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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOSEPH L. KRAMER,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

Filed April 8, 1983

2-483
2-68214

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Petitioner appeals the denial of his application seeking postconviction relief. AFFIRMED.

Mark Cody of Ernst & Cody, P.C., Dubuque, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General for respondent-appellee.

Heard en banc.

DONIELSON, J.

Petitioner appeals the denial of his application seeking postconviction relief. On appeal he contends (1) that he received ineffective assistance of counsel from his attorney in a 1976 criminal proceeding; and (2) that the State infringed his right to take a direct appeal from the 1976 conviction. We affirm.

Our scope of review is on assigned errors. Iowa R. App. P. 4; Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when the appellate court reviews a claim of ineffective assistance of counsel on direct appeal, it makes an independent evaluation of the totality of the circumstances to determine if the defendant has met his burden to show that counsel failed to perform an essential duty, and that the defendant was prejudiced as a result. State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981); see also Hinkle, 290 N.W.2d at 30.

I.

In 1976 petitioner Joseph Kramer entered a plea of guilty to a charge of robbery with aggravation, a violation of former Iowa Code § 711.2 (1975). He was convicted and sentenced to imprisonment, not to exceed 25 years. He filed a notice of appeal but soon dismissed it. He now alleges that the county attorney threatened to file unrelated charges if he pursued the appeal.

In 1980 petitioner filed the present application for postconviction relief. He alleged that his attorney in the 1976 criminal proceeding had rendered ineffective by: (1) improperly inducing his guilty plea by misleading him about the likelihood of a suspended sentence; (2) failing to obtain an adequate plea bargain; (3) disregarding the possibility that petitioner was entitled to a defense of lack of specific intent due to the influence of drugs; and (4) failing to examine, prior to the plea proceeding, a confession by an alleged accomplice which implicated petitioner.

Petitioner's postconviction petition also alleged that the State had infringed his right to take a direct appeal by threatening him with unrelated charges if he pursued the appeal. The trial court denied the application for postconviction relief. Petitioner then instituted this appeal.

II.

Petitioner asserts that, due to the actions of his attorney complained of in his application for postconviction relief, he was denied his sixth and fourteenth amendment right to effective assistance of counsel. See McMann v. Richardson, 379 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763, 773 (1970); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974). The test for judging counsel's effectiveness is whether counsel's performance falls "within the range of normal competency" of attorneys. State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973); State v. Aldape, 307 N.W.2d at 42; Snethen v. State, 308 N.W.2d at 14. The State argues that trial counsel's actions were part of his overall trial strategy and were within the normal range of competency of attorneys. See Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980)(presumption exists that counsel is competent). We find that, on the record before us, petitioner has not met his burden to show ineffective assistance of counsel. See State v. Steltzen, 288 N.W.2d 557, 560 (Iowa 1980); State v. Don, 318 N.W.2d 801, 807 (Iowa 1982); Sims v. State, 295 N.W.2d at 423 (defendant must prove ineffective assistance of counsel by a preponderance of the evidence).

We also believe that petitioner's contention that the State infringed his right to take a direct appeal is without merit. This claim was considered in the hearing of petitioner's postconviction relief application. We believe the record does not support petitioner's claim that he dismissed the appeal because he was threatened with additional charges. Moreover, any challenges to the guilty plea which could have been heard on direct appeal were considered in petitioner's postconviction relief application. We agree that those challenges are meritless.

Having found all of petitioner's contentions to be without merit, we affirm the conviction.

AFFIRMED.

All judges concur, except Oxberger, C.J., who specially concurs.

OXBERGER, C.J. (concurring specially).

Although I concur with the majority's position in this matter, I wish to add a note concerning the appellant's allegation that he was threatened with the filing of another charge, on forgery, if he pursued his appeal of this conviction.

In Cleesen v. Brewer, 201 N.W.2d 474, 476 (Iowa 1972), the supreme court said:

> When a Defendant in a criminal case claims that he was improperly denied his right of appeal, and the time to appeal has expired and the facts on the claim are undisputed, the Defendant should apply directly to this Court for permission to take a delayed appeal.

Such an application is clearly the proper route for the appellant to take, particularly since the state concedes that appellant's recitation of the facts is correct. If such an application were made, I would favor granting it.