

FILED

MAR 22 1979

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

WILLIAM CARL MORGAN,	)	
Appellant,	)	Filed March 22, 1979
vs.	)	
CALVIN AUGER, Warden of the	)	
Men's Reformatory, Anamosa,	)	738
and STATE OF IOWA,	)	<u>2-61681</u>
Appellees.	)	

Appeal from Scott District Court - Nathan Grant, Judge.

Petitioner appeals from the trial court's denial of his application for postconviction relief, alleging ineffective assistance of counsel and involuntariness of the plea. - AFFIRMED.

Bertram B. Metcalf, Davenport, for Appellant.

Thomas J. Miller, Attorney General of Iowa, William Armstrong, Assistant Attorney General, William Davis, Scott County Attorney, and Christine Hansen, Assistant County Attorney, for Appellees.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner appeals from the trial court's denial of his application for post-conviction relief. We affirm.

Review of postconviction relief actions involving constitutional issues is de novo requiring an independent evaluation of the totality of circumstances under which the postconviction ruling was made. Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); Cleesen v. State, 258 N.W.2d 330, 331 (Iowa 1977); Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975). The burden of proof in postconviction relief proceedings is on the petitioner who must establish facts asserted by a preponderance of the evidence. Snyder, 262 N.W.2d at 576; Cleesen, 258 N.W.2d 331.

Petitioner's principal contention is that the trial court erred in failing to find that he was denied effective assistance of counsel. He maintains his attorney failed to conduct adequate pretrial investigations, unduly pressured petitioner to plead guilty, and failed to take an appeal.

The sixth amendment right to counsel means the effective assistance of an attorney. Cleesen, 258 N.W.2d at 331. A determination of competency is made by asking whether, under all the circumstances, counsel's performance was within the range of normal competency. State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); Cleesen, 258 N.W.2d at 331. Such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. Rand, 268 N.W.2d at 648; Cleesen, 258 N.W.2d at 331.

In this case, petitioner has not shown a sufficient factual basis to prove by a preponderance of the evidence that his attorney's efforts fell outside the range of normal competency. Rather, the record indicates that counsel attempted to follow-up on the information provided by the petitioner but was unsuccessful in his efforts. Petitioner has further failed to meet his burden of showing that counsel coerced his plea and, consequently, ineffectively represented his interests. Conflicting evidence existed in the record as to this matter and in such a situation, we accord weight to the trial court's findings since it is in a better position to

determine the credibility of the testifying witnesses. Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220, 226 (Iowa 1977); Iowa R. App. P. 14(f)(7). Finally, petitioner's contention that his counsel was ineffective in failing to pursue an appeal is raised for the first time on appeal and will not be considered by this court. State v. Jump, 269 N.W.2d 642, 650 (Iowa 1978); Rand, 268 N.W.2d at 650. We do not find that petitioner's rambling response to a question unrelated to the issue of whether counsel failed to pursue an appeal represented a trial of the issue by consent. See Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782, 786-787 (Iowa 1976).

Petitioner further asserts that his plea was not voluntarily rendered. No argument on the specific issue of voluntariness of the plea was developed in the petitioner's brief, White v. Bd. of Review of Polk County, 244 N.W.2d 765, 769 (Iowa 1976); Iowa R. App. P. 14(a)(5), and, therefore, we will consider it only in relation to petitioner's claim of ineffective assistance of counsel.

While even a valid claim of ineffective assistance of counsel does not necessarily render a petitioner's plea of guilty involuntary, here petitioner does maintain that his plea was coerced by the active efforts of his attorney who, petitioner claims, hoped to avoid going to trial. This contention is without adequate support. We find that petitioner's statement at the plea proceedings that his plea was voluntarily rendered represented a choice made by the petitioner from among available, though harsh, alternatives. State v. Hansen, 221 N.W.2d 274, 276-277 (Iowa 1974). The trial court did not err in denying petitioner's application for postconviction relief.

AFFIRMED.