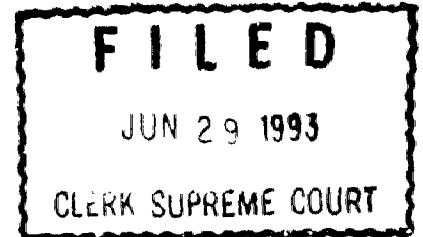


IN THE COURT OF APPEALS OF IOWA

No. 3-234 / 92-697



DONNIE LEE WYLDDES, JR.,

Appellant,

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vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Wayne County,
Peter A. Keller, Judge.

The applicant appeals a judgment of the district court
denying his application for postconviction relief.

AFFIRMED.

Dean Stowers of The Rosenberg Law Firm, Des Moines, for
appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden,
Assistant Attorney General, Virginia Barchman, Assistant
Attorney General, and Alan M. Wilson, County Attorney, for
appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

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HAYDEN, J.

Donnie Lee Wylde, Jr. appeals from a district court's order denying his application for postconviction relief. We affirm.

On February 20, 1987, Wylde was charged by trial information with first-degree murder and attempted murder. The charges stemmed from the murder of Wayne County farmer Ronald Starnes and the assault on his wife, Ruby Starnes. Following trial, the jury returned a verdict of guilty against Wylde on both counts. Wylde appealed his conviction. This court affirmed the conviction. State v. Wylde, No. 87-1156/8-465 (Iowa App. Jan. 26, 1989). The Iowa Supreme Court denied further review of the case.

On May 30, 1991, Wylde filed an application for postconviction relief. Wylde contends a juror, Paul Snyder, engaged in juror misconduct by performing a ballistic experiment and reporting his findings to the jury during deliberations. Wylde argued his trial counsel was ineffective in pursuing this issue. The district court concluded Wylde had already received the benefit of a full consideration of his claim of juror misconduct on direct appeal. See id. Wylde also maintained his trial counsel was ineffective in failing to object to testimony regarding shoe print identification and in failing to seek a change of venue. The district court ruled Wylde's trial counsel had not rendered ineffective assistance. The district court rejected Wylde's claim of ineffective assistance of appellate counsel. Wylde appeals.

Wylde contends the district court erred in failing to grant a new trial based on allegations Snyder had conducted his own ballistic experiment and had reported his findings to the jury. He also contends the district court erred in concluding trial counsel was not ineffective for failing to object to testimony regarding shoe print identification. Wylde maintains the State's expert was inexperienced in shoe print work, but trial counsel nevertheless stipulated the witness was an expert.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction applicant asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of a de novo review. Id. We will not disturb the trial court's denial of postconviction relief if the trial court's findings of fact in support of its judgment are supported by substantial evidence and are justified as a matter of law. Carroll v. State, 466 N.W.2d 269, 271 (Iowa App. 1990) (citing Benton v. State, 199 N.W.2d 56, 57 (Iowa 1972)).

I. Juror Misconduct. Wylde's claim of juror misconduct was fully adjudicated by this court in defendant's direct appeal. Wylde, No. 87-1156/8-465 (Iowa App. Jan. 26, 1989). This issue of juror misconduct is barred from relitigation by principles of issue

preclusion. The doctrine of issue preclusion applies when the following four prerequisites are satisfied:

1. The issue concluded is identical;
2. The issue was raised and litigated in the prior action;
3. The issue was material and relevant to the disposition of the prior action; and
4. The determination of the issue in the prior action was necessary and essential to the resulting judgment.

Harrison v. State Bank, 440 N.W.2d 398, 401 (Iowa App. 1989 (citation omitted)). We conclude the doctrine applies in this case because the four prerequisites have been met. On direct appeal this court addressed the defendant's claim of misconduct against juror Snyder. This court concluded the trial court had not abused its discretion in finding defendant failed to show jury misconduct sufficient to warrant a new trial. Wyldes, No. 87-1156/8-465, slip op. at 3-4. The issue of juror misconduct is identical to the issue raised in this postconviction proceeding. Determining whether such misconduct existed and whether a new trial was warranted was material and necessary to the court's disposition of defendant's criminal appeal.

We also cite statutory authority in support of our conclusion this issue of juror misconduct should not be relitigated in this postconviction proceeding. Iowa Code section 663A.8 provides, in pertinent part:

All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated . . . in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application

Iowa Code § 663A.8 (1991) (emphasis added). The Iowa Supreme Court has interpreted this section to mean "a person is barred from relitigating in a postconviction proceeding any ground which was finally adjudicated on direct appeal." Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982). We conclude this issue of juror misconduct has been finally adjudicated on direct appeal. Therefore, we do not address the issue on appeal of this postconviction proceeding.

II. Ineffective Assistance of Counsel. At trial Iowa Department of Criminal Investigation agent Frank Tarasi testified regarding the similarity of the shoe print left on the door of decedent's home and from a shoe worn by Wyldes. Wyldes claims the district court erred in refusing to find his trial counsel ineffective for failing to object to Agent Tarasi's testimony. The State contends defendant's ineffective assistance claim has not been preserved for appeal.

In order to support an ineffective assistance claim of trial counsel in a postconviction proceeding, an applicant must show his claim was preserved for review by being made on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). "Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously." Id. (citing Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973); Iowa Code § 663A.8 (1981)). The record

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shows Wyldes did not raise an ineffective assistance claim on direct appeal.

An ineffective assistance claim, however, may be raised for the first time in a postconviction proceeding if the applicant establishes by a preponderance of evidence sufficient reason for failing to raise the issue on direct appeal, and establishes actual prejudice resulted from the alleged errors. Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991) (citing Polly v. State, 355 N.W.2d 849, 855-56 (Iowa 1984)). Ineffective assistance of appellate counsel may provide sufficient reason to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a postconviction proceeding. Collins v. State, 477 N.W.2d 374, 375 (Iowa 1991) (citations omitted). Wyldes, however, failed to argue his appellate counsel rendered ineffective assistance by failing to raise the issue of ineffective assistance of trial counsel. Wyldes did not raise an ineffective assistance claim against his appellate counsel on this appeal. Wyldes has not shown sufficient reason for failing to raise the issue of ineffective assistance of trial counsel.

We affirm the district court's denial of Wyldes' application for postconviction relief in all respects.

AFFIRMED.