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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROGER DEAN HARTGRAVE,	)	Filed April 26, 1983
Petitioner-Appellant,	)	
vs.	)	2-485 2-68239
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from Linn District Court, Vern Robinson, Judge.

Petitioner appeals the denial of his application seeking postconviction relief from his 1976 conviction of robbery with aggravation. AFFIRMED.

Patrick R. Grady, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner appeals the denial of his application seeking postconviction relief from his 1976 conviction of robbery with aggravation in violation of Iowa Code section 711.2(1975). We affirm the decision of the postconviction court.

Petitioner was convicted of robbery with aggravation in violation of Iowa Code section 711.2 (1975), which defines the offense as robbery while "armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed. . . " At the trial, petitioner moved for a directed verdict on the grounds that the evidence was insufficient to establish intent to kill or maim. The motion was denied.

At the close of all the evidence, the court submitted its instructions to the jury. One of the instructions was on intent, and provided that "the law warrants an inference that when a person intentionally commits an act, he intends the natural results or consequences to follow which ordinarily do follow such acts." Petitioner objected to this instruction on the grounds that it allowed the jury to use that inference to conclude not only that the victim was intentionally put in fear (which is a necessary element of robbery of any sort), but also that petitioner had the intent to kill or maim if resisted. The trial court overruled the objection.

Despite the fact that error was preserved on these issues, petitioner did not raise either one on direct appeal. His conviction was affirmed by the supreme court. Subsequently, petitioner filed an application for postconviction relief asserting both issues along with an allegation of ineffective assistance of counsel as grounds for relief. The postconviction court denied petitioner's application.

On appeal, petitioner argues that the postconviction court erred in failing to grant postconviction relief based upon the submission of an improper jury instruction at trial and insufficiency of the evidence, since petitioner has demonstrated cause for his failure to raise these issues on direct appeal. We do not agree.

When a postconviction applicant asserts violations of basic constitutional safeguards, our review on those issues is essentially de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Our review on all other issues is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

Petitioner is only entitled to raise issues in his application for postconviction relief which were raised by him on direct appeal unless he can demonstrate sufficient reason for his failure to raise them on appeal. The only reason recognized by the supreme court as being sufficient to excuse such a failure has been ineffective assistance of appellate counsel. Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980), Zacek v. Brewer, 241 N.W.2d 41, 50 (Iowa 1976). In the absence of this, petitioner is bound by the decision made by counsel not to appeal the conviction on these gounds.

A presumption exists, which must be overcome by petitioner, that counsel was competent. Petitioner bears the burden of proving that counsel's performance fell beneath the range of normal competency. Sims, at 423. He has failed to do this.

Petitioner argues that failure of counsel to raise the issues of sufficiency of the evidence and impropriety of the jury instructions on appeal, despite the fact that error was preserved, fell below the range of normal competency. He supports this contention with the testimony of an attorney who opined that counsel should have raised these issues on appeal.

It is easy to spot errors in counsel's strategy when one utilizes twenty-twenty hindsight. However, errors in judgment on the part of counsel do not necessarily amount to ineffective assistance of counsel. Sims at 423. The fact that another attorney may have employed different tactics does not mean that counsel was ineffective for pursuing the tactics he did.

Our review of the trial record indicates that counsel may have had a valid reason for not pursuing the issues of sufficiency of the evidence and impropriety of the jury instruction on appeal. Counsel could have concluded that these contentions were without merit. Testimony was presented to the jury which would support a conclusion that petitioner intended to kill or maim his victim if resisted. Petitioner's cohort testified that petitioner's gun was loaded, and the victim testified that petitioner threatened to shoot him if he touched anything. This testimony is sufficient to raise a jury question on the issue of intent.

Petitioner bases his objection to the jury instruction on the decision in United States v. Jones, 418 F.2d 818 (8th Cir. 1969). An examination of Jones, however, reveals that it has no application to the facts of this case, and counsel was not ineffective for failure to rely on Jones when he calculated petitioner's appeal strategy.

Petitioner has failed to meet his burden of proving that counsel was ineffective. He therefore may not raise issues in an application seeking postconviction relief which counsel could have raised on appeal, but did not. The postconviction court was correct in its denial of postconviction relief.

AFFIRMED.