IN THE COURT OF APPEALS OF IOWA

No. 9-690 / 98-0075
Filed December 27, 1999

FILED
DEC 2 1 1999
CLERK SUPREME

LLOYD EUGENE NIELSEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gordon Abel, Judge.

Lloyd Eugene Nielsen appeals following the denial of his application for postconviction relief. **AFFIRMED.**

David A. Poore, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

HECHT, J.

Lloyd Eugene Nielsen ("Nielsen") appeals from the district court's order denying him postconviction relief. He claims he was subjected to double jeopardy when he pled guilty to two counts of terrorism for firing several shots in and near an occupied building. Nielsen also contends he was denied effective assistance of trial counsel who failed to raise a Fifth Amendment objection to double punishment for a single act of terrorism. We affirm.

I. Background Facts and Proceedings. Nielsen was charged with two counts of attempted murder, one count of burglary first degree, one count of going armed with intent, and one count of injury to animals. The charges arose from an incident on May 1, 1994, in which Nielsen fired shots outside of an occupied residence, forcibly entered the residence, and fired several gunshots through a door within the residence. He subsequently accepted a plea agreement and pled guilty to one count of burglary first degree, a Class B felony and two counts of terrorism, a Class D felony. On November 15, 1994, Nielsen was sentenced to twenty-five years in prison on the burglary charge, and two five-year concurrent sentences on the terrorism charges. He did not file a motion in arrest of judgment and took no appeal.

On January 13, 1997, Nielsen filed an application for postconviction relief. He now appeals from the district court order denying the relief requested.

II. Standard of Review. Our review of Nielsen's constitutional challenge to the district court's order is de novo. *See State v. Perez*, 563 N.W.2d 625, 627 (Iowa

1997) Our review of postconviction relief proceedings can be for errors at law or de novo. When, as in this case, a constitutional issue is raised, our consideration is in the nature of de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998).

III. Failure to Preserve Error.

A. Fifth Amendment Issue. Nielsen contends on appeal that his Fifth Amendment rights were violated when he was charged with and sentenced for multiple counts of terrorism. He asks us to hold Iowa Code section 708.6 (1997) permits only one charge of terrorism under the facts of this case. Though he concedes several gunshots were fired, he claims the incident can only be considered a single act of terrorism. The State argues multiple terrorism charges and sentences were appropriate under the statute because Nielsen discharged his gun several times inside, as well as outside, the occupied dwelling. Under the State's view, each discharge of the gun would support a separate charge under the statute.

Claims not urged in the district court will not be considered for the first time on appeal even if they are of constitutional dimension. *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985); *State v. Willet*, 305 N.W.2d 454, 458 (Iowa 1981). We do not reach the interpretation of Iowa Code section 708.6 (1997) because Nielsen failed to appeal from the district court judgment.

The limitations upon postconviction relief also prevent us from addressing the double jeopardy issue raised by Nielsen. An applicant for such relief is generally barred from assigning grounds for postconviction relief which were not raised on

direct appeal. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Collins v. State*, 477 N.W.2d 374, 377 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981); *see* Iowa Code section 822.2 (1997) (postconviction relief "is not a substitute for . . . any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). These authorities require us to hold Nielsen failed to preserve error on his double jeopardy claim.

B. Ineffective Assistance of Counsel. Claims of ineffective assistance of counsel may also be waived if not preserved by direct appeal. Any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error. *Osborn*, 573 N.W.2d at 921; *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). In *Berryhill v. State*, the Iowa Supreme Court recently noted this rule embodies several important societal interests, including:

> the need to avoid a prolonged trial process; the need to avoid degradation to the prominence and importance of the original trial; the need to focus the attention of the prisoner on good behavior, rehabilitation, parole, and release; and the need to avoid retrials long after the commission of the crime.

Berryhill v. State, ___ N.W.2d ___, ___ (Iowa 1999).

In this case, Nielsen offers no reason or cause for not raising ineffectiveness of his trial counsel in a direct appeal. Accordingly, we hold he may not litigate the issue in this postconviction relief proceeding. We affirm the district court's denial of his application for postconviction relief.

AFFIRMED.