

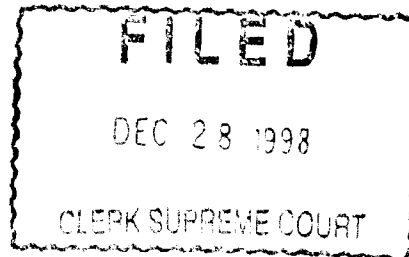
IN THE COURT OF APPEALS OF IOWA

No. 8-650 / 98-173
Filed December 28, 1998

WILLIAM C. SCOTT,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

William Scott appeals from the district court order denying his application for
postconviction relief. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des
Moines, and Christopher L. Hartley, Milwaukee, Wisconsin, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

VOGEL, J.

William Scott appeals from the district court order denying his application for postconviction relief. We find Scott suffered no prejudice from his trial counsel's failure to object to certain testimony and therefore affirm.

Background facts. Scott was convicted of first-degree murder in 1991. On appeal, we affirmed his conviction and preserved his claim of ineffective assistance for postconviction proceedings. *See State v. Scott*, No. 92-64 (Iowa App. Sept. 2, 1993). Scott filed an application for postconviction relief in July of 1996 asserting several claims of ineffective assistance. After a hearing, the district court denied Scott's application. Scott now appeals.

Scope of review. Generally, an appeal from the denial of an application for postconviction relief is review for errors at law. *Mabrier v. State*, 519 N.W.2d 84, 85 (Iowa 1994). However, as Scott raises the constitutional issue of effective assistance of counsel, our review is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

I. Objections under rules 402, 403 and 404. Prior to trial, defense counsel filed a motion in limine seeking, in part, to preclude the State from introducing evidence concerning statements made by Scott during an arrest prior to the time of the offense. The motion was overruled by the district court. At trial, the State called

three Waterloo police officers who testified as to Scott's statements. Scott asserts that counsel's failure to object to the testimony at trial amounts to ineffective assistance.

To prevail on an ineffective assistance of counsel claim the applicant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Pearson*, 547 N.W.2d 236, 240 (Iowa App. 1996). In evaluating counsel's performance, we presume counsel acted competently. *Id.* Prejudice requires proof that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 694 (1984). If the applicant makes an insufficient showing on either prong of the two-part test, we need not address both components. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998); *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985).

Scott particularly complains about the introduction of his somewhat rambling statement that he and his friends had an AK-47 rifle, and that when fired, its bullets could penetrate a squad car and kill whoever was inside. He asserts that the testimony was irrelevant because the statements were made seventeen days before the shooting in this case and the murder weapon was not an AK-47. In the motion in limine, this argument was made under Iowa Rules of Evidence 402 and 403. However, on appeal, Scott argues that this testimony amounted to improper character evidence under Iowa Rule of Evidence 404(a) & (b). We are not convinced that this argument was

preserved for our review; nevertheless, we will consider it. The State argues the statement was necessary as it described almost the same scenario which occurred seventeen days later, and was therefore admissible evidence of Scott's intent or plan under rule 403. We need not resolve the merits of this argument if we find Scott suffered no prejudice from counsel's failure to object to the testimony. *See Osborn*, 573 N.W.2d at 922.

The record was replete with evidence that Scott specifically intended to kill or injure the victim. One witness testified that after an argument, Scott told the victim "I am going to go get my gun and I will get you later." After the victim cut Scott in another confrontation, another witness heard Scott say: "I am going to go get my gun." Scott made similar statements regarding his intent to a police officer and another witness. Finally, a witness testified to seeing Scott shooting at the van the victim was riding in. We find that Scott cannot show a reasonable probability that, but for counsel's failure to object, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 694.

II. Other ineffective assistance claims. In his application for postconviction relief, Scott raised several additional claims of ineffective assistance against his trial counsel which were not raised on direct appeal. Claims not raised on direct appeal are barred from postconviction relief unless an applicant shows sufficient reason or cause for his failure to raise them in prior proceedings. *See Iowa Code* § 822.8

(1997); *Osborn*, 573 N.W.2d at 921; *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). Scott did not offer any reason or cause for his failure to raise these additional claims in his application for postconviction relief, and only did so in his reply brief for this appeal. We therefore conclude that these claims were not preserved for our review and will not consider them on appeal.

We affirm the district court's denial of Scott's application for postconviction relief.

AFFIRMED.