IN THE COURT OF APPEALS OF IOWA

No. 6-694 / 95-1678

JERRY EMERSON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
DEC 20 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jones County, Lynne E. Brady, Judge.

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

Philip B. Mears of the Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden and James Kivi, Assistant Attorneys General, for appellee.

Considered by Sackett, C.J., and Streit and Vogel, JJ.

STREIT, J.

Jerry Emerson appeals the district court's denial of his application for postconviction relief. He argues the court erred in finding his trial counsel was not ineffective for failing to present evidence casting his murder victim in a negative light to support a theory of self-defense.

Emerson was convicted of the first-degree murder of his wife, Linda, in 1984. Emerson's conviction was affirmed on appeal. *See State v. Emerson*, 375 N.W.2d 256 (Iowa 1985). Emerson did not raise the issue of ineffective assistance of counsel in the appeal.

Emerson filed an amended application for postconviction relief in May 1995 in which he alleged his trial counsel, James Thomas, provided ineffective assistance. Among his claims of ineffective assistance, Emerson asserted that Thomas failed to present available evidence that Linda had a history of irrational behavior and drug use which could have provided Emerson with a partial or complete defense to the first-degree murder charge.

Following a hearing, the district court denied Emerson's application.

A claim in postconviction proceedings should be presented for review on direct appeal. *Washington v. Scurr*, 304 N.W.2d 231, 234-235 (Iowa 1981).

> 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. However, a claim of ineffective assistance of trial 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. Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel for postconviction relief.

LeGrand v. State, 540 N.W.2d 667, 668 (Iowa App. 1995) (citations omitted).

Emerson attempts to make a showing of sufficient reason or cause for failure to raise his claim of ineffective assistance of trial counsel based on the fact no record existed to make the claim. The State contends that Emerson failed to preserve his claim even though he knew the evidence on which he now relies existed, and he was represented by different counsel on appeal.

We find Emerson has failed to prove a sufficient reason or cause for not having raised the issue of ineffective assistance of trial counsel in his direct appeal. He failed to present to the postconviction court the issue of ineffective assistance of appellate counsel, and he has failed to prove, in any other manner, a sufficient reason for not having previously raised this claim. Similar postconviction claims of ineffective assistance of trial counsel have been barred because of an applicant's failure to assert the ineffective assistance of appellate counsel. *See LeGrand*, 540 N.W.2d at 669; *Collins v. State*, 447 N.W.2d 374, 376 (Iowa 1991); *Washington*, 304 N.W.2d at 235.

AFFIRMED.