IN THE COURT OF APPEALS OF IOWA

No. 5-724 / 95-299

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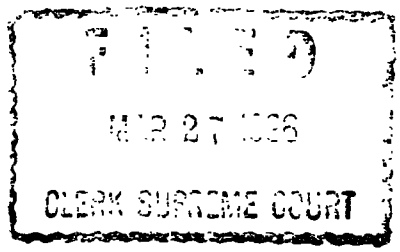
RICHARD MATHIS,

Applicant-Appellant.

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Richard Mathis appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Esther J. Dean, Muscatine, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana E. Christiansen, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

In 1991, Richard Mathis was convicted, following a jury trial, of four counts of second-degree burglary. Mathis appealed arguing, among other things, his trial counsel was ineffective. The supreme court affirmed Mathis' convictions and rejected his claims of ineffective assistance.

In 1994, Mathis filed an application for postconviction relief alleging his trial counsel was ineffective. Following a hearing, the district court denied Mathis' application. It noted it considered all of Mathis' ineffectiveness claims because it was unclear which claims were evaluated on appeal.

Mathis appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards, such as ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

On appeal, Mathis contends the district court erred in denying his application for postconviction relief. Mathis maintains his trial counsel was ineffective for the following reasons: (1) failing to strike certain allegedly biased jurors; (2) failing to timely object to a police officer's testimony regarding fingerprints and shoe prints and failing to subpoena fingerprint analysis and shoe print evidence; (3) failing to move for a change of venue; (4) failing to request the trial judge to recuse himself; (5)

failing to use discovery for information regarding the crime scenes; (6) failing to call witnesses to impeach the credibility of a State witness, Mark Wallace, and of a State witness who bought the stolen property from Mathis; (7) failing to call character witnesses in his behalf; (8) failing to review the juvenile file of Mark Wallace to ascertain whether the juvenile was away from the shelter on the dates the crimes occurred; (9) failing to present evidence that would show he did not receive title to the van allegedly used in the burglaries until after the first two burglaries had occurred; (10) failing to present evidence of his work schedule on the date of the burglaries; and (11) failing to obtain deposition testimony by the victims as to the dates and times of the burglaries. As will be discussed below, all of these claims must fail pursuant to Iowa Code section 822.8 (1993) or due to error preservation.

In his direct appeal, Mathis asserted a claim of ineffective assistance of counsel. Mathis contended he was dissatisfied with the handling of depositions and the extent to which depositions were taken; he was dissatisfied with the failure of his counsel to call certain witnesses he believed would support his case; and he wanted his counsel to review the juvenile file of Mark Wallace. Our supreme court, in an unpublished opinion, made the following statement denying Mathis' claim:

> Prior to trial, many of Mathis' concerns about his counsel were presented to the court. Much of the dispute [centered] on counsel's alleged failure to call witnesses and to adequately prepare for trial. Counsel responded to the allegations and Mathis eventually agreed to proceed with counsel during trial. On appeal, Mathis fails to indicate any new grounds for alleging ineffective assistance of counsel based on the conduct of the trial. Based on the record in this case, we conclude

> that Mathis was not denied effective assistance of counsel. Mathis' complaints primarily concern pre-trial strategy and tactics and these concerns were adequately addressed by counsel prior to trial.

State v. Mathis, No. 91-979 (Iowa April 27, 1992). The supreme court did not preserve Mathis' claims of ineffective assistance of counsel, but rather denied the claims.

The claims in this application for postconviction relief which were covered by the claim of ineffective assistance on direct appeal are claims six, seven, eight, and eleven.

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 822.8 (1993). As claims six, seven, eight, and eleven were finally adjudicated on direct appeal, Mathis cannot reassert these claims in the application for postconviction relief. Accordingly, these claims must fail.

Ordinarily, a claim of ineffective assistance of trial counsel must be preserved on direct appeal in order for it to be heard in postconviction proceedings. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). Such a claim may be raised in postconviction proceedings, even if not raised on direct appeal, if the applicant can

show by a preponderance of the evidence: (1) "sufficient reason" or "cause" for not having raised the issue at trial and on direct appeal; and (2) prejudice resulting from the alleged errors. *Id.*; *Kane v. State*, 436 N.W.2d 624, 626-27 (Iowa 1989). Ineffective assistance of appellate counsel may provide sufficient reason for not raising the issue on direct appeal. *Kane*, 436 N.W.2d at 627-28.

Mathis failed to raise the remaining claims on direct appeal. To raise these remaining claims in this application for postconviction relief, Mathis must show sufficient reason for not raising the claims on direct appeal and he must also show the prejudice resulting from the alleged errors. Mathis makes no attempt in his brief to argue a sufficient reason for not raising the claims on direct appeal. In addition, Mathis did not file a reply brief to address this error preservation argument raised by the State. While Mathis could have argued ineffective assistance of appellate counsel to demonstrate reasons for failing to raise the claims on direct appeal, he does not even attempt this argument. In short, Mathis has failed to argue or show these claims can be raised in the application for postconviction relief. We conclude these claims must also fail.

Even if Mathis had properly preserved error and these remaining claims were properly before this court, we find these claims must fail on their merits, since we are unable to find trial counsel failed to perform an essential duty or that prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987). Either the claims involve trial strategy or else Mathis cannot be shown to have suffered

prejudice. We affirm the ruling of the district court denying Mathis' application for postconviction relief.

AFFIRMED.