IN THE COURT OF APPEALS OF IOWA

No. 8-023 / 97-383

TROY ALEXANDER LEWIS,
Appellant,

vs.

STATE OF IOWA,
Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Troy Lewis appeals the denial of his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, John Sarcone, County Attorney, and George Karnas, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Background facts. Troy Lewis pled guilty to second-degree murder in the death of Davey Knox. During the plea proceedings he admitted he dropped a forty-pound concrete block on Knox's head which either caused his death or contributed to it. Lewis waived his right to file a motion in arrest of judgment and was immediately sentenced. He did not file a motion in arrest of judgment nor appeal the sentence. Lewis filed an application for postconviction relief, which application was denied, and he now appeals. Because we find no prejudice to Lewis, we affirm the district court's denial of postconviction relief and uphold Lewis's conviction.

Scope of review. We review appeals from postconviction proceedings ordinarily for errors of law. *See Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). However, when constitutional rights are implicated, we make our own evaluation of the totality of the circumstances in a de novo review. *Id.*

Preservation of error.

A. Factual basis for plea. Lewis claims the postconviction court erred as a matter of law when it concluded a factual basis was established for his guilty plea. He claims the court did not determine whether the victim was alive at the time he dropped the concrete block on him. We find Lewis has not preserved error to challenge the factual basis for his plea as he failed to file a motion in arrest of

judgment. *See* Iowa R. Crim. P. 8(2)(d), 23(3)(a); *State v. Glenn*, 505 N.W.2d 818, 819 (Iowa App. 1993). This issue is waived.

B. Ineffective assistance of counsel. Lewis argues the postconviction court erred when it determined (1) his trial counsel was not ineffective in allowing him to plead guilty to a crime for which no factual basis existed; and (2) his postconviction attorney was not ineffective for failing to focus upon his mens rea at the time of the offense.

In order for Lewis to prevail on an ineffective assistance of counsel claim, he must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Lewis must establish under the first prong of this test that counsel's performance was not within the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). Under the second prong of the ineffective assistance of counsel test, Lewis must prove but for counsel's error, the outcome of the trial would have been different. *Ray*, 516 N.W.2d at 865; *see Strickland v. Washington*, 466 U.S. 668, 694 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

Iowa Code section 822.8 (1997) provides that grounds for relief not raised in the direct appeal may not form the basis for a subsequent postconviction relief application, unless the court should find a "sufficient reason" exists for the waiver. A claim of ineffective assistance of counsel may be raised for the first time in a

postconviction proceeding if the applicant establishes by a preponderance of the evidence sufficient reason for not having raised the issue previously *and* also establishes actual prejudice resulting from the alleged errors. *Bettis v. State*, 547 N.W.2d 635, 637 (Iowa App. 1996) (citing *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991)).

In his case, the State failed to properly assert before the district court the defense that Lewis did not establish a "sufficient reason" for not raising the ineffective assistance claims on direct appeal. Because the State never raised this defense, Lewis was not given the opportunity to explain why he did not raise the ineffective trial counsel issue on appeal. *Cf. Polly v. State*, 355 N.W.2d 849 (Iowa 1984) (failure to raise an issue on direct appeal was raised in postconviction proceedings so applicant had opportunity to present evidence; consequently, postconviction court had opportunity to determine whether sufficient cause existed for failure to raise issue).

Regardless of the procedural infirmities, we find Lewis was unable to prove actual prejudice as to both of his ineffective assistance of counsel claims. That is, even if Lewis was able to demonstrate a "sufficient reason" for not raising the claims on direct appeal, he could not establish prejudice. *See Bettis*, 547 N.W.2d at 637. Lewis answered affirmatively in his testimony when asked if he was "convinced that the blow that [he] delivered to Mr. Knox either caused his death or contributed to his

death." Moreover, Lewis admitted he intentionally dropped the cement block on Knox and knew at the time it was wrong. The court elicited testimony from Lewis which laid the factual foundation for this crime:

> Court: As indicated under the law, malice would require that you did this not only intentionally and you knew that it was wrong, but that you did it out of either actual hatred or with an evil or unlawful purpose. Did you do it, first of all, in disregard of his rights or to injure him?
>
> Lewis: ***Yes.***
>
> Court: Did you do it . . . out of actual hatred towards him?
>
> Lewis: ***Yes.***
>
> Court: Did you also do it with an evil or an unlawful purpose?
>
> Lewis: ***Yes.***

Thus, with respect to both of Lewis's ineffective assistance of postconviction attorney and trial attorney claims, Lewis failed to show that but for counsel's alleged errors, a reasonable probability existed that the outcome of the case would have been favorable to him. *See Hill*, 474 U.S. at 57-59, 106 S. Ct. at 370, 88 L. Ed. 2d at 210. There is strong evidence in this case, independent of counsels' actions, that establishes Lewis's guilt.

Having carefully reviewed all arguments properly before us on appeal, we affirm the district court's denial of postconviction relief and uphold Lewis's conviction.

AFFIRMED.