

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 25 1983

CLERK SUPREME COURT

LARRY J. HEMMINGER,

)

Petitioner-Appellant,

)

Filed October 25, 1983

vs.

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STATE OF IOWA,

)

3-300
69607

Respondent-Appellee.

)

Appeal from Polk District Court - C. Edwin Moore, Senior Judge.

Petitioner appeals from the trial court's decision denying him postconviction relief. **AFFIRMED.**

Kermit L. Dunahoo, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Petitioner appeals from the trial court's decision denying him postconviction relief. We affirm.

Petitioner was charged with robbery in the first degree. Pursuant to an agreement he pled guilty and the State amended the trial information striking the allegation of use of a firearm. Subsequently petitioner filed a motion in arrest of judgment. The trial court order sustained the motion and provided that petitioner "is allowed to withdraw his guilty plea and his plea of not guilty is re-instated." Petitioner's conviction was affirmed in State v. Hemminger, 308 N.W.2d 171 (Iowa 1981).

In this proceeding petitioner alleges that his trial counsel was ineffective for failing to object or move to dismiss the case when a new trial information was not filed in accordance with Iowa Rule of Criminal Procedure 23(3) after his motion in arrest of judgment was granted. Petitioner further alleges that his appellate counsel provided ineffective assistance by failing to raise trial counsel's ineffectiveness on appeal.

A proceeding for postconviction relief under Iowa Code chapter 663A is at law and our review is on error. However, when petitioner asserts the violation of basic constitutional guarantees, we make our own evaluation of the totality of the circumstances. This is the equivalent of a *de novo* review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

Petitioner did not challenge the effectiveness of trial counsel on appeal. We will not consider it for the first time in a postconviction proceeding unless petitioner presents a sufficient reason for failing to raise the issue on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Ineffective assistance of appellate counsel is a sufficient reason. Id. Since the arguments concerning trial and appellate counsel are the same, we consider them together.

The burden of proof rests upon petitioner to show by a preponderance of the evidence that counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Although there is a presumption that counsel is adequate, this presumption can be overcome by a showing that counsel's performance was below the range of normal competency. Id.

It is clear in this case that the document filed by petitioner entitled motion in arrest of judgment was intended merely as an application to withdraw his guilty plea. It was treated as such by the court and the parties. A new trial information is not required after a motion for leave to withdraw a guilty plea is granted. State v. Belieu, 314 N.W.2d 382, 384 (Iowa 1982).

While it would have been proper for counsel to object or move to dismiss on the ground that a new trial information had not been filed, his failure to do so did not prejudice petitioner's case. If the issue had been raised, a new trial information undoubtedly would have been filed and there would have been no benefit to petitioner. Furthermore, trial counsel testified that if he had forced a new information to be filed by the State, he would have lost the ability to appeal on the ground that petitioner was not present when the court reinstated in the original information the provision relating to the use of a firearm.

Since petitioner failed to show any prejudice, his application for postconviction relief was properly denied.

AFFIRMED.