IN THE COURT OF APPEALS OF IOWA

No. 2-284 / 91-985

FILED
SEP 29 1992
CLERK SUPREME COURT

CLAYTON WORLEY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

The applicant, Clayton G. Worley, appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Patricia M. Hulting of Roehrick, Hulting & Moisan, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Thomas G. Fisher, Jr., Assistant Attorney General; John Sarcone, County Attorney; and George Karnas, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

The defendant, Clayton Worley, was convicted of operating a motor vehicle while intoxicated, third offense, on June 21, 1989. Worley was stopped after two officers observed him weaving between lanes. He was detained until Officer Brian Holtz arrived to administer a preliminary breath test and field sobriety tests. Worley requested he be granted leave to call an attorney. Officer Holtz denied Worley's request and told Worley he would be arrested immediately if he did not submit to the tests. Worley failed the tests and was subsequently arrested.

At the jail, Officer Holtz requested Worley complete the intoxilyzer tests. Worley refused, but did not reassert his request for legal counsel. He was later convicted. He appealed, through different counsel, his sentence. The Iowa Supreme Court affirmed his sentence.

Worley then filed application for postconviction relief. He claimed he sought advice of counsel prior to taking the field sobriety tests but was denied access to an attorney. Worley claims his trial counsel failed to properly inquire about his alleged request for counsel, and his refusal to submit to the intoxilyzer tests. The district court denied his application for postconviction relief. Worley has appealed.

Worley argues that at his initial arrest, he was informed the field sobriety tests were mandatory, and if he did not submit, he would be arrested immediately. Worley

maintains that since his choices were to submit to the tests or be arrested, he was not free to go and his detention came within the plain meaning of Miranda. Worley argues his timely request for counsel should have been honored since it did not interfere with the legitimate state interest in having the test administered within two hours of detention. Worley contends that since his request to consult with an attorney at the scene of his field sobriety tests carried through to the time he arrived at the Polk County jail where implied consent was invoked, his refusal to submit to the tests should have been suppressed. Worley additionally argues his trial counsel was ineffective in failing to engage in any discovery or move to suppress his refusal to take the tests.

The State argues Worley did not argue these issues on direct appeal. The State also argues Worley did not raise the issue of whether his appellate counsel was ineffective when he filed for postconviction relief. The State argues Worley should not be allowed to raise these issues for the first time on appeal.

Scope of Review

The court's scope of review for an ineffective assistance of counsel claim is de novo. State v. Hildebrant, 405 N.W.2d 839,841 (Iowa 1987).

Discussion

The issue presented is whether Worley has sufficient reason for failing to object to the admissibility of his refusal to take the intoxilyzer test.

Worley claims he did not raise the issue of the admissibility of his refusal to take the intoxilyzer test because his trial counsel was ineffective. He further alleges he did not raise the issue on direct appeal at the advice of his appellate counsel. He claims his appellate counsel told him to raise those issues in a postconviction relief application, rather than direct appeal. However, in his postconviction relief application, he did not allege ineffective assistance of appellate counsel. Neither his trial counsel or his appellate counsel testified at the postconviction relief hearing.

Any claim not properly raised at trial or on direct appeal may not be litigated in a postconviction relief proceeding unless there is sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). See also Iowa Code § 663A.8 (1991). To prevail, the applicant must establish by a preponderance of the evidence, "sufficient reason" for not having raised the issue at trial and on direct appeal, and must also establish prejudice resulting from the alleged errors. Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991). Ineffective assistance of appellate counsel may provide "sufficient reason" to permit the issue of ineffective assistance trial counsel to be raised for the

first time in a postconviction relief proceeding. Id.; Kane v. State, 436 N.W.2d 624, 627-28 (Iowa 1989). However, a petitioner does not prove "sufficient reason" for failure to raise the issue of ineffective assistance of trial counsel when he fails to present to the postconviction court the issue of ineffective assistance of appellate counsel. Id.; Collins, 477 N.W.2d at 376.

Worley claims he did not raise the issue of ineffective assistance of trial counsel at the advice of appellate counsel. However, he failed to present to the postconviction court the issue of ineffective assistance of appellate counsel. He also failed to prove any other "sufficient reason" for not raising his claim. Based on our supreme court's holding in Collins, we deny Worley's claim. We affirm the trial court's denial of postconviction relief.

AFFIRMED.