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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-152 / 91-432

DARRELL E. BIZZETT,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul and Michael S. Walsh, Judges.

Darrell Bizzett appeals from a judgment of the district court denying his application for postconviction relief **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Bonnie J. Campbell, Attorney General; Thomas D. McGrane, Assistant Attorney General; and Thomas Mullin, County Attorney, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The applicant in this case, Darrell Bizzett, was convicted of first-degree murder for the death of Dr. Robert Stukel, Jr., a Nebraska veterinarian. The conviction was affirmed on direct appeal in State v. Bizzett, 212 N.W.2d 466 (Iowa 1973) (Bizzett I). Bizzett previously filed two applications for postconviction relief which were denied. See Bizzett v. Brewer, 262 N.W.2d 273 (Iowa 1978) (Bizzett II) and Bizzett v. Nix, 344 N.W.2d 733 (Iowa App. 1983) (Table) (Bizzett III). Bizzett now appeals the denial by the district court of his third application for postconviction relief. We affirm.

We will first set forth some of the facts in this case. On the night of August 31, 1970, Bizzett was working as a bartender at the 711 Club, an establishment owned by his grandfather. Stukel was apparently making a round of Sioux City taverns that evening and eventually wound up at the 711 Club. Bizzett and Stukel engaged in conversation and when the club closed at about 2:00 a.m. they left together.

As Bizzett and Stukel were walking down the street, they met Debra Eggers and Tom Farmer. Bizzett was previously acquainted with Eggers. The four then proceeded together. As they were walking along, Eggers overheard Bizzett suggest to Farmer that they "roll" Stukel. Bizzett purchased some whiskey from a bootlegger known to him and the group then went to a nearby playground to drink.

From the time Bizzett and Stukel left the tavern they were followed by Willie Rucker. One conjecture is that Rucker was waiting for an opportunity to take money from Stukel. In any event, Rucker hid in some bushes near the playground in order to watch the group.

At the playground Bizzett gave a prearranged signal and Farmer knocked Stukel against a brick wall. Farmer and Bizzett began to go though Stukel's pockets. Rucker then ran out of his hiding place. The group noticed Stukel was not unconscious. Eggers testified Bizzett jumped and stomped on Stukel's head and face. Rucker testified Bizzett jumped on Stukel's back and neck. Stukel began to bleed profusely from his ears and mouth. The group then became alarmed and fled from the scene. One of them called the police. Stukel was taken to a hospital, where he died.

Farmer pled guilty to second-degree murder in connection with this incident. He did not testify at Bizzett's trial. Eggers and Rucker were given immunity in exchange for their testimony against Bizzett. As noted above, Bizzett was convicted of first-degree murder.

In this third postconviction action Bizzett claims he is entitled to postconviction relief because the State failed to prove beyond a reasonable doubt that he caused Stukel's death by jumping and stomping on him. He claims that in 1979 he discovered Dr. Coriden, the medical examiner who testified at his trial, was incompetent. Dr. Coriden had testified an external unnatural force of great

severity had been applied to Stukel's head and face. Dr. Coriden stated this force could have been a blow or a fall. At a postconviction hearing held on May 20, 1988, Bizzett presented the testimony of Dr. Earl Rose. Dr. Rose testified he believed kicking or stomping would not have caused the type of injuries suffered by Stukel. He testified the injuries could have been generated by falling and striking a wall.

The district court found Bizzett did not show a sufficient reason for not previously raising the issues concerning Dr. Coriden's testimony. The court also found that even if medical evidence showed stomping was not the cause of death, Bizzett could have been convicted on the basis of joint criminal conduct. The evidence showed Bizzett was acting in concert with Farmer, who hit Stukel against a brick wall. Finally, the court found Bizzett did not show that his previous attorneys were incompetent for failing to raise these issues. The court denied Bizzett's application for postconviction relief. Bizzett now appeals.

I. Proceedings for postconviction relief are special proceedings treated as an action at law. Gladson v. State, 439 N.W.2d 214, 215 (Iowa App. 1989). However, where there are fundamental constitutional rights involved, we review the cases de novo in light of the totality of the circumstances. Id.

II. Bizzett first contends the State failed to prove beyond a reasonable doubt that Stukel's death was caused by jumping and stomping and that he was the person who inflicted the fatal wound. He claims there was insufficient medical testimony to support a finding that Stukel's death was caused by someone jumping or stomping on him. He states that if Eggers and Rucker lied about seeing him jump on Stukel, they also probably lied about his presence at the scene of the crime. Bizzett testified at his trial that he lost contact with his companions when he went to the bootlegger's house to buy whiskey. He stated he did not see them again until they were running away from the playground after attacking Stukel.

Iowa Code section 633A.8 generally bars applicants in postconviction actions from assigning grounds for relief which were not asserted on direct appeal from the criminal conviction. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989). In order to assign new error challenging a conviction, an applicant must not only show cause for failure to challenge the alleged errors in trial court, but must show prejudice resulting from these errors. Id. Consequently, when a postconviction relief applicant has previously sought review of his conviction either by direct appeal or previous postconviction actions, he must establish a sufficient reason why each new ground for relief was not previously asserted. Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979).

A. Bizzett claims he comes within an exception to the rule requiring a postconviction applicant to show good cause for not raising an issue on direct appeal. The federal courts have created an exception "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." See Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397, 413 (1986).

We note that while Bizzett raised this argument in his reply brief in district court, the court did not rule on it. Iowa Rule of Civil Procedure 179 applies to actions for postconviction relief. State v. Mulqueen, 188 N.W.2d 360, 362 (Iowa 1971). A motion pursuant to rule 179(b) is essential for preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. State Farm Mutual Automobile Insurance Co. v. Pfilbsen, 350 N.W.2d 202, 206 (Iowa 1984). Bizzett did not file a motion pursuant to rule 179(b). Therefore, we will not address this issue on appeal.

B. Bizzett also claims he failed to raise this issue earlier because he received ineffective assistance of counsel. Ineffective assistance of counsel may be a sufficient reason for not presenting a claim in a direct appeal. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989). To establish a claim of ineffective assistance of counsel, an applicant must show: (1) that counsel's performance was

so deficient as not to be functioning as counsel guaranteed by the sixth amendment; and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Id.

We may examine the prejudice component first. See Gering v. State, 382 N.W.2d 151, 154 (Iowa 1986). The crux of the prejudice component rests on whether the defendant has shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Whitsel v. State, 439 N.W.2d 871, 873 (Iowa App. 1989).

We determine Bizzett has not shown the result of the trial would have been any different if his trial counsel had tried to discredit Dr. Coriden's medical testimony. Dr. Coriden did not testify Stukel had died as a result of someone jumping or stomping on his head. He testified Stukel's death was caused by "an external unnatural force of great severity," which could have been a blow or a fall. Two other medical experts testified in support of Dr. Coriden's opinion. Thus, even without Dr. Rose's testimony, the jury had evidence before it that Farmer struck Stukel, that Stukel fell against a wall, and that Bizzett jumped and stomped on him. The jury chose to believe Bizzett's actions caused Stukel's death.

Furthermore, as the district court noted, Bizzett could have been convicted based on his joint criminal conduct with Farmer. See Bizzett I, 212 N.W.2d at 469 ("he

[Bizzett] would of course also be responsible for the blow delivered by Tom Farmer").

Because we have found Bizzett was not prejudiced by the actions of his trial counsel that he now complains of, we do not need to examine the alleged deficiencies of his counsel's conduct. We conclude Bizzett has not shown good cause for failing to raise his arguments concerning the sufficiency of the medical evidence at his criminal trial.

III. Bizzett was convicted on a theory of felony murder, with the underlying felony being robbery. He now contends there was insufficient evidence to instruct the jury on robbery. He claims there was not sufficient evidence he had the intent to commit a robbery.

We first note that the district court did not rule on this argument. As discussed above, a party must file a rule 179(b) motion in order to preserve error where the district court fails to resolve an issue. See State Farm, 350 N.W.2d at 206. Furthermore, in postconviction and subsequent proceedings an applicant must establish a sufficient reason why an issue was not raised in prior proceedings. See Schertz v. State, 380 N.W.2d 404, 412 (Iowa 1985). Bizzett does not even allege any reasons for not raising this argument in prior proceedings. We conclude Bizzett has not properly presented this issue for our review.

IV. After examining all of the issues raised in this case for our review, we conclude Bizzett is not entitled to

postconviction relief. We affirm the decision of the district court denying his application for postconviction relief.

AFFIRMED.