FILED
OCT 25 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS A. HAHN,
Petitioner-Appellant,
vs.
THE STATE OF IOWA,
Respondent-Appellee.

Filed October 25, 1983

3-180
2-68961

Appeal from Black Hawk District Court, Dennis D. Damsgaard, Judge.

Petitioner Hahn appeals the denial of his petition seeking postconviction relief from the fifty-year sentence imposed upon his 1977 conviction of rape in violation of Iowa Code section 698.1 (1975). AFFIRMED.

Kjas T. Long of Gottschalk, Shinkle & Long, Cedar Falls, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlege, Hayden, and Sackett, JJ.

OXBERGER, C.J.

Petitioner Hahn appeals the denial of his petition seeking postconviction relief from the fifty-year sentence imposed upon his 1977 conviction of rape in violation of Iowa Code section 698.1 (1975). On appeal Hahn asserts that the trial court, in imposing the original sentence, improperly considered unproven and unadmitted allegations that Hahn had committed three other rapes, and that the postconviction court therefore erred by refusing to grant postconviction relief. Hahn seeks a remand for resentencing.

The State asserts, inter alia, that Hahn waived the instant sentencing issue because he did not raise it in trial court, on direct appeal, or in his prior postconviction action. We affirm.

In May of 1977, Hahn pleaded guilty to one count of rape in violation of Iowa Code section 698.1. The plea bargain set out on the record provided that in exchange for Hahn's guilty plea the State would not recommend life imprisonment and would "not file three potential rape charges which we have against [Hahn]," but would "use and request their inclusion in a presentence report."

In May of 1977, Hahn was sentenced to a fifty-year term of imprisonment. At sentencing, the prosecutor referred to allegations that Hahn had raped three other women. The prosecutor then submitted statements of the alleged victims to the court and made further statements regarding these alleged rapes. The presentence report also contained allegations regarding these other alleged rapes. Hahn's counsel did not object to submission of the statements of the alleged victims; however, he did point out that Hahn had not been convicted of or charged with the alleged additional rapes.

Hahn did not take a direct appeal. In July of 1978 he did, however, file an application for postconviction relief, asserting that he had not understood the consequences of his plea, that the plea was coerced, and that his counsel was ineffective. Postconviction relief was denied, and that denial was subsequently affirmed by the supreme court. See Hahn v. State, 306 N.W.2d 764 (Iowa 1981).

On the same day that Hahn's first postconviction appeal was decided, the supreme court decided State v. Messer, 306 N.W.2d 731 (Iowa 1981), holding that it was an abuse of discretion for a sentencing court to consider additional, unproven and unprosecuted charges unless the facts before the court showed defendant committed those offenses or they were admitted by him. Hahn filed a second application for postconviction relief, asserting that the sentencing court improperly considered the allegations regarding the additional rapes.

In denying postconviction relief, the trial court noted that the allegations Hahn committed three additional rapes were part of the plea bargain; that the three alleged victims were listed as witnesses in the minute of testimony; that Hahn had not objected to introduction of the alleged victim's statements at sentencing; that Hahn had not objected to allegations contained in the presentence report; and that Hahn failed to raise the sentencing issue in either a direct appeal or his prior postconviction action.

Postconviction relief actions taken pursuant to Iowa Code chapter 663A are law actions triable to the court and ordinarily are reviewed on error only. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981). The burden of proof is on the petitioner to establish facts asserted by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). In this proceeding, Hahn asserts a ground for relief

which was not asserted in an earlier proceeding initiated by him to secure relief from his conviction. Therefore, the controlling statute in Hahn's case is section 663A.8, which provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application. (emphasis added).

We find that Hahn has not met his burden of proving a "sufficient reason" why the ground relied on now was not previously asserted.

The facts that give rise to this claim were known to Hahn at the time of his first postconviction proceeding. Hahn does not rely on any facts outside the prior record, nor does he develop any new evidentiary record. At the time of sentencing, Hahn read the presentence investigation report and made no objection. There was no objection when the State offered testimony exhibits concerning the other alleged offenses. In fact, Hahn's attorney himself discussed those alleged offenses before the sentencing court.

A postconviction proceeding is not an avenue for litigating issues not properly preserved in a prior proceeding or appeal. See Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). We do not find any new contentions that Hahn did not know of at the time of the original postconviction proceeding that would raise a "sufficient reason" why this ground was not previously asserted. As such, Hahn is not entitled to relief.

Even assuming "sufficient reason" was found, there is no indication that the sentencing court relied upon the three uncharged allegations of rape within the

context of Messer in ascertaining punishment. The trial court in Messer stated it was "taking into consideration the fact that there were two other charges that were not prosecuted in this matter as part of the plea bargain." We see no such evidence in the case at bar to indicate that allegations of the other alleged offense were used as a basis for enhanced punishment. See State v. Schwartz, 278 N.W.2d 22 (Iowa 1979).

Therefore, for the foregoing reasons, we affirm the trial court's denial of postconviction relief.

AFFIRMED.