FILED
DEC 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RONALD M. KENDALL,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Filed December 29, 1982

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2-294
2-67206

Appeal from Scott District Court, Jack Burns, Judge.

Petitioner appeals from dismissal of his application for postconviction relief. On appeal, petitioner asserts that the material before the postconviction court was sufficient to raise a material issue of fact as to whether defendant's counsel on direct appeal was ineffective. AFFIRMED.

Douglas Staskal, Assistant Appellate Defender, for petitioner-appellant.

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

Considered en banc.

Petitioner appeals from dismissal of his application for postconviction relief. On appeal, petitioner asserts that the material before the postconviction court was sufficient to raise a material issue of fact as to whether defendant's counsel on direct appeal was ineffective. We affirm.

Kendall was convicted of aggravated burglary and sentenced to life imprisonment in 1967. His conviction and sentence were affirmed on direct appeal to the supreme court. State v. Kendall, 167 N.W.2d 909 (Iowa 1969). In that appeal, he alleged that he was denied effective assistance of trial counsel and that the life sentence imposed was excessive. Id. at 910.

Following Kendall's application for postconviction relief, the State moved to dismiss on the ground that the issues raised were barred either because they had been adjudicated previously or because he had failed to plead sufficient cause for failing to raise them in his initial appeal. The trial court granted the State's motion after concluding that Kendall was seeking to "relitigate matters that could have been raised on direct appeal," and on the further ground that he was seeking "to relitigate matters that were in fact raised on direct appeal and denied by the Iowa Supreme Court." See Iowa Code § 663 A.8 (1981).

We must first determine whether the issues raised in Kendall's application for postconviction relief are identical with those raised on direct appeal.

Two of the five issues raised by Kendall are ineffectiveness of trial counsel and an alleged abuse of discretion by the trial court in imposing a life sentence upon him, which Kendall claims is violative of the eighth amendment of the United States Constitution. These are precisely the issues raised in his direct appeal. See Kendall at 911-12.

The other three issues raised by Kendall in his application have to do with alleged violations of his right of procedural due process and of various rights guaranteed by the fourth, fifth, and sixth amendments to the United States Constitution and article I, section 8 of the constitution of the state of Iowa. These have to do with the admissibility of the fruits of an allegedly illegal search and seizure, allegedly illegal police identification procedures and an allegedly improper in-court identification procedure, and impeachment of Kendall at his trial by reference to prior felonies.

The trial court, in dismissing Kendall's application, found that these matters were included in Kendall's appeal as grounds for finding his trial attorney incompetent. The supreme court referred to "numerous possible claimed erroneous trial tactics and procedures" as the ground upon which Kendall based his claim that his attorney was incompetent. The court observed that he did not "show any omitted motions or objections to testimony, requests for instructions or exceptions to those given if made, asserted or exercised, would have been sustained, and if overruled would constitute reversible error." The court went on to note that Kendall failed to specify "even generally, wherein any act or omission on the part of his appointed attorney would have affected the result." Id. at 911. The trial court found the same to be true here, and so do we. We conclude, therefore, that there was no material issue of fact and that the trial court was not abusing its discretion in dismissing Kendall's application.

We turn, finally, to Kendall's contention that the supreme court had adopted a new test of competence after ruling that his attorney was not incompetent, and that this new test should be applied retroactively. In Kendall, at 910, the court cited a Sixth Circuit opinion:

> Only if it can be said that what was or not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail.

Scott v. United States, 334 F.2d 72, 72 (Sixth Cir. 1964), cert. denied, 379 U.S. 842, 85 S. Ct. 81, 13 L. Ed. 2d 48 (1964). The test that is now applied by the Iowa Supreme Court is "whether in all the circumstances counsel's performance was within the range of normal competency." State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). In Sims v. State, 295 N.W.2d 420, 424-25 (Iowa 1980), the supreme court pointed out that there was no substantial distinction between these two tests. There is therefore no need to decide the question of retroactivity.

We find no error in the trial court's dismissal of Kendall's application, and therefore affirm.

AFFIRMED.