FILED 161
JAN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM HARRISON STEPHEN,

Petitioner-Appellant,

vs.

LOU V. BREWER, Warden of the Iowa State Penitentiary and STATE OF IOWA,

Respondents-Appellees.

Filed January 30, 1981

0-323
2-64134

Appeal from Polk District Court - Luther T. Glanton, Jr., Judge.

On delayed appeal, postconviction petitioner challenges denial of his application for postconviction relief from his 1975 conviction of larceny in the nighttime in violation of section 709.4, The Code 1975, contending he presented sufficient evidence at the postconviction proceeding to show 1) that he did not commit the larceny crime to which he originally pleaded guilty, 2) that the factual basis for the guilty plea was improperly and insufficiently established, and 3) that the guilty plea resulted from coercive plea bargaining and therefore was involuntary. AFFIRMED.

James Cleary, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for respondent-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

On a delayed appeal, postconviction-petitioner, William H. Stephen, challenges denial of his application for postconviction relief from his 1975 conviction of larceny in the nighttime in violation of section 709.4, The Code 1975. On appeal, petitioner contends he presented sufficient evidence at the postconviction proceeding to show 1) that he did not commit the larceny crime to which he originally pleaded guilty, 2) that the factual basis for the guilty plea was improperly and insufficiently established, and 3) that the guilty plea resulted from coercive plea bargaining and therefore was involuntary. We affirm.

During October, 1975, petitioner was charged with murder and subsequently with larceny in the nighttime in violation of section 709.4, The Code 1975. As part of a negotiated bargain, defendant agreed to plead guilty to larceny in the nighttime in exchange for reduction of the murder charge to manslaughter. On October 28, 1975, petitioner was sentenced to imprisonment for not more than ten years for the larceny with the sentence running consecutively with the eight year manslaughter sentence. His direct appeal was dismissed by the supreme court pursuant to Iowa R. App. P. 19 due to failure to comply with Iowa R. App. P. 14. His federal habeas corpus action was dismissed due to his failure to exhaust state postconviction remedies. On August 3, 1977, he filed a pro se application for postconviction relief, which was denied on July 27, 1978, following hearing. On November 16, 1979, the supreme court granted permission for a delayed appeal from denial of postconviction relief.

I. Scope of Review. Our review of postconviction rulings under section 663A.9, The Code 1979, is generally on error and not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). We will not disturb trial court's judgment where the findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979). Where petitioner alleges a violation of a constitutional safeguard, however, we will make our own evaluation of the totality of the circumstances under which the ruling was made. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980); Hinkle, 290 N.W.2d at 30; Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980); Stanford, 279 N.W.2d at 31. This is the equivalent of a **de novo** review. Sims, 295 N.W.2d at 422; Hinkle, 290 N.W.2d at 30. Petitioner must establish the factual assertions entitling him to relief by a preponderance of the evidence. Hinkle, 290 N.W.2d at 30; Stanford, 279 N.W.2d at 31; Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977).

II. The Guilty Plea. Petitioner contends that the postconviction court erred in its conclusion that the trial court which accepted his plea of guilty to larceny in the nighttime had established a factual basis for the plea and thus erroneously ruled that his plea at the time entered was voluntarily, knowingly and intelligently made. He maintains that his plea to the charge was coerced and involuntary and that the Sisco-Brainard requirements for establishing a factual basis were not met. See State v. Sisco, 169 N.W.2d 542, 547-48 (Iowa 1969) and Brainard v. State, 222 N.W.2d 711, 717-18 (Iowa 1974).

Petitioner further claims that the factual basis for his plea was established by a means disapproved in United States v. Cody, 438 F.2d 287 (8th Cir. 1971), in that the prosecutor, rather than the court, made the inquiry and read from the charge. We find no merit in petitioner's arguments.

In Cody, the court stated that the prosecutor's ". . . reading from the indictment in the presence of the defendant falls far short of demonstrating any factual basis for the defendant's plea." 483 F.2d at 289. The record here shows the following:

> THE COURT: Do you enter this plea of guilty because you in fact did commit this crime?
>
> THE DEFENDANT: Yes.

The court then directed the prosecutor to inquire into the factual basis. This was done through a question and answer method. When, for example, the prosecutor asked petitioner if he assisted any other people in removing a tool box full of tools from the truck, petitioner responded, "[y]es, I did assist in it." We find this question and answer method of establishing the factual basis to be distinguishable from the "reading" method disapproved of in Cody. Under the case law in effect at the time petitioner entered his guilty plea in 1975, we find no error in the method used to establish the factual basis.

Petitioner next argues that his plea was not voluntary, but instead was a result of a coercive plea bargain. From the record it is clear that petitioner was informed by his attorney and the court that the court was not bound to accept the prosecutor's recommendation for concurrent rather than consecutive sentencing. We believe the supreme court's statements in State v. Hollins, 253 N.W.2d 597 (Iowa 1977), apply with equal force here. Petitioner faced a difficult situation with the possibility of a life sentence; he chose to accept the plea bargain and ". . . to try to make the best of a bad situation." Hollins, 253 N.W.2d at 601. Further, the weight given to the co-defendant's affidavit exonerating defendant from participation in the larceny was for trial court's determination; trial court certainly was not bound to believe the assertions in the

affidavit. See State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980).

We conclude petitioner failed to carry his burden of proof to show that a factual basis for his plea was not established and to show that his plea was not voluntary. Trial court properly denied petitioner's application for postconviction relief. Trial court's ruling therefore is affirmed.

AFFIRMED.