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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JAMES MICHAEL TAYLOR,)

Petitioner-Appellant,) Filed August 27, 1986

vs.)

STATE OF IOWA,) 6-180
85-95

Respondent-Appellee.)

Appeal from the Iowa District Court for Black Hawk County (No. 65271) - Forest E. Eastman, Judge.

Petitioner appeals the district court's denial of his motion for postconviction relief contending that he is entitled to such relief on the ground that he was denied effective assistance of trial and appellate counsel, on the ground that the trial court denied him his right to compulsory process, and on the ground that prosecutorial comment during closing argument violated his right against self-incrimination. **AFFIRMED.**

Mary E. Robinson, Cedar Rapids, for petitioner-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Scott Lemke, Assistant County Attorney, for respondent-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

SNELL, J. 456

The petitioner was accused of the 1981 murders of two Waterloo police officers. The petitioner was found guilty of two counts of first-degree murder. A motion for a new trial was filed and overruled following the jury verdicts. He was sentenced to two concurrent life sentences. His convictions and sentence were affirmed on direct appeal by the Iowa Supreme Court. State v. Taylor, 336 N.W.2d 721 (Iowa 1983).

The petitioner proceeded to file a petition for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. This petition was dismissed without prejudice by Judge W. C. Stuart.

The petitioner then filed an Application for Postconviction Relief pursuant to chapter 663A of the Iowa Code in which he raised a number of issues supporting his request for a new trial. A telephonic hearing was held on the application. Following the submission of briefs, the postconviction court entered an order denying relief. Petitioner filed a timely notice of appeal.

Petitioner alleges first of all that he was denied effective assistance of trial counsel as secured by the sixth amendment. As the petitioner is asserting that his constitutional right to counsel was violated, we make an independent evaluation of the totality of the circumstances, the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

In order to succeed on a claim that he was denied effective assistance of counsel, petitioner must show that his counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Petitioner has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94 (1984). Petitioner must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, at 14. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, petitioner must show that counsel's failure to perform an essential duty worked to petitioner's actual and substantial disadvantage. Specifically, petitioner

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

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Petitioner's claim of ineffective assistance of trial counsel is based upon a number of allegations. First of all, petitioner alleges that his trial counsel failed to properly investigate petitioner's case. Petitioner, however, specifically mentions only one shortcoming of counsel in this respect. He claims that trial counsel made no attempt to contact and interview Winkey Williams who, petitioner alleges, could have testified to petitioner's drug intoxication on the day of the shootings.

Petitioner has presented us with no evidence supporting the claim that his trial counsel failed to contact Williams. Petitioner testified at the hearing that he did not know whether his trial counsel contacted or attempted to contact

Williams. Williams did not testify at the postconviction hearing. Petitioner argues that, because of the brevity of the chief counsel's notes in this case, "we must assume that the interviews and investigations were somewhat lacking." This argument misplaces the burden of proof on this issue. Ineffective assistance of counsel is not assumed. It must be affirmatively shown by the person claiming its existence. Petitioner has failed to do so.

Secondly, petitioner claims that his trial counsel failed to properly prepare for trial. As with his claim of ineffective investigating, petitioner notes only one instance of trial counsel's improper preparation. This concerned trial counsel's failure to secure an expert witness to testify, assumably on the mental and physical effects of alcohol and drug use. The trial court refused to allow the proposed expert, Dr. Moore, to testify because petitioner's trial counsel failed to list Moore as an expert witness, as is required, on the notice of diminished responsibility defense filed pursuant to Iowa R. Cr. P. 10(11)(b) (1986) (then Iowa R. Cr. P. 10(10)(b) (1981)).

In analyzing this claim, we note first that we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Taylor, 352 N.W.2d at 685. We accept the counsel of the United States Supreme Court in this regard that

> [t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700; Taylor, 352 N.W.2d at 685.

Petitioner appears to argue that he was prejudiced simply by virtue of the fact that as a result of trial counsel's alleged error, petitioner was not able to present a desired witness. This, however, is not an adequate showing of prejudice in the constitutional sense. Petitioner has the burden of persuading us by a preponderance of the evidence that there is a reasonable probability that the result of his trial would have been different absent the alleged error. We are convinced that the petitioner has not satisfied this burden.

Petitioner failed to produce Moore to testify at the postconviction hearing. Petitioner's brief states that Moore "was not going to testify regarding his knowledge of appellant [petitioner] but was going to testify regarding his knowledge of the effect of intoxication generally, assumably with reference to the ability of one to form a requisite intent." (emphasis added). The sole source of information produced at the postconviction hearing concerning the nature of Moore's testimony was Dean Olson, an attorney who assisted defendant's chief trial counsel. When asked how important Moore's testimony was to the defendant's theory of the case, Olson initially replied that "he [Dr. Moore] certainly couldn't have hurt." Olson went on to characterize Moore as "not a Perry Mason, win-all lose-all witness," and to say that the defense had "certainly hoped" that Moore's testimony would have gone to the issue of premeditation. Although Olson went on to outline his understanding of the theory of the defense at trial and the role Moore was expected to play in relation to that theory, such testimony falls short of showing that a reasonable probability exists that a trial including the speculated testimony of Moore would have ended in a different result.

Petitioner's third claim of ineffective assistance asserts that trial counsel failed to fully and consistently consult with the petitioner. Petitioner alleges that he experienced "some difficulty" in communicating with trial counsel. This allegation is unsupported by any specific claims and is contrary to the

testimony elicited at the postconviction hearing from the assistant trial counsel. Petitioner also claims that when he decided not to testify at trial, counsel made no attempt to advise him regarding the consequences of that decision. This claim is flatly contradictory to the trial transcript which clearly shows that petitioner's decision not to testify was made against the advice of counsel and was thoroughly discussed by petitioner and counsel. Petitioner has failed to meet his burden of showing a breach of an essential duty by trial counsel in this regard.

Fourth, petitioner claims that trial counsel was ineffective in that he failed to timely file required notices concerning defenses. Petitioner advances no specifics in support of this claim. To the extent that this allegation deals with trial counsel's failure to list an expert witness on the notice of diminished capacity defense and the trial court's subsequent refusal to allow Dr. Moore to testify, we have dealt with it adequately above.

Petitioner's final allegation of ineffective assistance claims that trial counsel failed to perfect all available issues for appeal. Petitioner directs our attention to only one instance of trial counsel's alleged failure in this regard, that trial counsel failed to object on sixth amendment compulsory process grounds to the trial court's refusal to allow Dr. Moore to testify. Even assuming error, petitioner has made no showing that there is a reasonable probability that such an objection would have resulted in the proceedings ending with a different result. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Conners, 241 N.W.2d 447 (Iowa 1976).

In sum, petitioner has failed to sustain his burden of showing ineffective assistance of trial counsel.

Petitioner's second claim alleges that he was denied effective assistance of counsel at the appellate stage of his case. This claim is based upon his appel-

late counsel's failure to raise on appeal either the issue of trial counsel's ineffective assistance of counsel or the issue that the trial court's exclusion of petitioner's expert witness violated due process as well as petitioner's rights to compulsory process.

The right to effective assistance of counsel also applies to assistance of counsel on appeal. Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). The same standards applied to trial counsel competency should apply in measuring the competency of appellate counsel. Hinkle, 290 N.W.2d at 31.

As discussed above, we have found petitioner's claim of ineffective assistance of trial counsel to be without merit. Consequently, appellate counsel was not ineffective by virtue of his failure to argue that petitioner was denied effective assistance of trial counsel.

Petitioner next alleges that appellate counsel was ineffective by virtue of his failure to argue that the trial court's exclusion of petitioner's expert witness deprived petitioner of his constitutional guarantees to compulsory and due process. It is uncontroverted that defendant's trial counsel failed to preserve his constitutional challenge by raising it at trial. No Iowa appellate court will entertain constitutional issues which were not presented in the trial court. Shenandoah Educational Ass'n v. Shenandoah Community School District, 337 N.W.2d 477, 483 (Iowa 1983); In Interest of W.E.G., 342 N.W.2d 900, 901 (Iowa Ct. App. 1983). Consequently, appellate counsel's essential duties do not include attempting to raise issues on appeal that cannot be heard by the appellate courts.

Petitioner's third claim is that he was denied his sixth amendment rights to compulsory process as made applicable to the states by the fourteenth amendment when the trial court excluded the testimony of his proposed expert witness.

As we have noted above, the parties to this appeal agree that petitioner failed to raise this constitutional issue at trial and thus preserve it for further review. Consequently, the constitutional claim could not have been heard on appeal.

A postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). We will not ordinarily allow a defendant to claim in postconviction proceedings that the trial court erred on issues that were not properly preserved for our review on direct appeal. Id. As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code section 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

Petitioner argues that the ineffective assistance of his counsel establishes sufficient reason for his failure to challenge the constitutional error in the trial court. We have discussed petitioner's ineffective assistance claims above and have found them to be without merit. It follows that petitioner has not met his burden under Polly and is barred from raising his sixth amendment claim in this court.

Finally, petitioner alleges that remarks made during the State's closing argument violated his constitutional right against self-incrimination. Petitioner

concedes that this issue was raised on direct appeal to the Iowa Supreme Court. That court reached the merits of this issue and decided it against the petitioner. State v. Taylor, 336 N.W.2d 721, 727-28 (Iowa 1983).

Iowa Code section 663A.8 (1985) provides that:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated . . . 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 . . . .

The Iowa Supreme Court has held this section to mean that a person is barred from relitigating in a postconviction proceeding any ground that was finally adjudicated on direct appeal. Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982); Armento v. Baughman, 290 N.W.2d 11, 12 (Iowa 1980).

AFFIRMED.