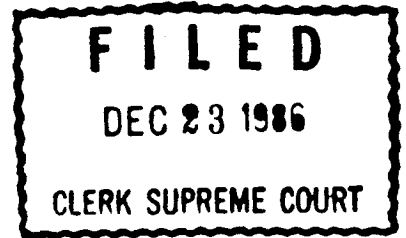


IN THE COURT OF APPEALS OF IOWA



DANIEL SNETHEN,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed December 23, 1986

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6-289
85-1316

Appeal from the Iowa District Court for Polk County (No. 310) - C. Edwin Moore, Senior Judge.

Petitioner appeals from the district court's denial of postconviction relief, contending that constitutional rights were violated in his 1975 first-degree murder trial when a state-employed psychiatrist testified about incriminating statements made by the petitioner during a court-ordered psychiatric examination and that the postconviction court erred by holding that he had not shown sufficient reason for failing to raise his issues in prior proceedings and by holding that the psychiatrist's testimony had not prejudiced him. **AFFIRMED.**

James P. Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Thomas McGrane and Joseph Weeg, Assistant Attorneys General, for respondent-appellee.

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

SNELL, J.

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This appeal represents another leg of Daniel Snethen's twelve-year journey through the state and federal judicial systems. A brief summary of the history of this case illustrates the labyrinth our system of criminal justice can become. Originally convicted of first-degree murder and sentenced accordingly following a jury trial in 1975, Snethen's case was affirmed on direct appeal by the Iowa Supreme Court one year later. State v. Snethen, 245 N.W.2d 308 (Iowa 1976). In 1979, Snethen initiated his initial postconviction action. Postconviction relief was denied by the district court and that result was affirmed on appeal, once again, by our supreme court. Snethen v. State, 308 N.W.2d 11 (Iowa 1981).

Following the denial of state postconviction relief, Snethen filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. After originally finding that Snethen had shown cause for his failure to raise his claims in prior state court proceedings, the federal district court, upon reconsideration, reversed itself on that issue in light of Engle v. Isaac, 456 U.S. 107, 102 S. Ct. 558, 71 L. Ed. 2d 783, reh'g denied, 456 U.S. 1001, 102 S. Ct. 2286, 73 L. Ed. 2d 1296, and reh'g denied, 457 U.S. 1141, 102 S. Ct. 2976, 73 L. Ed. 2d 1361 (1982). Accordingly, the district court denied his petition. On appeal, the Eighth Circuit Court of Appeals reversed the district court and remanded Snethen's case, instructing the district court to dismiss the federal action as a result of Snethen's failure to exhaust his potential remedies in our state courts. Snethen v. Nix, 736 F.2d 1241 (8th Cir. 1984).

Snethen then filed this, his second, state postconviction proceeding on February 20, 1985. Relief was denied by the district court following a hearing and this timely appeal followed.

Given the lengthy history of this case, it comes as no surprise that much of the battleground at its later stages has consisted of procedural claims such

as failure to exhaust state remedies, failure to show cause for not raising issues at earlier stages, and failure to properly preserve issues for subsequent review. This appeal presents us with similar issues.

Snethen contends his rights under the fifth, sixth, and fourteenth amendments to the United States Constitution were violated at his 1975 trial when Dr. Paul Loeffelholz testified to certain incriminating statements made by Snethen during interviews ordered to determine his competency to stand trial. Dr. Loeffelholz conducted two competency interviews with Snethen pursuant to a court order resulting from an application for a psychiatric evaluation made by Snethen's trial counsel. The State asserts that these claims were not made during prior trial and postconviction proceedings and therefore cannot be raised here.

A postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code section 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

With respect to his fifth amendment claim, Snethen contends that the issue was not raised earlier because of its novelty. Snethen maintains that

his current claim is based upon Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). As Estelle was decided after his trial and first postconviction proceeding, Snethen claims he should be allowed to raise this issue at this stage.

We note initially an inconsistency involved in Snethen's contention on this issue. Although arguing that Estelle provides the novel basis for his fifth amendment claim, Snethen fails to cite to that case in the section of his brief which argues the merits of that claim. In fact, the major case he cites in support of the merits of his fifth amendment claim, State v. Craney, 347 N.W.2d 668 (Iowa), cert. denied, 469 U.S. 884, 105 S. Ct. 255, 83 L. Ed. 2d 192 (1984), expressly distinguishes Estelle as not controlling the disposition of that case. Id. at 673.

In any event, we agree that the novelty of a legal claim may provide, in some contexts, sufficient reason for adjudication of a constitutional claim in the absence of a contemporaneous objection at trial. Reed v. Ross, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910, 82 L. Ed. 2d 1, 15 (1984). In tension with this proposition is the principle that where the basis of a constitutional claim is available and other defense counsel have perceived and litigated the claim, the demands of finality counsel against labeling the alleged unawareness of the objection as cause for a procedural default. Engle v. Isaac, 456 U.S. 107, 134, 102 S. Ct. 1558, 1575, 71 L. Ed. 2d 783, 804, reh'g denied, 456 U.S. 1001, 102 S. Ct. 2286, 73 L. Ed. 2d 1296, and reh'g denied, 457 U.S. 1141, 102 S. Ct. 2976, 73 L. Ed. 2d 1361 (1982). Although both these cases are from the context of federal habeas corpus relief, we believe that situation is sufficiently analogous to our postconviction proceedings for these cases to provide us with guidance in deciding the present issue.

In the present case, we think that the principles delineated in Engle control the disposition of Snethen's contention on the fifth amendment issue. Estelle held that when faced while in custody with a court-ordered psychiatric inquiry, the fifth amendment privilege against self-incrimination requires that a defendant's statements to the psychiatrist can be used by the State at the penalty phase of a criminal trial only if the defendant was apprised of his rights prior to the interview and had knowingly decided to waive them. A number of circuit courts of appeal had dealt, prior to both Estelle and Snethen's trial, with a criminal defendant's fifth amendment rights in the context of a court-ordered psychiatric examination. See, e.g., United States v. Williams, 456 F.2d 217 (5th Cir. 1972); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States ex rel. Smith v. Yeager, 451 F.2d 164 (3d Cir.), cert. denied, 404 U.S. 859, 92 S. Ct. 112, 30 L. Ed. 2d 101 (1971); United States v. Albright, 388 F.2d 719 (4th Cir. 1968). Each of these cases serves as authority for the proposition that it is impermissible under the fifth amendment to introduce into evidence on the issue of guilt any statement made by the defendant during the course of a court-ordered psychiatric examination. Williams, 456 F.2d at 218; Bohle, 445 F.2d at 66-67; Smith, 451 F.2d at 165; Albright, 388 F.2d at 725. As we think this proposition forms the basis for Snethen's contention here, we cannot say that he lacked the tools to construct his constitutional claim. Engle, 456 U.S. at 133, 102 S. Ct. at 1574, 71 L. Ed. 2d at 804. Accordingly, we do not believe that Snethen has shown sufficient reason for failing to bring his fifth amendment claim earlier, and we decline to entertain it now.

With respect to his claims under the sixth and fourteenth amendments, Snethen contends that his status as a pro se petitioner in prior proceedings provides sufficient reason for his not raising these issues earlier. We note, however, that these claims were not raised on direct appeal of Snethen's conviction.

At that stage, Snethen was represented by counsel. A postconviction applicant must provide sufficient reason for failure to raise and cause adjudication of his claim on direct appeal. Fryer v. State, 325 N.W.2d 400, 404 (Iowa 1982). Snethen advances no claim here of sufficient reason for his failure to present his sixth and fourteenth amendment claims on direct appeal. Accordingly, we fail to see merit in Snethen's argument that his pro se status at the initial stages of his postconviction proceedings furnishes sufficient reason for not raising these issues earlier.

Finally, Snethen argues that in this case "attorney inadvertence" supplies sufficient reason for failure to raise his constitutional issues earlier. In support of this claim, Snethen cites to Carrier v. Hutto, 754 F.2d 520 (4th Cir. 1985). In Carrier, the Court of Appeals for the Fourth Circuit, sitting en banc, affirmed an earlier decision by a panel of the fourth circuit, Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), holding that under some circumstances an attorney error that does not rise to the level of a sixth amendment violation may, nevertheless, constitute "cause" within Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), the case from which we derive our requirement that "sufficient reason" be shown for failure to challenge errors in trial court prior to our hearing them in postconviction action. See Polly, 355 N.W.2d at 856.

We note initially that Snethen's argument on this point is weakened considerably by the United States Supreme Court's reversal of Carrier on appeal. Murray v. Carrier, ____ U.S. ____, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). In reversing the fourth circuit, the Court held that attorney error, unless violative of the sixth amendment, does not constitute "cause" within the rule of Wainwright. Id., ____ U.S. at ____, 106 S. Ct. at 2644-47, 91 L. Ed. 2d at 407-09. In addition, we think we need not decide whether to adopt the reasoning in Carrier as our law governing actions under Iowa Code Chapter 663A, as we think Snethen has

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failed to persuade us that the principle enunciated in Carrier has any application to the facts of this case. Snethen contends that prior counsel "may have improperly framed the issues" for his constitutional claims, but fails to support this contention by directing our attention to any record evidence demonstrating when, and in connection with what issue, this occurred.

Accordingly, the district court's denial of postconviction relief is affirmed.

AFFIRMED.