IN THE COURT OF APPEALS OF IOWA

FILED
JAN 29 1997
CLERK SUPREME COURT

No. 6-723 / 96-0211

SAMUEL COOK,

Applicant-Appellant,

000107

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Samuel Cook appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Kathryn Q. Chang, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HUITINK, J.

Samuel Dean Cook appeals from the denial of his petition for postconviction relief. We affirm.

Cook was convicted of second-degree robbery in April 1992 based on the following evidence: On December 28, 1991, a man, later identified as Cook, robbed a Coastal Mart in Waterloo. Glen Pietan, the clerk on duty at the time, testified that as he was opening the cash register to ring up a purchase, the customer making the purchase put both hands into the cash register. The man took whatever money he could grab and ran out of the store. A customer, Willie Ross, identified Cook as the man who ran out the door of the Coastal Mart and also testified he saw Cook hit Pietan in the face. A criminologist testified that hairs obtained from the scene were similar to the hair sample taken from Cook.

The Iowa Supreme Court affirmed Cook's conviction on June 1, 1993. *State v. Cook,* 504 N.W.2d 633 (Iowa 1993). Cook filed an application for postconviction relief on January 20, 1995. After a hearing in November 1995, the district court denied Cook's petition in January 1996.

Cook appeals the denial of his petition asserting he received ineffective assistance of counsel at trial. He argues his trial attorney failed to investigate and present evidence of Cook's medical condition that would have provided a basis for claiming Cook physically could not have committed the crime. Cook also argues his

counsel failed to locate and pursue the testimony of a potential alibi witness, Debra Henderson. Finally, Cook contends his counsel failed to pursue the existence of conflicts between Ross and Cook that may have been used to discredit Ross's testimony.

In order to assert a claim of ineffective assistance of trial counsel in a post-conviction proceeding, an applicant . . . ordinarily must show that his claim was preserved for review by being made on direct appeal. *LeGrand v. State,* 540 N.W.2d 667, 668-9 (Iowa App. 1995), *quoting Collins v. State,* 477 N.W.2d 374, 376 (Iowa 1991). However, a claim of ineffective assistance of counsel may be made in a postconviction proceeding, even if not made on direct appeal, if the applicant establishes by a preponderance of the evidence "sufficient reason" or "cause" for not having raised the issue on direct appeal. *Id.*; *see also* Iowa Code § 822.8 (1995). Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *Collins,* 477 N.W.2d at 376.

We find that Cook has not preserved error on any of his claims. On direct appeal, Cook did not raise the issue of ineffective assistance of counsel. We note that in his postconviction petition filed pro se, Cook alleged his appellate counsel, as well as his trial counsel, was ineffective. However, the record reveals Cook failed to pursue this argument at the hearing. He did not present the testimony of his appellate

counsel but rather only those individuals involved in his trial participated at the postconviction hearing. Furthermore, Cook does not raise the argument in his postconviction appellate brief. Therefore, we conclude that although Cook raised the issue in his initial petition, he failed to satisfy his burden to then prove by a preponderance of the evidence "sufficient reason" or "cause" for not having raised the issue of ineffective assistance of trial counsel on direct appeal. *See Collins,* 477 N.W.2d at 376 (defendant failed to present to postconviction court issue of ineffective assistance of appellate counsel). He has also failed to prove by any other means, sufficient reason for not raising his claims of ineffective assistance of trial counsel. *See Id.*

While the postconviction court did not rely on Cook's failure to preserve error in denying his application, we will affirm on appeal "where any proper basis appears for the district court's ruling, even though it is not the one upon which the court based its ruling." *Collins,* 477 N.W.2d at 376.

The decision of the district court is affirmed in its entirety

AFFIRMED.