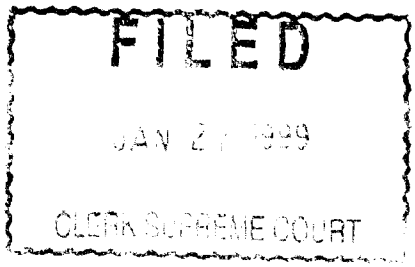
IN THE COURT OF APPEALS OF IOWA

No. 8-721 / 98-289
Filed January 27, 1999



ALFRED E. MYRE,
Appellant,

vs.

STATE OF IOWA,
Appellee.

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

Alfred Myre appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Michael R. Stowers of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Richard Crowl, County Attorney, and Daniel J. McGinn, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Alfred Myre appeals from the district court's denial of his application for postconviction relief. We affirm.

Background facts. Myre was convicted of second-degree murder in 1991. We affirmed his conviction on appeal. *See State v. Myre*, No. 91-1391 (Iowa App. Feb. 2, 1993). In 1994 Myre filed an application for postconviction relief which was eventually denied by the district court. He now appeals.

I. Previously raised claims. On direct appeal, Myre asserted that the trial court erred by: 1) failing to allow the jury to view a videotape during their deliberations; 2) allowing the state to present evidence of a fistfight between himself and the victim; and 3) allowing an allegedly prejudicial photograph of himself into evidence. All three claims were rejected by this court. *See State v. Myre*, No. 91-1391 (Iowa App. Feb. 2, 1993). In his application for postconviction relief, Myre reasserts the same three issues. Ordinarily, claims that have been finally adjudicated on direct appeal may not be the basis for an application for postconviction relief. *See* Iowa Code § 822.8. However, Myre argues that they are not barred from our review because 1) he is raising them for the first time on constitutional grounds, and 2) his appellate counsel was ineffective for failing to raise the issues as such on direct appeal.

We again reject all three of these claims. Myre makes no constitutional arguments in his brief, nor does he cite any constitutional authority. He merely

repeats the same arguments he made in his direct appeal under the Iowa Rules of Evidence and Criminal Procedure. In any event, we find Myre's counsel had no duty to challenge the court's alleged errors on constitutional grounds, nor did Myre suffer any prejudice from counsel's failure to do so.

II. Instruction on willful injury. Myre next claims that his counsel was ineffective in failing to ask for an instruction on willful injury as a lesser included offense. Myre did not raise this issue on his direct appeal and does not offer any reason for his failure to do so. We therefore find this claim is barred from our review. *See* Iowa Code § 822.8; *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). However, even if the claim were not barred, we would find it to be without merit. In this case, the jury was instructed on first degree premeditated murder and felony murder with willful injury as the underlying felony, in addition to the lesser included offenses of second degree murder, voluntary manslaughter, and involuntary manslaughter based on the commission of a reckless act resulting in death. Under the circumstances, Myre cannot show he was prejudiced by counsel's failure to request the instruction. *See State v. Carberry*, 501 N.W.2d 472, 476 (Iowa 1993) ("[W]hen one or more lesser included offenses are submitted to the jury and a conviction of the greater offense is returned, there is no prejudice in the failure to submit additional included offenses") (citations omitted).

III. Cumulative effect. Finally, Myre contends the cumulative effect of numerous alleged errors was so prejudicial that he was denied a fair trial. The postconviction court did not address this claim, and Myre did not file a 179(b) motion asking the court to do so. We have no ruling to review and therefore cannot consider this claim on appeal. *See State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997) (appellate court does not consider issues not presented to or decided by the district court in the first instance).

Having considered all issues properly before us on appeal, we hereby affirm the district court's denial of Myre's application for postconviction relief.

AFFIRMED.