FILED
NOV 30 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-446 / 91-1969

TIMOTHY C. SMITH,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Phillip R. Collett, Judge.

Timothy Smith appeals a district court decision denying his application for postconviction relief. **AFFIRMED.**

Elizabeth S. Kruidenier of Parrish & Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Roxann M. Ryan, Deputy Attorney General; and William H. Appel, County Attorney, for appellee.

Heard by Donielson, P.J., Sackett, J., and Keefe, S.J.*

*Senior Judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

Timothy Smith appeals a district court decision denying his application for postconviction relief.

On August 8, 1987, when Ruth Ann Drummond failed to meet her husband for lunch as planned, he went home and found her body, nude and bloodied, laying on the couch. The telephone wires had been torn out and a bare footprint was found outside a bedroom window. The victim suffered severe blows to the head and body and multiple stab wounds.

Smith, a trucker from Ottumwa, had separated from his wife and was staying in a motel near the victim's residence on the night before the killing. In the DCI's investigation, footprints were obtained from people who were in the area at the time of the murder, including Smith. Smith was interviewed by the DCI, and he then disappeared. The DCI checked the prints and discovered the prints matched. When Smith reappeared, he met with a DCI agent and confessed he had killed the victim.

In May 1988, a jury found Smith guilty of murder in the first degree. The district court entered judgment and sentenced Smith to life in prison. In October 1989, the court of appeals affirmed his conviction. See State v. Smith, No. 88-870, (Iowa App. Oct. 8, 1989).

In December 1990, Smith filed this application for postconviction relief. Following a hearing, the district court entered an order denying Smith's application for

postconviction relief. The district court ruled Smith failed to preserve his claims of ineffective assistance of counsel. In addition, the district court concluded even if the issues had been preserved, Smith failed to prove he was denied effective assistance of counsel. Smith now appeals.

Smith contends the trial court erred in denying his motion for change of venue. Smith also argues he was denied effective assistance of appellate counsel for the failure to raise this issue on appeal.

In addition, Smith contends he was denied effective assistance of trial counsel for three reasons. First, Smith claims he was denied effective assistance of counsel by trial counsel's failure to have voir dire reported. Smith contends trial counsel admitted at the postconviction hearing that two people selected for the jury were possibly acquainted with the victim or her family. Smith argues without a record he is unable to demonstrate actual prejudice or bias of the two jurors.

Next, Smith contends his trial counsel provided ineffective assistance by failing to fully investigate the physical arrangement of the room in which he was questioned. Finally, Smith contends he was denied effective assistance in regards to numerous errors concerning the expert testimony presented at the trial. Specifically, Smith points to counsel's failure to rebut the testimony of Dr. Bennett, who testified the crime appeared to be a sexual-type assault.

The State asserts Smith has failed to properly preserve error on any of these issues.

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.

I. Change of Venue. Smith first contends the district court erred in denying his motion for change of venue. Smith contends there was actual prejudice on the part of the jury and the publicity surrounding the case was so pervasive and inflammatory that prejudice could be presumed. Smith points to several articles which appeared in the Des Moines Register and the Ottumwa Courier prior to the time of trial. Smith also argues he was denied effective assistance of counsel for the failure to raise this issue on appeal.

Upon review of the record, we determine this claim has not been properly preserved. The claim that the district court erred in denying this motion was never raised on direct appeal. The claim that Smith was denied effective appellate counsel because of the failure to directly appeal this issue was withdrawn from Smith's application for postconviction relief by Smith's counsel. The district

court at the postconviction hearing noted: "Counsel for the Petitioner withdrew that issue because she felt that the person in the Appellate Defender's office handling the appeal had adequate reason to not pursue the change of venue question."

Objections should be raised at the earliest time at which error became apparent in order to properly preserve error. State v. Steltzer, 288 N.W.2d 557, 559 (Iowa 1980). Our courts have long held postconviction relief is not a means for relitigating claims that were or should have have been properly presented on direct appeal. Carroll v. State, 466 N.W.2d 269, 271 (Iowa App. 1990) (citing Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981)).

Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless the defendant can establish, by a preponderance of the evidence, both "sufficient reason" for not having raised the issue at trial and on direct appeal, and actual prejudice resulting from such error. State v. Jones, 479 N.W.2d 265, 271 (Iowa 1991). Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

Here, Smith did not raise the issue of the district court's denial of his change of venue motion on direct appeal. Smith also did not properly raise the issue of

ineffective assistance of appellate counsel at the postconviction proceeding.

We therefore find Smith has not demonstrated "sufficient reason" for not having raised, on direct appeal from his criminal trial, this particular claim of the district court's alleged error in denying his motion for change of venue. Furthermore, we find Smith has not properly preserved the question of ineffective assistance of appellate counsel.

II. Ineffective Assistance of Trial Counsel. Smith contends he was denied effective assistance of trial counsel for three reasons: (1) trial counsel's failure to have voir dire reported, (2) trial counsel's failure to fully investigate the physical arrangement of the room in which Smith was questioned, and (3) trial counsel's failure to rebut the testimony of the State's expert witness.

Again, Smith must show "sufficient reason" for not having raised the issue of ineffective assistance of trial counsel on direct appeal. State v. Jones, 479 N.W.2d 265, 271 (Iowa 1991). While ineffective assistance of appellate counsel is a sufficient reason for failing to raise an issue on direct appeal, Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981), Smith has not argued he received ineffective assistance of appellate counsel.

We note the findings of the district court on this issue:

> In light of the fact that a different attorney handled the appeal and that an adequate evidentiary record already existed concerning the issues raised in the postconviction application, Smith's ineffective assistance of counsel claims should have been raised in his appeal to the Iowa Supreme Court. In his postconviction application Smith did not state any reason for his failure to raise those issues in the appeal and presented no evidence as to why the issues were not previously asserted at the time of direct appeal.

Notwithstanding the district court's conclusion that Smith was barred from asserting these claims at the postconviction proceeding, the district court addressed the issues raised in Smith's application for postconviction relief. The district court determined Smith failed to establish that he received ineffective assistance of trial counsel or that he suffered any prejudice from the actions of trial counsel.

Because Smith has failed to preserve his claims of ineffective assistance of trial counsel and has failed to even offer a reason for failing to do so, we find the district court properly denied Smith postconviction relief and decline to consider issues which should have been raised on direct appeal. We will affirm the trial court if any reason for affirmance appears in the record. See Hewitt v. City of Des Moines, 300 N.W.2d 121, 126 (Iowa 1981); Kelly v. Brewer, 239 N.W.2d 109, 113 (Iowa 1976).

For the reasons stated, we affirm the judgment of the district court.

The costs of this appeal are taxed to Smith.

AFFIRMED.