IN THE COURT OF APPEALS OF IOWA

FILED
DEC 13 1999
CLERK SUPREME COURT

No. 1999-450 (9-707) / 98-1819
Filed December 13, 1999

SHAWN DESHAY HOOSMAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Shawn Deshay Hoosman appeals the denial of postconviction relief. **AFFIRMED.**

Richard R. Hollis, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

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

HUITINK, P.J.

I, Background Facts and Proceedings.

In July 1996 a jury convicted Hoosman of the offense of terrorism by display of a firearm. The district court sentenced Hoosman to a term of ten years with a mandatory minimum of five years pursuant to statute. The Iowa Supreme Court affirmed the judgment and sentence of the trial court on December 8, 1997, and preserved two issues for postconviction relief. Those issues included ineffective assistance of counsel for failing to correct an error in the marshaling instruction and in failing to object to the admission of evidence linking defendant to a gang. *State v. Hoosman*, No. 96-1595 (Iowa Dec. 8, 1997). In his application for postconviction relief, Hoosman requested relief from his conviction and sentence:

> The conviction or sentence was in violation of the Constitution of the United States or laws of this state, to-wit: affective assistance of counsel was not provided to petitioner prior to and at the time of his trial; Petitioner's determination to proceed to jury trial was premised erroneously upon defense c ounsel's promises concerning the maximum amount of criminal liability (years to be served) risked in the event of a verdict of guilty. In addition, Petitioner was not informed of his ability to waive Jury trial and request a bench trial.
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> Specifically (1): Notwithstanding the sentence imposed by the court following jury conviction, prior to trial defense counsel for Petitioner had stated that the most time the State of Iowa could incarcerate petitioner would be five years.
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> Specifically (2): Prior to trial, defense counsel for Petitioner only met with Petitioner on two occasions, failed to have a working knowledge of the law and facts of the case, failed to have knowledge of the roles of the state's witnesses in the case, and failed to advise, discuss and counsel Petitioner as to his right to a jury trial and option to waive said right in lieu of bench trial.

The postconviction district court provided:

> The court, having observed the demeanor of the witnesses presented, finds that the testimony of Attorney Bishop is credible and that the testimony of the petitioner is less credible. The record presents a petitioner who heard what he wanted to hear and, more importantly, did not hear what he did not want to hear prior to trial. Having now had time to reflect, the petitioner knows that the outcome could have been different if he had accepted the advice of counsel. Unfortunately, at that time he could not hear what his lawyer was saying.

The district court concluded Hoosman had failed to present evidence upon which relief can be granted.

On appeal, Hoosman argues his trial counsel was ineffective for (1) failing to advise him regarding his right to a bench trial; (2) failing to properly advise him of the alleged different sentencing consequences of going to trial as opposed to accepting a plea agreement with the State; (3) failing to advise him the State would try to introduce evidence that he was involved in a gang; (4) failing to object to inflammatory, prejudicial testimony purporting to show he was involved in a gang and to the display of his tattoo; (5) failing to object to a marshaling instruction; (6) failing to raise the two issues preserved for postconviction proceedings; (7) failing to introduce evidence by one of the alleged victims that another alleged victim reached for a gun during the course of the incident in question. Finally, Hoosman asserts the admission of gang-related testimony and the display of the tattoo violated Hoosman's constitutional rights of due process and equal protection.

II. Standard of Review.

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction

petitioner asserts violations of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.*

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

III. Error Preservation.

An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. *See* Iowa Code § 822.8 (1997). Before Hoosman may raise a claim of ineffective assistance of trial counsel for the first time in postconviction proceedings, he must demonstrate a "sufficient reason" for not raising the claim on direct appeal. *See id.*; *Polly v. State*, 355 N.W.2d 849, 855 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time

in a proceedings for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995).

A. Preserved Claims. On direct appeal, the supreme court preserved two ineffective assistance of counsel claims for postconviction relief proceedings: (1) failing to correct an error in the marshaling instruction submitted to the jury, and (2) failing to object to the admission of evidence linking him to a gang.

Even though the failure to object to gang evidence claim was properly preserved by the Iowa Supreme Court for postconviction proceedings, the claim was waived because it was not raised in the postconviction application nor ruled on by the district court.

Hoosman argued preservation of the marshaling instruction claim was preserved by his statement in his postconviction application which stated "defense counsel . . . failed to have a working knowledge of the roles of the State's witnesses in the case." We disagree. Such a vague claim may not be substituted for failing to raise the precise issue of counsel's failing to object to a marshaling instruction in the postconviction application. A vague claim may not substitute for raising the precise issue on appeal, even as an expansion of a claim which was raised in a different fashion. *Snethen v. State*, 308 N.W.2d 11, 17 (Iowa 1981). As a result, Hoosman waived both issues preserved for further review by the supreme court.

B. Other Claims. As noted above in his direct appeal, Hoosman made two challenges on direct appeal to the representation he received from his trial counsel.

The supreme court declined to reach those claims, affirming the conviction but preserving applicant's right to raise them in postconviction relief proceedings. Hoosman failed to raise the following claims on direct appeal: (1) trial counsel erred in not advising him of his right to waive jury trial; (2) trial counsel erred in not advising him on the alleged different sentencing consequences as opposed to accepting a plea agreement; (3) trial counsel erred in not advising him on potential introduction of evidence defendant was involved in a gang; and (4) trial counsel erred in not introducing evidence by one of the alleged victims that another alleged victim reached for a gun during the course of the incident in question.

At no point in his application for postconviction relief or his appellate brief has Hoosman attempted to show sufficient reason or cause for failing to raise these issues on direct appeal. Accordingly, Hoosman also failed to preserve these issues for postconviction relief.

IV. Ineffective Assistance of Postconviction Counsel.

Hoosman contends his postconviction counsel was ineffective for failing to argue the two issues preserved for appeal for postconviction proceedings. We disagree.

A. Failure to Object to Gang Evidence. Hoosman failed to show counsel breached an essential duty in failing to object to the gang evidence because the evidence was relevant and admissible as responsive evidence to the defense theory of the case. The defense sought to portray Hoosman as a person uninvolved in gangs

and who had reason to fear persons who were known gang members. The State's evidence contradicting this was responsive to that defense theory and therefore was relevant and admissible. Since this evidence is admissible, counsel was not ineffective for failing to make all the objections applicant asserts he should have made.

B. Failing to Object to the Marshaling Instruction. Hoosman contends he did not raise the claim in his postconviction application because his trial counsel "failed to have a working knowledge of the law and facts of the case . . ." We disagree. As noted earlier, such a vague claim may not substitute for raising the precise issue on appeal.

C. Conclusion. For these reasons, we find counsel did not breach an essential duty. Even if counsel had breached an essential duty, the evidence of Hoosman's guilt is so overwhelming, there is no reasonable probability the jury would have reached a different result in the absence of failing to raise the two issues preserved in the direct appeal for postconviction proceedings.

V. Summary.

We have carefully considered to the extent they are ascertainable, all of the grounds Hoosman cites in support of his claims for postconviction relief. None of them have any merit. The judgment of the district court is therefore affirmed.

AFFIRMED.