FILED
FEB 28 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-037 / 94-336

WARREN SUEHL,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Clinton County, Bobbi Alpers, Judge.

Suehl appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellant.

Thomas J. Miller, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce Ingham, Assistant County Attorney, for appellee.

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

HUITINK, J.

Warren Suehl appeals from a district court order denying his application for postconviction relief. We affirm.

Suehl was charged with simple misdemeanor assault for breaking the window of his cousin's combine with a hammer. At trial Suehl testified he was not present when the window was broken. He contended the window was broken when his cousin ran through a fence separating their properties.

On January 29, 1992, Suehl was convicted as charged. The magistrate immediately entered judgment and ordered Suehl to pay a fine, costs, and restitution. On August 4, Suehl moved for leave to file a delayed appeal, contending he had not been informed of his right to appeal to the district court.

The magistrate filed an affidavit stating he had no recollection of whether he informed Suehl of his right to appeal. Suehl's trial counsel filed an affidavit stating the magistrate had not informed Suehl of his right to appeal, but counsel had. The court denied Suehl's motion.

Suehl filed an application for postconviction relief alleging he was denied his statutory right to appeal and he was denied effective assistance of counsel. Suehl argued his conviction was not supported by sufficient evidence and there was prosecutorial misconduct. The district court denied the application, concluding Suehl suffered no prejudicial error.

Our review of postconviction proceedings is for errors at law. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989). In order to assign new error challenging a conviction, an applicant must show (1) cause or sufficient reason for failing to challenge the alleged errors on direct appeal and (2) actual prejudice resulted from these errors. Id. (citations omitted).

Suehl claims he failed to raise these issues (insufficient evidence to support the conviction and prosecutorial misconduct) in a timely appeal because the magistrate failed to inform him of his right to appeal. He contends the postconviction court erred in determining the magistrate's failure was harmless.

Iowa Rule of Criminal Procedure 22(3)(e) provides in part :

> After imposing sentence in a case, the court shall advise the defendant of his or her statutory right to appeal . . . .

The filed affidavits show the court, most likely, did not inform Suehl of his right to appeal. Since the court failed to comply with the requirements of 22(3)(e), Suehl has shown sufficient reason for failing to timely appeal his conviction on the above grounds.

Even though Suehl has shown sufficient reason, he must also show actual prejudice resulted from the alleged error. Suehl first contends there was not sufficient evidence to support his conviction.

Our standard of review on a sufficiency claim is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Where the evidence is in conflict, however, the jury is empowered to resolve those conflicts in accordance with its own views as to the credibility of the witnesses. State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984) (citations omitted).

The postconviction record shows Suehl offered another explanation of the events at trial. Suehl denied he assaulted his cousin. The jury chose not to accept Suehl's version of the events. Suehl's mere denial of guilt is not enough to show he would have prevailed on direct appeal. There was substantial evidence to support the conviction, and Suehl suffered no prejudice from failing to timely appeal. The trial court is affirmed on this issue.

Suehl also claims his attorney was ineffective for failing to object to prosecutorial misconduct and false testimony offered by the prosecution. We disagree.

In order to prevail on an ineffective assistance claim, Suehl must prove by a preponderance of the evidence that (1) counsel breached an essential duty and (2) prejudice resulted. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). In evaluating counsel's performance, we presume counsel acted competently. Id.

The postconviction record shows Suehl objected to the prosecutor's statements in his closing argument which was, by its nature, unfavorable to Suehl's position. The alleged false testimony is that of Suehl's cousin, which was also unfavorable to Suehl's position.

We, like the trial court, find there is no proof to support Suehl's claims of prosecutorial misconduct and false testimony. There was no breach of an essential duty by Suehl's counsel, and no prejudice resulted from the failure to object. Accordingly, the trial court is affirmed on this issue.

The trial court's denial of Suehl's application for postconviction relief is affirmed. Costs of this appeal are assessed to Warren Suehl.

AFFIRMED.