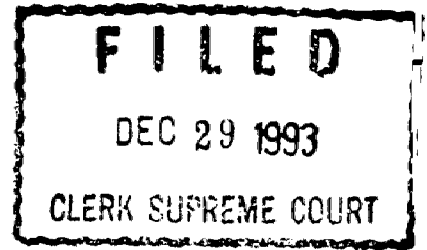


IN THE COURT OF APPEALS OF IOWA

No. 3-498 / 92-847



JAMES L. MAYBERRY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Johnson County,
Larry J. Conmey, Judge.

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

AFFIRMED.

Jon M. Kinnamon of Kinnamon, Kinnamon, Russo & Meyer,
Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Jr., Assistant Attorney General, and J. Patrick White,
County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

HAYDEN, J. 000298

The applicant, James Mayberry, was found guilty on December 15, 1985, of first-degree murder for the death of Julia Wires. Mayberry was sentenced to life in prison. On direct appeal, the supreme court affirmed his conviction. State v. Mayberry, 411 N.W.2d 677 (Iowa 1987). On June 28, 1988, Mayberry filed an application for postconviction relief pursuant to then Iowa Code chapter 663A. Mayberry filed several amendments to his application. The district court denied his application for postconviction relief. Mayberry has appealed.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Thompson v. State, 492 N.W.2d 410, 412 (Iowa 1992) (citation omitted). In this case, however, the applicant raises claims of ineffective assistance of trial counsel. 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. Id. at 413. This is the equivalent of de novo review. Id.

In order to prevail on an ineffectiveness claim, Mayberry must show by a preponderance of the evidence (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989).

I. In this postconviction appeal Mayberry raises issues which were raised and resolved by our supreme court in his direct appeal. See Mayberry, 411 N.W.2d 677. Issues that have been raised, litigated, and adjudicated on direct appeal cannot be relitigated in a postconviction proceeding. Wycoff v. State, 382 N.W.2d 462, 465 (Iowa 1986) (citing Armento v. Baughman, 290 N.W. 2d 11, 12 (Iowa 1980); Iowa Code § 663A.8 (1985) (now codified at Iowa Code § 822.8 (1993))). We do not address such issues in this postconviction proceeding.

Mayberry asserts trial counsel failed to raise the issue of mutual exclusivity as to the jury instructions. At trial the State asserted alternative elements of first-degree murder: willful, premeditated killing and killing while participating in a forcible felony. Mayberry, 411 N.W.2d at 682. To the extent Mayberry argues the felony-murder doctrine and insufficiency of the evidence, these issues were raised and resolved on direct appeal. Id. at 681-83.

Mayberry also alleges the district court erred in failing to submit a nonflight instruction to the jury. This ~~issue~~ was addressed by our supreme court in Mayberry's direct appeal. Id. at 684. The court concluded the trial court acted correctly in refusing to give a nonflight instruction. Id.

Defendant has attempted to raise variations of these issues in his postconviction action. With regard to the

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jury instructions Mayberry contends his trial counsel was ineffective in failing to raise the issue of mutual exclusivity on the basis murder and felony assault are independent offenses. Mayberry also argues the court's failure to submit a nonflight instruction constituted a violation of his due process rights.

If defendant seeks to raise a new issue in a postconviction relief proceeding, defendant must show by a preponderance of the evidence (1) sufficient reason or cause exists for not having raised it on direct appeal and (2) actual prejudice resulted from the claimed error. Collins v. State, 477 N.W.2d 374, 377 (Iowa 1991) (citing Kane v. State, 436 N.W.2d 624, 626-27 (Iowa 1989); Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code § 663A.8 [1989] (now codified at Iowa Code § 822.8 (1993)). Mayberry failed to prove, in any manner, sufficient reason for not raising his claims. In fact he makes no attempt to prove sufficient cause or reason. We do not address these claims.

II. Next we deal with Mayberry's claims of ineffective assistance of trial counsel. In his direct appeal our supreme court addressed and rejected all four claims of ineffectiveness raised by Mayberry. In this postconviction action Mayberry attempts to raise six other claims of ineffectiveness. Defendant contends his trial counsel rendered ineffective assistance of counsel by failing to:

- 1) rebut improper and inadmissible comment by the State regarding his refusal to take a polygraph test,

- 2) to further investigate the time of Wise's death,
- 3) to employ a crime scene reconstructionist and a forensic expert to review the evidence,
- 4) to call witnesses Doug Menees and Libby Lee,
- 5) to pursue and obtain a ruling on suppression of the evidence regarding unrecorded interviews between defendant and officers,
- 6) to object to the admission of certain evidence contained in medical reports.

These claims have not been properly preserved for appeal because defendant did not raise them in his direct appeal.

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. 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.

Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981); see Iowa Code § 663A.8 (1991) (now codified at Iowa Code § 822.8 (1993)). Defendant has made no attempt to prove sufficient cause or reason for failing to raise these ineffectiveness claims on direct appeal. We do not address these issues.

III. Finally Mayberry raises three substantive issues in this postconviction appeal which were not raised in his direct appeal. Therefore these claims were not properly preserved for postconviction proceedings. Our supreme court has stated:

postconviction proceedings should not be considered to be a substitute for direct appeal. "We will not ordinarily allow a defendant to claim in postconviction proceedings that the trial court erred on issues that were not properly presented for our review on direct appeal."

Kane, 436 N.W.2d at 627 (quoting Washington, 304 N.W.2d at 235).

Mayberry raises issues of judicial estoppel and suppression of evidence in this postconviction appeal. Neither issue was raised in direct appeal. Therefore they were not preserved for postconviction proceedings. Defendant has made no attempt to prove sufficient cause or reason for the failure to raise the issues of judicial estoppel or suppression of evidence on direct appeal. We do not address these issues in this postconviction proceeding.

Mayberry also argues his due process rights were violated by the failure of law enforcement officers to record their interviews with him. He contends sufficient reason existed for not having raised this issue on direct appeal. Mayberry ties this claim in with an ineffectiveness claim for failing to pursue and obtain a motion to suppress evidence of the interviews. He argues if his trial counsel did not have any legal basis for the claim asserted in a motion to suppress until after the trial, then such a circumstance constitutes "sufficient reason." There is no merit in defendant's argument.

Mayberry lastly argues the State suppressed newly-discovered evidence. Specifically defendant claims a positive test showing blood on a knife constituted newly-discovered evidence warranting a new trial. The knife, which was allegedly found near the crime scene in a set of railroad ties, was not introduced at trial.

A newly-discovered evidence claim in a postconviction relief case has three elements: (1) the evidence could not have been discovered earlier in the exercise of due diligence, (2) the evidence must be material rather than cumulative, and (3) the evidence would probably change the result of the trial. Cornell v. State, 430 N.W.2d 384, 386-87 (Iowa 1988) (citing State v. Whitesel, 339 N.W.2d 149, 156 (Iowa 1983)); see Iowa R. Crim. P. 23(2)(b)(8). Defendant must satisfy these elements by a preponderance of the evidence. Id. (citation omitted). Our courts disfavor motions for new trials on the grounds of newly-discovered evidence. Id. (citing Jones v. Scurr, 316 N.W.2d 905, 910 (Iowa 1982)).

The Iowa Department of Criminal Investigation determined and reported no blood was found on the knife. Dr. Irving Stone, however, testified at the postconviction hearing he had detected a trace of blood on the knife. He did not conduct more sensitive tests to determine if the alleged trace of blood was human or animal in origin. The postconviction court concluded the testimony would not have changed the result of the jury verdict had it been available. We agree. Mayberry failed to meet the materiality element of the test because he failed to show the newly-discovered evidence would have changed the outcome of the trial.

We affirm the district court's denial of Mayberry's application for postconviction relief.

AFFIRMED.