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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-030 / 92-626

ELDON RICHARD WITTERN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Eldon Wittern appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Robert L. Stenander, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General; Robert P. Ewald, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Mark A. Campbell, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Eldon Wittern appeals from the district court's denial of his application for postconviction relief.

Wittern was found guilty on three counts of delivery of cocaine in violation of Iowa Code section 204.401(1) (1989). Wittern's conviction was affirmed by the court of appeals, and further review was denied. Wittern then filed a pro se application for postconviction relief which was subsequently amended after Wittern retained counsel. Wittern alleged he received ineffective assistance of counsel by: (1) counsel's failure to object to a multi-count information, (2) counsel's failure to make a proper inquiry and objection to alleged witness misconduct in the presence of the jury, and (3) counsel's actions in consenting to continuances without Wittern's authority. In January 1992, the State moved for summary judgment and dismissal of Wittern's application. In March 1992, the district court granted the State's motion and dismissed Wittern's application.

Wittern now appeals. He contends the district court erred in denying his application for postconviction relief.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v.

Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423. Summary judgment procedures apply to postconviction proceedings. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981).

Upon review of the record, we determine Wittern's claim for postconviction relief has not been properly preserved, and the district court properly granted the State's motion for summary judgment. Objections must be raised at the earliest time at which error became apparent in order to properly preserve error. State v. Stelzer, 288 N.W.2d 557, 559 (Iowa 1980). Our courts have long held postconviction relief is not a means for relitigating claims that were or should have been properly presented on direct appeal. Carroll v. State, 466 N.W.2d 269, 271 (Iowa App. 1990) (citing Washington v. Scurr, 304 N.W.2d 231, 234-34 (Iowa 1981)).

Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction proceedings unless the defendant can establish, by a preponderance of the evidence, both "sufficient reason" for not having

raised the issue at trial or on direct appeal, and actual prejudice resulting from such error. State v. Jones, 479 N.W.2d 265, 271 (Iowa 1991). See Iowa Code § 663A.8 (1991). Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

Here, Wittern did not raise the issue of ineffective assistance of counsel on direct appeal. He has not argued he received ineffective assistance of appellate counsel. Furthermore, Wittern has made absolutely no showing either of a "sufficient reason" for not having raised this issue on appeal, or of any actual prejudice which resulted from the failure to do so.

Notwithstanding the district court's conclusion that Wittern was barred from asserting these claims at the postconviction proceeding, the district court addressed the issues raised in Wittern's application for postconviction relief. The district court concluded Wittern failed to show actual prejudice resulted from the alleged deficiencies of his trial counsel.

Because Wittern failed to preserve his claims of ineffective assistance of trial counsel and offered no explanation for this failure, we find the district court properly granted the State's motion for summary judgment and properly declined to consider issues which should have been considered on direct appeal. We will affirm the

district court if any reason for affirmance appears in the record. See Hewitt v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981); Kelly v. Brewer, 239 N.W.2d 109, 113 (Iowa 1976).

For the reasons stated, we affirm the judgment of the district court.

The costs of this appeal are taxed to Wittern.

AFFIRMED.