

IN THE COURT OF APPEALS OF IOWA

SEP 20 1979
CLERK SUPREME COURT

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ROBERT DEAN WIEBRAND,)

Plaintiff-Appellant,)

Filed September 20, 1979

vs.)

STATE OF IOWA,)

Defendant-Appellee.)

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2-62260

Appeal from Cerro Gordo District Court - Ray E. Clough, Judge.

Plaintiff appeals denial of application for postconviction relief. Affirmed.

R. L. Stephenson, of Beck, Pappajohn, Shriver & Stephenson, Mason City, for appellant.

Thomas J. Miller, Attorney General of Iowa, Richard L. Cleland, Assistant Attorney General, and Richard N. Tompkins, Cerro Gordo County Attorney, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Plaintiff appeals denial of application for postconviction relief. For reversal, plaintiff asserts the court hearing the application erred in not granting relief on the following grounds: The identification procedures at the preliminary hearing and original trial were impermissibly suggestive; he was denied effective assistance of counsel at his original trial; and juror misconduct denied him a fair trial. We affirm.

On December 12, 1975, plaintiff was sentenced to five years in prison after being found guilty of committing lascivious acts with a person under the age of 16 years in violation of section 725.10, The Code 1975. This court affirmed that conviction on appeal; none of the issues now raised were argued.

I. A person seeking postconviction relief must establish the facts asserted by a preponderance of the evidence. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). If the trial court's fact-findings in support of its judgment denying postconviction relief are supported by substantial evidence and justified as a matter of law, the reviewing court will not disturb the judgment. Stanford, 279 N.W.2d at 31; Benton v. State, 199 N.W.2d 56, 57 (Iowa 1972). Where there is an alleged violation of a constitutional safeguard, we evaluate the totality of the circumstances under which the postconviction ruling was made. Stanford, 279 N.W.2d at 31; Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); State v. Lemburg, 257 N.W.2d 39, 45 (Iowa 1977).

II. A preliminary issue is whether our review of plaintiff's contentions is precluded by his direct appeal that did not raise the grounds for relief now asserted. A postconviction-relief applicant, who has previously sought review of his conviction by direct appeal, must establish sufficient reason why each new ground for relief was not previously asserted. Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979); Bledsoe v. State, 257 N.W.2d 32, 34 (Iowa 1977); section 663A.8, The Code 1977. We, therefore, must conduct a *de novo* review concerning plaintiff's three constitutional issues to determine whether plaintiff has sustained his burden of demonstrating sufficient reason for not raising these issues on direct appeal. Stanford, 279 N.W.2d at 31; Redding, 274 N.W.2d at 317; Cleesen v. State, 258 N.W.2d 330, 331 (Iowa 1977); Bledsoe, 257 N.W.2d at 34; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

A. Plaintiff asserts the errors involved in the pre-indictment and in-court identifications were not raised on direct appeal because of trial counsel's decision not to file a motion to suppress the identifications or raise any objections. Due to this failure to preserve the errors, plaintiff argues, there was no opportunity to raise them on direct appeal. Failure to preserve error through proper objection as a consequence of trial strategy or oversight is an insufficient reason for not having raised the issue on direct appeal. See generally Carstens v. Rans, 210 N.W.2d 663, 664-65 (Iowa 1973). Additionally, plaintiff did not assert the error concerning the in-court identification in his application for postconviction relief and it cannot be raised for the first time on appeal. Cf. State v. Nowlin, 244 N.W.2d 596, 604 (Iowa 1976) (defendant failed to raise at trial sufficiency of corroboration of accomplice's testimony); State v. Chase, 234 N.W.2d 871, 873 (Iowa 1975) (defendant failed to raise at trial issue of his sanity at the time of the crime). The remedy of postconviction relief was not intended to give a defendant numerous appeals and chapter 663A, The Code 1977, has been construed in a strict manner consistent with that intent. Snyder, 262 N.W.2d at 578; Carstens, 210 N.W.2d at 664-65; Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973). We conclude plaintiff is precluded by section 663A.8 from receiving further consideration on these issues.

B. Plaintiff contends that if this court concludes, as we do, plaintiff has waived all of his objections to the admissibility of the identification evidence, we should consider whether that waiver is the result of ineffective assistance of counsel. Here again, this issue was not asserted in the direct appeal. The alleged failure to make proper objections was known to plaintiff's appeal counsel, but no reason was given why it was not raised. Although a close question, we conclude plaintiff has not established sufficient reason why this ground was not previously raised. Bledsoe, 257 N.W.2d at 34; State v. Boge, 252 N.W.2d 411, 414-15 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41, 46-47 (Iowa 1976); Rinehart, 234 N.W.2d at 658. In certain instances, a postconviction-relief hearing is a preferred forum to fully examine a claim of ineffective assistance of counsel, particularly when the facts are insufficiently presented in the record. State v. Smith, No. 62414 (Iowa, filed August 29, 1979); State v. O'Connell, 275 N.W.2d 197, 206 (Iowa 1979); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978); State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Where, however, the alleged error of counsel is glaring or further

proceedings are unnecessary, the question may be settled on direct appeal. State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750-51 (Iowa 1978). Furthermore, there is no holding by the Iowa Supreme Court that the claim need not be raised on direct appeal, absent a showing of sufficient reason why the claim was not raised earlier, Zacek v. Brewer, 241 N.W.2d 41, 46-47 (Iowa 1976) (suppression by police of material evidence rendering guilty plea involuntary and denying effective assistance of counsel was a "sufficient reason"). In view of the strict construction given section 663A.8, Snyder, 262 N.W.2d at 578; Cartens, 210 N.W.2d at 664-65; Horn, 209 N.W.2d at 120, and plaintiff's failure to establish a sufficient reason why this alleged error was not raised in his direct appeal, we hold that section 663A.8 precludes our review of this issue.

Nevertheless, reaching the merits of plaintiff's argument, we find his position untenable. The modern standard of performance of defense attorneys in criminal cases is whether under all the circumstances counsel's performance was within the range of normal competency. State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. O'Connell, 275 N.W.2d at 206; State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Kellogg, 263 N.W.2d at 544; Cleesen v. State, 258 N.W.2d at 332. "Effective does not mean successful. It means conscientious, meaningful representation Improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." Kime v. Brewer, 182 N.W.2d 154, 156 (Iowa 1970).

Plaintiff's trial counsel made a tactical decision, with the consent of plaintiff and after discussion with his law partner, not to move to suppress the pre-indictment hearing. The purpose of this strategy was to allow a challenge of the victim's in-court identification. Such a calculated decision excuses the failure to preserve error on this point. Veverka, 271 N.W.2d at 750; Long v. Brewer, 253 N.W.2d 549, 558 (Iowa 1977).

Plaintiff also complains of trial counsel's failure to move to suppress the in-court identification of plaintiff by the victim because of the taint of the pre-indictment photographic identification. It is unclear from the record whether this, too, was a tactical move or merely an omission. Plaintiff has the burden of proving ineffectiveness of counsel, Stanford, 279 N.W.2d at 31; Veverka, 271 N.W.2d at 750, and counsel is presumed to act properly. Kime, 182 N.W.2d at 156. Absent sufficient proof to the

contrary, we hold the performance of defendant's trial counsel under all the circumstances was within the range of normal competency.

C. Lastly, plaintiff asserts juror misconduct denied him his right to a fair trial. During the course of the jury deliberations, a juror revealed defendant's prior record to the other jurors. This alleged misconduct, plaintiff asserts, was not known until the postconviction-relief hearing so it could not have been raised on direct appeal.

Evidence newly discovered after trial is a permissible basis for postconviction relief. Stanford, 279 N.W.2d at 32-33; section 663A.2(4), The Code 1977. Three elements must be established, however, before a new trial will be granted: "(1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) its admission would likely change the result if a new trial were granted." Stanford, 279 N.W.2d at 32-33. We conclude the conversations among the jurors do not satisfy the third criterion. Accordingly, a new trial is not warranted.

Defendant also alleged in his amended application for postconviction relief the denial of his constitutional right to trial before an impartial jury because two of the jurors were acquainted with him. Plaintiff knew of this circumstance at the time of jury selection; no reason was presented why this matter was not raised earlier. This contention was waived by defendant's failure to raise the issue in his direct appeal. Redding, 274 N.W.2d at 317. Even on the merits, we do not view this contention as an adequate grounds for relief since plaintiff did not establish any prejudice suffered by him due to this circumstance. State v. Hall, 235 N.W.2d 702, 729 (Iowa 1975); State v. Houston, 209 N.W.2d 42, 45 (Iowa 1973).

Plaintiff failed to establish his claim for postconviction relief by a preponderance of the evidence; we affirm the trial court's judgment.

AFFIRMED.

Carter, J., concurs. Oxberger, C. J., Snell, J., and Johnson, J., specially concur.

JOHNSON, J. (specially concurring)

In cases involving a claim of ineffective assistance of counsel, the Iowa supreme court has given strong judication that, absent blatant or glaring error, see, e.g., State v. Coil, 264 N.W.2d 293 (Iowa 1978), a postconviction proceeding is the proper method for raising such an issue because it ordinarily requires an evidentiary, adversary hearing. See, e.g., State v. Smith, No. 62414 (Iowa, filed August 29, 1979); State v. O'Connell, 275 N.W.2d 197, 206 (Iowa 1979); State v. Coil, 264 N.W.2d at 296; State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Thus, I would not conclude, as does the majority in Division II, that our review is precluded under section 663A.8 because plaintiff has failed to establish a sufficient reason why this accepted error was not raised in his direct appeal. I, however, do agree with the majority on the merits that the record establishes the competency of plaintiff's trial counsel and that trial court's judgment should be affirmed.

Oxberger, C.J., and Snell, J., join in this special concurrence.