED.