IN THE COURT OF APPEALS OF IOWA

No. 0-103 / 99-0781
Filed May 10, 2000

CHARLES BASIL ANDERSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Defendant-Appellant.

FILED
MAY 10 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Charles Basil Anderson appeals the denial of his postconviction relief application. **AFFIRMED.**

William A. Price, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven Foritano, Assistant County Attorney, for appellee.

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

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[redacted] Charles Basil Anderson, appeals the denial of his postconviction relief application. We affirm.

On August 18, 1989, a jury convicted Anderson of first-degree murder and attempted murder based on his shooting of Ricky Rollen and Kenneth Hunter. Anderson appealed, presenting one issue for review: whether he was denied effective assistance of counsel because his trial attorney failed to object to the jury instructions on justification. This court affirmed his convictions after addressing his ineffective assistance of counsel claim on direct appeal. *See State v. Anderson*, No. 89-1675 (Iowa App. Feb. 26, 1991).

On May 28, 1991, Anderson filed an application for postconviction relief. A hearing was held on February 22, 1999. The record does not reveal the reason for the lengthy delay between the filing of the application and the hearing. Anderson claimed his trial counsel was ineffective in many respects. He also contended his appellate counsel was ineffective for failing to raise on direct appeal issues which had been included in motions for judgment of acquittal and new trial. The district court found trial counsel was not ineffective for: (1) failing to call the notary who witnessed the affidavit of Hunter; (2) failing to object to autopsy photos; (3) failing to present prior inconsistent statements of witnesses; (4) failing to visit with him prior to trial; (5) failing to object to one statement in the prosecutor's closing argument; (6) and failing to introduce evidence of Rollen's drug use. The district court found Anderson's other issues meritless and denied the application. The district court made no findings regarding appellate counsel. Anderson appeals, reiterating that his trial and appellate counsel were ineffective.

I. Scope of Review. Generally, an appeal from the denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997) (citations omitted). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994)). Our review is de novo because Anderson alleges a denial of his constitutional right to effective assistance of counsel. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999); *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

II. The Merits. Anderson must demonstrate two elements to succeed on his claim of ineffective assistance: (1) counsel failed to perform an essential duty; and (2) this failure resulted in prejudice. *Westeen*, 591 N.W.2d at 207 (citation omitted). Appellate counsel's failure to raise issues of claimed ineffectiveness of trial counsel are tested under the same standard as ineffective-assistance-of-trial-counsel claims. *Osborn*, 573 N.W.2d at 922.

In his application for postconviction relief, Anderson asserted numerous errors made by trial counsel. However, only one of these errors, the failure to object to the jury instructions on the justification defense, was raised in his direct appeal. This court addressed the issue on direct appeal and determined it was meritless. The remaining issues in Anderson's appeal from the denial of postconviction relief present formidable error preservation difficulties. Any claim not raised on direct appeal may not be litigated in postconviction unless there was sufficient cause for not raising it earlier and actual prejudice resulted from the alleged error. *Osborn*, 573 N.W.2d at 921 (citations omitted); *see also* Iowa

Code § 822.8 (1997). Anderson raises issues in his postconviction action that were [redacted] on direct appeal. These issues cannot properly be raised now unless he demonstrates "sufficient cause."

Anderson's allegation of ineffective assistance of appellate counsel may provide such cause.[1] *See Osborn*, 573 N.W.2d at 921. Anderson enumerates the many ways he believes his trial counsel was ineffective and then makes the general statement that "appellate counsel's performance was so deficient as to give rise to the reasonable probability that, but for appellate counsel's errors, the result of the appeal would have been different." Anderson fails to specify how appellate counsel's performance was inadequate and how competent representation would have changed the outcome of his direct appeal. This failure renders his claims too general to grant relief. *See Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

Furthermore, we have nothing to review. The postconviction court did not address the ineffectiveness of Anderson's appellate counsel or make any findings in that regard. Anderson did not ask the court to enlarge its findings. It does not appear appellate counsel was called to testify at the postconviction hearing, despite the fact Anderson raised appellate counsel's ineffectiveness and his ability to bring the postconviction action rose or fell on whether appellate counsel had rendered effective assistance. No record was made of appellate counsel's strategic decisions in selecting arguments for the direct appeal. Such

[1] Anderson does not raise any other grounds which have been held to constitute 'sufficient cause' in past cases. *See, e.g., Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 33-34 (Iowa 1979) (holding factual or legal matters excusably unknown at time of trial or appeal may be raised first in postconviction action); *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996) (stating ineffectiveness of postconviction counsel may permit new issues to be raised in postconviction application).

a record is equally as important as in the context of asserting trial counsel's errors [redacted] assignments to assert as grounds for reversal on appeal is a professional judgment call we are reluctant to second-guess. *See Osborn*, 573 N.W.2d at 922. Competent appellate counsel usually do not assign all possible errors, but select the strongest points on which to urge reversal. *See Cox v. State*, 554 N.W.2d 712, 715-16 (Iowa App. 1996). The trial court did not err in denying Anderson's application for postconviction relief.

We also conclude even if Anderson were entitled to present his claims, his appellate counsel was not ineffective for failing to raise all alleged errors of trial counsel because trial counsel was effective. As the district court concluded, trial counsel "ably and competently" represented Anderson. A presumption exists that counsel performed competently. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). The district court addressed six of the issues raised by Anderson as grounds for postconviction relief and found he failed to carry his burden of proof on all of them. In his brief to this court, Anderson fails to cite authorities which support his contention the claimed errors constituted ineffectiveness of trial counsel. After a de novo review of the record, we find trial counsel breached no essential duty and Anderson suffered no prejudice as a result of the alleged errors. We affirm the denial of postconviction relief.

AFFIRMED.