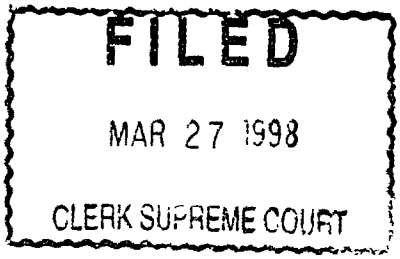
IN THE COURT OF APPEALS OF IOWA

000381

No. 8-002 / 96-1867
Filed March 27, 1998



BOBBY GENE SYKES,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

Applicant appeals from the district court ruling denying his postconviction relief application. **REVERSED AND REMANDED FOR RESENTENCING.**

Bobby Gean Sykes, Newton, pro se, and Harold K. Widdison, Sioux City, as stand-by counsel for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Defendant contends his trial counsel was ineffective for not challenging the application of the habitual offender statute to his sentence. Because he committed the second offense before he was convicted for his first offense, only one of his convictions could be used in assessing if the habitual offender statute applied to the sentence for his third offense. It was ineffective assistance of counsel not to raise the issue at trial. We reverse and remand for resentencing.

I. Procedural Background & Facts.

Bobby Sykes entered a plea of guilty in July of 1994, pursuant to a plea agreement, to twelve charges: five counts of possession of marijuana with intent to deliver as a habitual offender; five counts of failure to affix a drug tax stamp; one count of fraudulent practices; and one count of tampering with a witness.

On August 12, 1994, the court sentenced Sykes to a total indeterminate term of sixty years with a twelve-year mandatory minimum sentence. In arriving at the sentence, the court ordered some sentences to run consecutively and some concurrently. The habitual offender status was based upon two prior convictions, in June 1987 and June 1986, for intent to deliver a controlled substance. Sykes did not appeal his sentences. Sykes filed a pro se application for postconviction relief in August of 1995. The court denied his application. Sykes appeals.

II. Standard of Review.

Ordinarily, postconviction relief proceedings are reviewed for errors at law. *Love v. State,* 543 N.W.2d 621,623 (Iowa App. 1995). When a postconviction applicant asserts a violation of constitutional safeguards, however, we make our own evaluation based on the totality of the circumstances. *Id.* This is akin to a de novo review. *Id.* Because the claim in this case is based on ineffective assistance of counsel, we review de novo. *Id.*

III. Preservation of Claims.

Sykes did not directly appeal his convictions. To assert a claim through a postconviction proceeding, an applicant must show his claim was preserved for review by being made on direct appeal. *See Collins v. State,* 477 N.W.2d 373, 376 (Iowa 1991). Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. *Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981).

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 at trial and on direct appeal, and also establishes prejudice resulting from the alleged errors. *Id.; see also Polly v. State*, 355 N.W.2d 849, 855-56 (Iowa 1984) (alleged errors must infect the entire trial with error of constitutional dimension). Thus, we discuss the merits of Sykes' claims only to decide whether his

trial counsel was ineffective. All other issues are waived. *See Washington v. Scurr*, 304 N.W.2d 231, 234 (Iowa 1981).

IV. Ineffective Assistance of Counsel.

Sykes alleges his counsel was ineffective because counsel: (1) did not object to or appeal the use of enhancement statutes in sentencing Sykes; (2) did not raise a double jeopardy argument; (3) did not properly preserve issues or appeal Sykes' sentence.

In order to show ineffective assistance of counsel, defendant must establish that counsel failed to perform an essential duty and prejudice resulted. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Prejudice may be established by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 699 (1984)).

A. Applicability of Habitual Offender Statute. The question of the applicability of the third-offense provisions of Iowa Code section 906.8 should have been raised in the district court. Normally, failure to do so waives the issue. *State v. Clark*, 351 N.W.2d 532, 535 (Iowa 1984). Appellate review is not precluded here because Sykes alleges the failure to preserve error resulted from ineffective representation. *Id.*

We first address whether Sykes' counsel was ineffective for not objecting to use of the habitual offender statue when sentencing him. Criminal recidivism statutes

enhancing punishment only apply when the second offense occurs after the imposition of the judgment and sentence on the first offense. *State v. Hollins*, 310 N.W.2d 216, 217-18 (Iowa 1981); *see also Hajek v. State*, 414 N.W.2d 122, 123-24 (Iowa 1987). The rationale for this rule is that recidivism statutes are intended to punish violators who have not responded to the restraining influence of conviction and punishment. *Id.*

Sykes was arrested on September 9, 1985, for delivery of a controlled substance. He was arrested for a second offense of the same crime on May 2, 1986. He was sentenced for the September 1985 crime in June of 1986. He was sentenced for the May 1986 crime in June of 1987. Thus, he was not convicted of his first offense until after he had committed the second offense. Sykes pled guilty to delivery of a controlled substance in July of 1994. He was sentenced in August of 1994. The trial court enhanced his sentence pursuant to Iowa Code section 902.8,[1] finding the 1994 conviction was his third offense because of his 1986 and 1987 convictions.

Sykes argues only one of his prior convictions could be counted in assessing whether the enhancement statute applies to his 1994 conviction pursuant to the general rule set out in the *Hollins* case interpreting the habitual offender statute. *See Hollins v. State*, 310 N.W.2d 216 (Iowa 1981).

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[1] An habitual offender is any person convicted of a class "C" or class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States. Iowa Code § 906.8 (1997).

Sykes is correct in his assertion. The Supreme Court in *Hollins* set out this general rule of interpretation for the habitual offender statute, section 906.8: "[E]ach succeeding conviction must be subsequent in time to the previous convictions, both with respect to commission of the offense and to conviction." *Id.* at 217 (quoting 39 Am. Jur. 2d, *Habitual Criminals, Etc.* § 6, p. 314). In application this means for a defendant to be punished for a third offense, he must have been convicted of the first offense before committing the second, and must have been convicted of the second offense before committing the third. *See id.*

The general rule has been altered by statutory amendment in regard to OWI offenses. *See* Iowa Code § 321J.2(3).[2] Application of section 321J.2(3) to OWI offenses makes each previous OWI violation count as "a previous offense" for purposes of the habitual offender statute without regard to whether the defendant was convicted for the first offense before committing the second. *State v. Chesmore*, 474 N.W.2d 551, 552 (Iowa 1991).

The general rule, however, has not been altered for crimes other than OWI offenses. Thus, the general rule applies to Sykes' case. Because Sykes' second offense was committed prior to his conviction for his first offense, his prior convictions did not trigger the operation of the habitual offender statute in sentencing

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[2] The statute states in part: "[e]ach previous violation shall be considered a separate previous offense without regard to whether each was complete as to commission and conviction or deferral of judgment following or prior to any other previous violation." Iowa Code § 321J.2(3) (1997).

his third offense. Accordingly, it was error for the trial court to sentence defendant as an habitual offender. Sykes' trial counsel was ineffective for not questioning the application of the habitual offender statute. *See Clark*, 351 N.W.2d at 536. Prejudice resulted from enhancement of Sykes' sentence.

Our holding makes it unnecessary to consider Sykes' other assignments of error. The case is remanded for resentence in accordance with the views expressed in this opinion.

REVERSED AND REMANDED FOR RESENTENCING.