FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MICHAEL ASHBY,)

Petitioner-Appellant,) Filed December 29, 1982

vs.)

STATE OF IOWA,) 2-291
2-67111

Respondent-Appellee.)

Appeal from Polk District Court - Joel D. Novak, Judge.

Postconviction relief applicant appeals from trial court's dismissal of his application seeking postconviction relief from his 1980 conviction of theft in the second degree asserting 1) that he was denied effective assitance of counsel during the proceedings leading to his guilty plea and sentence, 2) that because of this denial of effective assistance of counsel petitioner's failure to file a motion in arrest of judgment resulted in a bypass of an unknown right, and 3) that dismissal of petitioner's appeal due to a procedural default does not preclude consideration of his challenge to the guilty plea proceedings because, despite his request for court-appointed counsel on appeal, this request was not granted. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Considered en banc.

PER CURIAM

Petitioner, Michael Ashby, appeals from trial court's dismissal of his petition for postconviction relief which challenged his 1980 conviction of theft in the second degree in violation of Iowa Code §§ 714.1(1), 714.2(2) (1979). On appeal he asserts that the postconviction court erred in failing to find 1) that he was denied effective assistance of counsel during the proceedings leading to his guilty plea and sentence, 2) that because of this denial of effective assistance of counsel the petitioner's failure to file a motion in arrest of judgment resulted in a bypass of an unknown right, and 3) that dismissal of petitioner's appeal due to a procedural default does not preclude consideration of his challenge to the guilty plea proceedings since petitioner filed a pro se notice of appeal requesting court-appointed counsel which was never granted. We affirm.

On February 27, 1970, petitioner pled guilty to the charge of theft in the second degree, in violation of Iowa Code §§ 714.1(1), 714.2(2) (1979). Judgment subsequently was entered and petitioner was sentenced to a term not to exceed five years. On May 15, 1980, petitioner filed a pro se notice of appeal. This appeal was dismissed on July 8, 1980, pursuant to rules 19 and 12(b) of the Iowa Rules of Appellate Procedure.

On February 5, 1981, petitioner filed his petition for postconviction relief, alleging, inter alia, the grounds now urged on appeal. In its findings of fact and conclusions of law filed on May 27, 1981, the postconviction court dismissed the petition. This appeal followed.

I. Scope of Review. Generally, a proceeding under chapter 663A is for correction of errors only, not de novo. Iowa R. App. P. 4. However, where the petitioner asserts the violation of a basic constitutional safeguard, we make our own evaluation of the totality of the circumstances under which the postconviction ruling was made. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979).

II. Jurisdictional Requirements under Iowa Code SS 663A.2(6) and 663A.8. It is clear that when a postconviction applicant has sought review of his conviction or sentence via direct appeal or previous postconviction action, he is barred from addressing any issue which he failed to pursue in the previous proceedings unless he carries his burden to show a sufficient reason why the claim was not asserted. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). We believe petitioner has met that burden. When petitioner filed his notice of appeal, his trial counsel had not withdrawn and other appellate counsel had not been appointed. Under Iowa R. App. P. 31(a), petitioner's trial counsel is deemed to be his appellate counsel. We believe this circumstance provides sufficient reason for any failure to raise on appeal the issue of the effectiveness of assistance of counsel at the plea proceedings. See Washington v. Scurr, 304 N.W.2d at 235. Thus, we conclude that the issue of ineffective assistance of counsel may be reviewed and is not barred by the jurisdictional requirements of sections 663A.2(6) and 663A.8.

III. Ineffective Assistance of Counsel. We next turn to petitioner's assertion that he was denied effective assistance of counsel during the proceedings leading to his guilty plea and sentence. We find no merit in petitioner's claim.

The test for ineffective assistance claims is well established. The complaining party bears the burden of proving his or her allegations of ineffective assistance by a preponderance of the evidence, including establishing an affirmative factual basis that counsel provided ineffective assistance. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The petitioner must show that counsel failed to perform an essential duty, or, in other words, an alleged omission by counsel was outside of the range of normal competency and that he was prejudiced by the omission. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

Here petitioner alleges that his counsel's representation was below the range of normal competency because counsel failed to advise him adequately regarding

the intent element of theft and, as a result of counsel's ineffectiveness, petitioner did not file a motion in arrest of judgment. Petitioner's counsel testified at the postconviction hearing that, although he did not remember the specifics of his conversation with petitioner, his usual procedure was to explain to a client the elements of the offense with which a client was charged. Trial counsel was an experienced lawyer and there is nothing in the record to indicate any reason he would have deviated from his normal procedure. On this record, trial court concluded that petitioner had not met his burden of proof.

However, even assuming arguendo that petitioner met his burden of proving ineffective assistance of counsel, petitioner must still show he was prejudiced by any alleged failure to explain the elements of the offense. Snethen, 308 N.W.2d at 14. At the plea proceeding, the judge carefully and thoroughly followed the standards and requirements set forth in State v. Sisco, 169 N.W.2d 542 (Iowa 1969), and Brainard v. State, 222 N.W.2d 711 (Iowa 1974), including informing petitioner of the elements of the offense to which he pled guilty. Specifically, after several series of questions relating to petitioner's intent, the following exchange occurred:

> The Defendant: Yes.
> The Court: I mean the owner wouldn't have the property when you took it, which you did do; is that correct?
> The Defendant: Yes.
> The Court: Therefore, you intended to drive the truck away? Would your intent have been to deprive that owner of the truck?
> The Defendant: Yes.[1]

Petitioner was given the information by the court that he alleges his counsel did not give him. Additionally, the record shows that, in 1978, petitioner was charged with larceny of a motor vehicle and ultimately pled guilty to the reduced charge of operating a motor vehicle without the owner's consent. These facts further

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[1]We note that petitioner was apprehended in the vehicle after a high-speed chase, thereby making incredible his claim that he intended only to drive the car.

negate any prejudice that might have arisen from counsel's failure to inform petitioner of the elements of the offense. We conclude that petitioner also has failed to show that he was prejudiced by an alleged omission of counsel.

Petitioner's argument that due to ineffective assistance of counsel his failure to file a motion in arrest of judgment resulted in a bypass of unknown right likewise is unpersuasive. Petitioner's counsel testified at the hearing for postconviction relief that after the plea of guilty up to the time of sentencing petitioner never voiced any concern about pleading guilty nor ever talked to counsel about an appeal or a motion to reconsider his sentence. It is clearly the petitioner's initial responsibility to express some desire to challenge his guilty plea where the record shows he was informed of this requirement. Since petitioner failed to prove sufficient reason for his failure to file a motion in arrest of judgment, he is precluded from challenging the adequacy of his guilty plea proceedings. Iowa R. Crim. P. 123(3)(a).

IV. Dismissal of Appeal. Petitioner's final complaint is that the dismissal of his pro se notice of appeal due to a procedural default does not preclude consideration of his challenge to the guilty plea proceedings. We find no merit in petitioner's claim.

The dismissal of petitioner's appeal is immaterial to his eligibility for postconviction relief based upon a challenge to his guilty plea. As we concluded above, when petitioner failed to file a motion in arrest of judgment, he was precluded from challenging the adequacy of his guilty plea proceedings. Iowa R. Crim. P. 23(3)(d). This preclusion is jurisdictional and prohibits the Iowa appellate courts from entertaining any appeal which challenges the adequacy of petitioner's plea proceedings. See State v. Spence, 282 N.W.2d 131, 132 (Iowa 1979). Therefore, the dismissal of petitioner's appeal for failure to file a certificate of ordering transcript or a certificate of not ordering transcript is immaterial to any challenge to the adequacy of petitioner's plea proceedings.

Finding no error by the postconviction court, we affirm its judgment dismissing the petition.

AFFIRMED.