

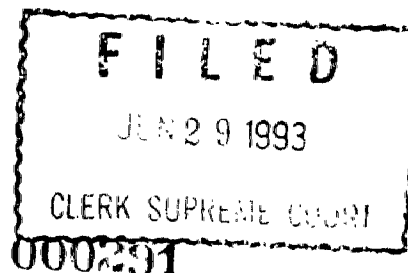
IN THE COURT OF APPEALS OF IOWA

No. 3-168 / 92-220

MILTON WEIR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Warren County,
Robert O. Frederick, Judge.

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

D. William Thomas, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Roxann M. Ryan
Deputy Attorney General, Kevin Parker, County Attorney, and
John Criswell, Assistant Attorney General, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab,
JJ.

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OXBERGER, C.J.

Milton Weir was charged with three counts of first-degree murder and one count of first-degree robbery. At trial, codefendant Larry Simpson testified he was aiding Weir in robbing a drug dealer when Weir shot and killed the dealer, a woman, and a child living with him. The evidence showed the two guns used in the murders and personal property of the victims was found in Weir's possession. Testimony of other witnesses indicated Weir told them he wanted to kill drug dealers.

Weir's defense was alibi. He also claimed Simpson gave him the guns as collateral for a loan and framed him for the murders.

After a jury trial, Weir was found guilty of three counts of murder in the first degree and one count of robbery in the first degree, in violation of Iowa Code section 711.2. Weir was given three consecutive life sentences and a consecutive twenty-five-year term for robbery. His convictions were affirmed by the Iowa Supreme Court. State v. Weir, 414 N.W.2d 327 (Iowa 1987).

In 1990 Weir applied for postconviction relief. A witness, who at the original trial testified Weir said he wanted to rob and kill drug dealers, claimed he now thought it was Simpson who had said he wanted to kill drug dealers. Weir claims this is newly-discovered evidence. Weir's original trial counsel testified they had investigated a number of possible witnesses but rejected

them for various reasons. After a hearing, the district court issued a ruling denying Weir relief. The court found Weir failed to show anything more than a dispute with counsel as to trial technique. Weir's subsequent 179(b) motion was denied.

Weir appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Discussion

The State argues Weir waived the issue of ineffective assistance by not raising it on direct appeal. Weir claims he informed his appellate counsel that he wanted to make an ineffective assistance of trial counsel claim on direct appeal. He claims he was informed he could not make such a claim until he made application for postconviction relief. His appellate counsel did not testify at the postconviction relief hearing.

As a general rule, issues not presented on appeal may not be presented at a postconviction hearing. See e.g. Connor v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982),

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the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation.

However, in order to raise issues not properly preserved, a defendant must establish, by a preponderance of evidence, sufficient reason or cause for not raising the issue on direct appeal and prejudice resulting from the alleged errors. Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991). We assume, arguendo, Weir presented sufficient cause for his failure to address the issue on direct appeal and turn to the question of prejudice.

Ample testimony presented at trial indicated Weir committed the murders and the robbery. Simpson testified he saw Weir fire the gun at the victims. Other testimony indicated possessions of the victims were found at Weir's residence. In addition, Weir attempted to alter the murder weapons in order to avoid detection for crimes. We are unable to find any prejudice in this case and affirm the trial court's denial of Weir's postconviction relief application.

AFFIRMED.