IN THE COURT OF APPEALS OF IOWA

No. 7-572 / 96-1708

000209

JUSTIN STEVEN McINTOSH,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
NOV 25 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

On appeal from the denial of his application for postconviction relief, the appellant argues his counsel at his probation revocation hearing was ineffective. **AFFIRMED.**

Katherine T. Miller of Phelps & Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Sackett, and Huitink, JJ.

CADY, C.J.

Justin Steven McIntosh appeals the district court's denial of his application for postconviction relief. McIntosh claims he received ineffective assistance of counsel at his probation revocation hearing. He also claims his right to freedom of religion under the First Amendment was violated because a term of probation ultimately required him to accept a "higher power." We affirm.

McIntosh pled guilty to third-degree burglary. The district court imposed an indeterminate five year suspended sentence, and placed him on probation for three years. One term of the probation required McIntosh to successfully complete the Center for Alcohol and Drug Services (CADS) inpatient substance abuse program. The CADS substance abuse program involved a twelve-step process which required patients, at some point, to accept a higher power.

Prior to sentencing, McIntosh participated in a screening where the terms of the twelve-step program were explained to him. McIntosh understood the twelve-step program at the time of the sentencing hearing and agreed to complete the program. Following sentencing, he also signed a probation agreement which required him to participate in and successfully complete the program.

After McIntosh failed to comply with the terms of the CADS program, a probation revocation hearing was held. His attorney stipulated McIntosh violated the terms of probation. The court revoked probation and imposed the original sentence.

McIntosh subsequently applied for postconviction relief which the district court denied.

On appeal McIntosh claims he received ineffective assistance of counsel at the probation revocation hearing when his attorney stipulated a probation violation occurred and failed to call a witness to testify to the CADS "higher power" concept. He also asserts the revocation of his probation violated his First Amendment right to freedom of religion. McIntosh claimed he lost faith in the existence of God, following his sentencing after he was sexually assaulted by an inmate. His probation officer testified the "higher power" did not necessarily mean God, but included anyone a patient admired or respected, like a friend or parent.

I. First Amendment

Generally, we review postconviction relief claims for errors at law. *State v. Voelkers*, 547 N.W.2d 625, 634 (Iowa App. 1996). Because McIntosh's claim involves a constitutional challenge, we review it de novo, making our own evaluation of the circumstances under which the postconviction ruling was made. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997)

A postconviction proceeding is not the appropriate forum to raise new issues that have not been properly preserved. *Blum v. State*, 510 N.W.2d 175, 177-78 (Iowa App. 1993). Nor is it a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993). Further, any claim not properly raised at trial or on direct appeal

may not be litigated in postconviction proceedings unless there is sufficient reason for not properly raising it previously. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa App. 1994).

McIntosh claims the probation revocation court erred in failing to apply the First Amendment to his case. He also claims the postconviction relief court erred in failing to grant him a new probation revocation hearing based on his First Amendment claim.

McIntosh did not expressly assert a First Amendment objection to the CADS program at the probation revocation hearing. He also asked the court to place him in Alcoholics Anonymous meetings which also involves a higher power concept. Additionally, his testimony did not connect his sexual assault incident with his refusal to accept a higher power as he does now on appeal. Clearly, McIntosh failed to adequately raise First Amendment issues at the probation revocation hearing. Thus, we decline to address the claim. *See O'Conner v. State*, 855 F. Supp. 303, 307 (C.D. Cal. 1994) (requiring a drunk driver to participate in Alcoholics Anonymous did not violate establishment clause); *Stafford v. Harrison*, 766 F. Supp. 1014, 1016-17 (D. Kan. 1991) (twelve- step treatment program using a "higher power" concept is not properly characterized as religion where the definition of "higher power" is left to the individual); *Youle v. Edgar*, 526 N.E.2d 894, 899 (Ill. App. 1988) (primary purpose behind Alcoholics Anonymous was to treat alcoholism and not promote religion); *see also Kerr v. Farrey*, 95 F. 3d 472, 480 (7th Cir. 1996) (under establishment clause,

an inmate could not be forced to attend narcotics rehabilitation program which refers to God).

II. Ineffective Assistance of Counsel

McIntosh's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

To prevail on an ineffective assistance of counsel claim, McIntosh must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Ray*, 516 N.W.2d at 865; *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996). He must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Counsel need not make every possible objection to satisfy the standard of normal competency. *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993). Additionally, a miscalculated trial strategy or mistake in judgment does not necessarily amount to ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). Trial counsel is entitled to a presumption of competence and we will not second guess a reasonable trial strategy. *Id.*

McIntosh claims defense counsel was ineffective by stipulating to the probation violation and failing to call CADS witnesses to testify to the meaning of a "higher power." The record reveals defense counsel's strategy was to show the CADS counselor made a poor decision in discharging McIntosh and he needed further substance abuse treatment. In fact, McIntosh expressed a desire to attend Alcoholics Anonymous meetings. When defense counsel makes a reasonable decision concerning strategy, we will not interfere simply because the strategy does not achieve the desired result. *Steinkuehler v. State*, 507 N.W.2d 716, 720 (Iowa App. 1993).

It was reasonable for defense counsel to stipulate to McIntosh's violation of probation. The record clearly reveals he violated the terms of his probation. Moreover, we find counsel's strategy to attempt to secure additional treatment for McIntosh to be reasonable trial strategy. McIntosh therefore fails to demonstrate how his trial counsel breached an essential duty in electing to use this strategy or how he was prejudiced.

We have considered all issues raised by McIntosh. We affirm the district court.

AFFIRMED.