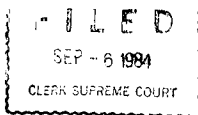


IN THE COURT OF APPEALS OF IOWA



MEL B. IVY,)

Petitioner-Appellant,)

Filed September 6, 1984

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vs.)

STATE OF IOWA,)

4-171
2-69134

Respondent-Appellee.)

Appeal from the Iowa District Court for Black Hawk County - L. D. Lybbert,
Judge.

Petitioner appeals the denial of his application for postconviction relief from the five-year mandatory minimum sentence imposed pursuant to Iowa Code section 902.7 after his 1978 conviction for willful injury in violation of Iowa Code section 708.4. AFFIRMED.

Charles Harrington, Appellate Defender, and Raymond Rogers, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Heard by Snell, P.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Petitioner appeals the denial of his application for postconviction relief from the five-year mandatory minimum sentence imposed pursuant to Iowa Code section 902.7 after his 1978 conviction for willful injury in violation of Iowa Code section 708.4.

In April 1978, petitioner was charged by information with the crime of willful injury. The information did not mention a firearm or the mandatory minimum sentence provisions of Iowa Code section 902.7. The minutes of testimony, however, stated several times that petitioner shot the victim with a rifle.

The case was tried to the court. The trial court found petitioner guilty as charged and determined that he had used a firearm in commission of the crime. Accordingly, the court sentenced him to an indeterminate ten-year term of imprisonment with a mandatory five-year sentence for use of the firearm as required by Iowa Code section 902.7. The conviction subsequently was affirmed on direct appeal. State v. Ivy, 300 N.W.2d 310 (Iowa 1981).

Thereafter, petitioner filed and subsequently amended an application for postconviction relief. He asserted that his trial counsel was ineffective for improperly persuading him to waive his right against self-incrimination, failing to properly cross-examine witnesses, and failing to investigate the case. As a separate ground for relief petitioner urged that, because the information did not allege the use of a firearm, the trial court violated his right to due process of law by imposing the five-year mandatory minimum sentence.

The postconviction court held that a conflict of interest between trial and appellate counsel was a sufficient reason for not raising on direct appeal the issue of ineffectiveness of trial counsel. The court determined, however, that petitioner had shown no sufficient reason for not raising the issue of the mandatory minimum sentence on direct appeal. Nevertheless, the postconviction court considered the merits of that issue and concluded that the information did

not have to specify that a firearm was used in order to make the mandatory minimum sentence applicable.

On appeal petitioner pursues only the legality of the minimum sentence; he has not appealed from the court's determination that his trial counsel was not ineffective.

Postconviction proceedings stand as an action at law and our review is ordinarily not de novo. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975). However, when the postconviction applicant raises issues of constitutional violations, we make an independent evaluation of the totality of the circumstances. This is the equivalent of a de novo review. Id.; Sims v. State, 295 N.W.2d 420, 422(Iowa 1980).

A. Preservation of the Issue. Before a claim can be considered for the first time in a postconviction proceeding, petitioner must establish by a preponderance of the evidence a "sufficient reason" for not raising the issue in his direct appeal. Iowa Code § 863A.8; Fryer v. State, 325 N.W.2d 400, 404 (Iowa 1982); Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). In Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982), the supreme court held that being represented by the same attorney at all prior stages of the case was a sufficient reason for not raising an ineffective assistance of counsel claim at an earlier date.

Petitioner argues that the same rule should apply to his case since his trial and appellate counsel were members of the same law firm. We agree that one member of a law firm is unlikely to raise an ineffective assistance of counsel claim against another lawyer in the same firm. However, petitioner did not base his challenge to the five-year mandatory minimum sentence on the grounds of ineffective assistance of trial counsel. Although he did raise an ineffective assistance claim before the postconviction court, none of the allegations of ineffectiveness dealt with the minimum sentence. That issue was presented as a separate ground for relief based on the denial of due process. We do not see how a

conflict of interest between trial and appellate counsel can excuse the failure to appeal any claim except ineffectiveness of trial counsel.

B. Merits of the Case. Even if petitioner had alleged that trial counsel was ineffective for failing to challenge the mandatory minimum sentence, and had thus preserved the issue for review, we could not agree with his claim.

The test used when considering a claim of ineffective assistance of counsel is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). There is a presumption of counsel's competency which petitioner must overcome. Id.

An information or indictment should apprise the defendant of the crime charged. State v. Lass, 228 N.W.2d 758, 765 (Iowa 1975). In considering whether adequate notice has been given, courts also consider the minutes attached to the indictment or information. Id.; State v. Marti, 290 N.W.2d 570, 576-77 (Iowa 1980). In this case petitioner was charged by information with willful injury. Although the information did not specifically refer to section 902.7, the attached minutes of testimony clearly revealed that under the State's theory of the case a firearm had been used. Considering the state of the law at the time of defendant's conviction,¹ we could not say counsel's conduct in failing to challenge the five-year mandatory minimum sentence was outside the range of normal competency.

AFFIRMED.

¹ In State v. Matlock, 289 N.W.2d 625, 629 n.2 (Iowa 1980), the supreme court notes that a defendant should be given notice of and the opportunity to present evidence on the potential application of section 902.7. Although the court does not specify what would be adequate notice, Iowa Rule of Criminal Procedure 6(6) now requires an allegation of the use of a firearm to be in the indictment if section 902.7 is applicable. Since both Matlock and rule 6(6) postdate petitioner's conviction, they are not relevant to a determination of the competency of counsel at trial.