

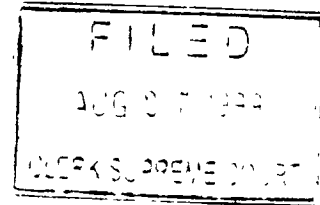
IN THE COURT OF APPEALS OF IOWA

No. 9-394 / 97-2365
Filed August 27, 1999

JOE WILLIE CANNON.
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Des Moines County, John C. Miller,
Judge.

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

Mitchell L. Taylor of Cray, Goddard, Miller & Taylor, L.L.P., Burlington, for
appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Patrick C. Jackson, County Attorney, and Jennifer Verhein, Assistant County
Attorney, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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MAHAN, J.

Joe Willie Cannon appeals the district court's denial of his application for postconviction relief. We affirm.

Orley Culp died after someone broke into his house and beat him with a baseball bat. Evidence was found linking Cannon to Culp's death, and he was charged with first-degree murder and first-degree burglary. A jury convicted Cannon as charged.

On direct appeal, Cannon asserted only two claims both of which involved the rebuttal testimony of witness Karen Herd. He complained the admission of Herd's rebuttal testimony was a violation of Iowa Rule of Evidence 404(b). Alternatively, he argued if error was not preserved his counsel was ineffective. We affirmed the judgment of the trial court. *State v. Cannon*, No. 93-1527 (Iowa App. Nov. 28, 1994).

Cannon subsequently filed an application for postconviction relief containing numerous claims of ineffective assistance of trial counsel, a claim he was denied his right to confrontation, and a claim he was denied his right to counsel. The district court determined the allegations had not been raised on direct appeal and Cannon failed to provide sufficient reason for not previously raising the claims. Further, the district court concluded all of Cannon's grounds for relief were meritless. Cannon's application for postconviction relief was denied.

Cannon appeals.

Cannon contends he received ineffective assistance of counsel because counsel (1) failed to find and call alleged alibi witnesses, (2) deposed a witness for the State after trial had begun, (3) failed to prevent the admission of tennis shoes, (4) failed to explain *Alford* pleas, (5) failed to object to other crimes evidence, (6) failed to investigate a hair allegedly found in one of the shoes, and (7) failed to develop testimony about a telephone conversation. He also contends he was denied his right to confrontation and his right to counsel.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *State v. Hoeck*, 547 N.W.2d 852, 862 (Iowa App. 1996) (citing *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.*

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may

be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Postconviction relief may not be granted on assignments not asserted in prior applications for relief in the absence of a showing of good cause; postconviction relief is not a means for relitigating claims that were or should have been properly presented on direct appeal. Iowa Code § 822.8 (1997); *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). Thus any claim not properly raised on direct appeal may not be litigated in postconviction unless there is a showing of "sufficient reason" or "cause" for not properly raising it previously. *Osborn*, 573 N.W.2d at 921; *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984).

Although we are reluctant to decide a case without addressing the merits, the State's brief makes a strong case for rejecting this case on the ground Cannon failed to preserve his claims. Cannon did not raise these claims on direct appeal and does not allege there was "sufficient reason" for this failure.¹ Cannon's claims are barred. Iowa Code § 822.8; *Collins v. State*, 477 N.W.2d 374, 376-77 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d at 234. We can affirm the district court on the ground that Cannon has not preserved any of his claims. *Collins v. State*, 477 N.W.2d at 376. We do so here.

¹ The failure to object to other crimes evidence may have been raised on direct appeal, in which case it is barred because it was finally adjudicated and cannot be relitigated. Iowa Code § 822.8.

That said, we have reviewed the record and find Cannon was unable to prove he was prejudiced by his trial counsel's alleged failures. We also find Cannon's other claims are equally without merit.

For these reasons we affirm the district court's denial of Cannon's application for postconviction relief.

AFFIRMED.