

FILED

MAR 22 1979

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

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DARYL EUGENE REED,

)

Appellant,

)

Filed March 22, 1979

vs.

)

748
2-61902

STATE OF IOWA,

)

Appellee.

)

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Petitioner defendant appeals from lower court's dismissal of his application for post-conviction relief on the grounds of newly discovered evidence under section 663A.9, The Code, 1977, following his plea of guilty to a charge of robbery with aggravation in violation of section 711.2, The Code 1975. AFFIRMED.

Gary W. Kazragis of Rickert & Thompson, Reinbeck, Iowa, for appellant.

Thomas J. Miller, Attorney General of Iowa, and David H. Correll, Black Hawk County Attorney, for appellee.

Heard by Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J. takes no part.

PER CURIAM

Petitioner, Daryl Eugene Reed, appeals from lower court's judgment dismissing his application for postconviction relief instituted August 4, 1977, under chapter 663A, The Code 1977. He was convicted of robbery with aggravation pursuant to section 711.2, The Code 1975, based on his voluntary plea of guilty on which judgment was entered July 16, 1976. Petitioner's application for postconviction relief alleged that newly discovered evidence negated the voluntariness of his guilty plea and that lack of knowledge of this evidence had denied him the effective assistance of trial counsel. We affirm.

A brief recitation of facts is necessary to achieve adequate discussion of the issues. On November 25, 1975, Aaron Sanders reported to police that he had been robbed by one Calvin Jones and petitioner Reed. Both men were arrested and charged. At Jones's trial in January, 1976, Sanders unequivocally testified that petitioner had used a gun in the robbery.¹ Petitioner subsequently pled guilty to the charge of robbery with aggravation. After his application for postconviction relief was filed, petitioner deposed Aaron Sanders on February 9, 1978, at which time Sanders indicated all he could remember is that petitioner, at the time of the robbery, had in his hand what appeared to be a gun. At petitioner's postconviction relief hearing, petitioner's trial counsel testified that he had heard through various sources that Sanders was no longer certain petitioner had used a gun in the robbery. Although he prepared and delivered to Sanders an affidavit to this effect, he was unable to obtain a signed affidavit, apparently due to Sanders' unwillingness to sign it.²

I. In postconviction relief proceedings, the burden is on petitioner to establish the facts asserted by a preponderance of the evidence. Iowa R. App. P. 14(f)(5); Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977). Since petitioner has alleged violation of a constitutional safeguard, we must review independently the entire record under which the postconviction court's ruling on those constitutional rights was made. Bizzett v. Brewer, 262 N.W.2d 273, 274 (Iowa 1978); Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

In nearly every case some pieces of additional evidence can be found after trial, but most are not of a nature warranting vacation of the conviction in the interest of justice. Bizzett, 262 N.W.2d at 278. When a party alleges newly discovered evidence as grounds for postconviction relief, he or she must satisfy the elements stated in State v. Sims, 239

¹ Petitioner, at all times, denied having or using a gun.

² Sanders was unavailable as a witness at the postconviction relief hearing.

N.W.2d 550 (Iowa 1976). These are: 1) the new evidence was discovered after trial; 2) it could not have been discovered earlier in the exercise of due diligence; 3) it is material, not merely cumulative or impeaching; and, 4) it would probably change the result if a new trial were granted. Id. at 554.

Focusing on the third factor enumerated in Sims, we find that petitioner has failed to show by a preponderance of the evidence that any changes in Sanders' testimony is material or other than impeaching. The "new evidence" does not amount to the materiality of an illegal search concealed by police which induced a guilty plea in Zacek v. Brewer, 241 N.W.2d 41 (Iowa 1976), but is rather of the nature reflecting on Sanders' credibility as a witness. It is insufficient to overcome the force of Sanders' testimony under oath at Jones's trial when the robbery was fresh in his mind and the fact that petitioner elected to enter an otherwise informed and voluntary guilty plea rather than face Sanders' testimony at his own trial.

"The rule is well established that a guilty plea voluntarily and intelligently made by a defendant constitutes an admission of guilt and when accepted by the court constitutes a conviction of the highest order." Lynch v. State, 213 N.W.2d 502, 502 (Iowa 1973). The United States Supreme Court has characterized the guilty plea as making the defendant a witness against himself, a posture prohibited by the Fifth Amendment unless voluntary. Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468-1469, 25 L.Ed.2d 747, 756 (1970). A desire by defendant to secure a lesser penalty does not invalidate the plea. Id. at 751, 90 S.Ct. at 1463, 25 L.Ed.2d at 758.

The record here shows that the lower court personally interrogated defendant as to the force and effect of his guilty plea under the guidelines of State v. Sisco, 169 N.W.2d 542, 547-48 (Iowa 1969); and that the plea was entered with sufficient awareness of relevant consequences. Therefore, it cannot be found that defendant made other than a knowing, intelligent, and voluntary plea of guilty which must stand against this offering of new evidence. See Zacek v. Brewer, 241 N.W.2d at 48.

II. Defendant's second assertion is that his counsel's assistance was rendered ineffective because the "new evidence" was not available at the time of plea. Thus, as petitioner asserted in Zacek, "counsel[s] assistance was ineffective by reason of [his] inability to consider facts material to an intelligent decision on whether or not to plead guilty." 241 N.W.2d at 50.

The Iowa standard for effective assistance of counsel is whether counsel's action was, under all the circumstances, within the range of normal competency. State v. Dee, 218 N.W.2d 561, 563 (Iowa 1974). The circumstances include a showing of an affirmative factual basis demonstrating counsel's inadequacy of representation. State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); Zacek, 291 N.W.2d at 51. Effective does not mean successful, but whether conscientious, meaningful representation was given in advising defendant of his rights. State v. Kendall, 167 N.W.2d 909, 910 (Iowa 1969). Here defendant has only presented a speculative, generalized argument that ignorance of the "new evidence" hindered his counsel's view of his situation. Viewing the totality of the circumstances, this ground, likewise, is insufficient to afford petitioner the relief he seeks.

Finding no error in the postconviction court's denial of relief on the ground of newly discovered evidence, we affirm the court's judgment.

AFFIRMED.