

IN THE COURT OF APPEALS OF IOWA

No. 6-074 / 95-71

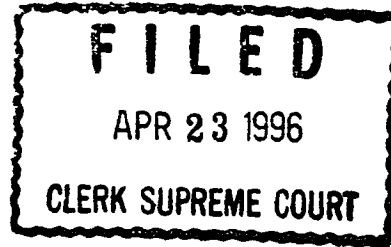
EURIC FOUNTAIN,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Applicant appeals from the denial of postconviction relief. **AFFIRMED.**

John P. Messina, Des Moines, until his withdrawal, and then F. Montgomery Brown of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Euric Fountain was convicted of first-degree murder on June 30, 1988, after a jury trial. Fountain's conviction was affirmed on appeal by the Iowa Court of Appeals on January 25, 1990. Fountain filed this application for postconviction relief on March 12, 1993.

In his application for postconviction relief, Fountain contended trial counsel was ineffective in failing to object to the composition of the jury, failing to adequately prepare for trial, failing to depose a corroborating witness, and failing to adequately examine and object at trial. He also alleged appellate counsel was ineffective in failing to raise these issues on direct appeal.

The district court denied Fountain postconviction relief. The district court found Fountain had failed to raise ineffectiveness of trial counsel on direct appeal and had not shown sufficient reason therefore. The court nonetheless addressed the merits of Fountain's contentions and rejected them.

Fountain 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.*

On appeal, Fountain raises two issues, neither of which were raised or considered by the district court in the application for postconviction relief.¹ Fountain's first assertion is that appellate counsel, on the direct appeal, did not provide effective assistance since she represented both Fountain and an alleged accomplice on their respective convictions involving the same crime. Fountain's second claim is that he was denied effective assistance of trial, appellate, and postconviction counsel due to the failure to challenge the submission of the felony murder theory to the jury.

All grounds for postconviction relief available to an applicant must be raised in the original, supplemental, or amended application. *See* Iowa Code § 822.8 (1993). The district court had no opportunity to consider or rule on the issues brought in this appeal since Fountain never raised them in his application for postconviction relief. The district court was not given the opportunity to consider the claims now urged on appeal. We need not consider these claims on appeal.² *See State v. Mann*, 512 N.W.2d 528, 536 (Iowa 1994); *Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991);

¹ None of the issues decided by the district court in the denial of postconviction relief are at issue in the appeal.

² Ordinarily, in order for these claims to be considered, Fountain must raise them in a second application for postconviction relief. To raise these claims, Fountain generally would have to consider the requirements set out in *Whitsel v. State*, 525 N.W.2d 860 (Iowa 1994). In addition, we note Fountain did not assert a separate issue of ineffective assistance of postconviction counsel in this appeal. Rather, he merely discussed such a claim in an attempt to gain our consideration of the issues he raised on appeal.

Davis v. State, 443 N.W.2d 707, 710 (Iowa 1989); *Williams v. State*, 421 N.W.2d 890, 893 (Iowa 1988).

Although we need not consider these two issues raised for the first time on appeal, we will do so. To prevail on a claim of ineffective assistance of counsel, the applicant must show: (1) counsel's performance fell outside the normal range of competency, and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, defendant must show counsel's failure worked to defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

As it relates to Fountain's conflict claim, we find it to be without merit. He has failed to demonstrate an actual conflict of interest adversely affected his appellate lawyer's performance (for a valid federal constitutional claim) or the existence of a substantial possibility the alleged dual representation created a conflict between his interest and those of the alleged accomplice (the apparent measure for state constitutional claims). See *Cosgrove v. State*, 304 N.W.2d 184, 186 n.1 (Iowa 1981).

Regarding Fountain's second claim that each of the lawyers who have represented him at every stage of the proceedings rendered ineffective assistance for their failure to challenge the submission of the felony murder instruction to the jury, we likewise find that to be without merit.

An instruction on felony murder was appropriate if substantial evidence existed that defendant, with malice, participated in or aided and abetted one participating in a forcible felony which caused death. Iowa Code §§ 707.1(2) and 707.2(2) (1987). The record contains sufficient evidence to support the submission of the felony murder instruction. The actions of both Fountain and his accomplices before, during, and after the murder supports the submission of the felony murder instruction. Defendant's trial counsel breached no duty in failing to challenge the submission of this instruction. In addition, Fountain has failed to satisfy the prejudice prong of his ineffective assistance claim.

Accordingly, we affirm the ruling of the district court denying postconviction relief.

AFFIRMED.