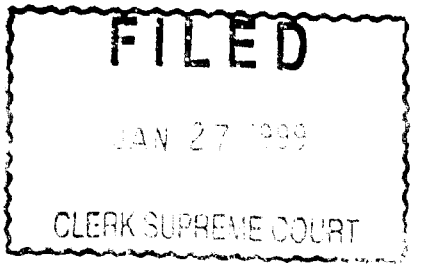
IN THE COURT OF APPEALS OF IOWA

No. 8-709 / 97-2168
Filed January 27, 1999



TRACY A. McGREW,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Tracy McGrew appeals district court ruling barring him from re-litigating in a postconviction relief proceeding an ineffective assistance of counsel claim that he should have raised on direct appeal. **AFFIRMED.**

Matthew M. Boles of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Tracy McGrew appeals from the denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

On February 12, 1992, a jury convicted Tracy McGrew of kidnaping in the first degree, burglary in the first degree, and escape. The court sentenced him to life imprisonment for kidnaping, an indeterminate twenty-five year term for burglary, and an indeterminate five-year term for escape.

On McGrew's direct appeal, the Iowa Supreme Court affirmed both the district court and the court of appeals decisions in *State v. McGrew*, 515 N.W.2d 36 (Iowa 1994). McGrew's only contention on direct appeal was a challenge to the sufficiency of the evidence in which he claimed the victim's confinement was merely incidental to the sexual abuse and therefore not sufficient to establish the requisite confinement for a kidnaping charge.

McGrew then filed a petition for postconviction relief in the district court. McGrew claimed he was denied his Sixth Amendment right to counsel due to his trial counsel's ineffectiveness. In his application, McGrew set forth five instances at trial he claimed demonstrated his counsel's ineffectiveness. He raised all five issues for the first time in his application, having failed to bring them before either the court of appeals or supreme court on direct appeal.

The postconviction court found McGrew "did not raise any of the grounds [in his direct appeal] that he now seeks to litigate, nor did he preserve the claim of ineffective assistance of counsel." The district court went on to address each of McGrew's claims and found them to be without merit.

In this appeal, McGrew reasserts two of the five ineffectiveness claims which the district court denied. In particular, he argues his trial counsel was ineffective in not objecting to the introduction of a note, a portion of which stated he had spent time in prison. He also asserts his counsel was ineffective for failing to object when a police officer testified for the State he knew McGrew's identity from "prior contact" with him.

Notably absent from McGrew's original application and this appeal is any attempt to explain his procedural default in failing to preserve error on any of his postconviction claims by raising them on direct appeal.

II. Standard of Review.

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

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him.

Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.; Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

III. Error Preservation.

An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. *See* Iowa Code § 822.8 (1997). Before McGrew may raise a claim of ineffective assistance of trial counsel for the first time in postconviction proceedings, he must demonstrate a "sufficient reason" for not raising the claim on direct appeal. *See id*; *Polly v. State,* 355 N.W.2d 849, 855 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995).

At no point in his application for postconviction relief or his appellate brief has McGrew attempted to make a showing of a sufficient reason or cause for his failure to raise his claim of ineffective assistance of trial counsel on direct appeal.

McGrew has failed to prove a sufficient reason or cause for not having raised the issue of ineffective assistance of trial counsel in his direct appeal. He failed to present to the postconviction court the issue of ineffective assistance of appellate counsel, and he has failed to prove, in any other manner, a sufficient reason for not having previously raised this claim. Similar postconviction claims of ineffective assistance of trial counsel have been barred because of an applicant's failure to assert the ineffective assistance of appellate counsel. *See LeGrand*, 540 N.W.2d at 669; *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981).

AFFIRMED.