

FILED

MAR 22 1979

IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

360

LARRY DeWAYNE TALBOTT,)

Petitioner-Appellant,)

Filed March 22, 1979

vs.)

STATE OF IOWA,)

Defendant-Appellee.)

708
2-61856

Appeal from Des Moines District Court - D. B. Hendrickson, Judge.

Petitioner appeals from a denial of postconviction relief, alleging that he was unaware of and did not waive his right to confront and cross-examine his accusers and his privilege against self-incrimination when he tendered his guilty plea. **AFFIRMED.**

Michael J. Schilling of Burlington for appellant.

Thomas J. Miller, Attorney General; Kermit L. Dunahoo, Assistant Attorney General; and Steven S. Hoth, Des Moines County Attorney; for appellee.

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

CARTER, J.

Petitioner appeals from the district court's order denying his application for postconviction relief pursuant to chapter 663A, The Code 1977, asserting that the record of his guilty plea proceeding fails to demonstrate his awareness and waiver of his constitutional right to confront and cross-examine his accusers and his constitutional privilege against self-incrimination.

The State, in response to the petitioner's contention on appeal, maintains that the petitioner waived his right to postconviction relief according to § 663A8, The Code, since he failed to take advantage of an opportunity to fully litigate an appeal. Petitioner had directly appealed from conviction and sentence based upon his plea of guilty. After the filing of the appeal, petitioner's counsel filed an application to withdraw pursuant to then Iowa Sup. Ct. R. 16 (now Iowa R. App. P. 104), stating that he found the appeal to be frivolous. Counsel's request to withdraw was accompanied by a brief, required by rule 16, which addressed the issue of the trial court's compliance with the mandates of State v. Sisco, 169 N.W.2d 542 (Iowa 1969). After notice petitioner failed to communicate to the court his desire to continue with the appeal. The Supreme Court, after considering counsel's brief and the record of the guilty plea proceeding, found petitioner's appeal to be without merit and dismissed it.

Section 663A.8, The Code, states in part:

Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

When a postconviction applicant has previously sought review of his conviction by direct appeal, he must establish a sufficient reason why a new claim for postconviction relief was not previously asserted. Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979). In Bledsoe v. State, 257 N.W.2d 32, 34 (Iowa 1977), preclusion under section 668A.8 was applied in a situation where as here the prior appeal was dismissed under then Iowa Sup. Ct. R. 16. Bledsoe continues to be cited with approval. See Redding, 274 N.W.2d at 317. Petitioner contends that the limitations of Redding and Bledsoe apply only to newly raised claims not asserted in a prior

appeal. Here it is urged that the claimed inadequacies in the plea procedure were previously raised in the direct appeal but were inadequately raised. Section 663A.8 refers to grounds "inadequately raised" in another proceeding to secure relief as well as grounds "not raised." But both situations require a showing of "sufficient reason" for the action or inaction taken in the prior proceeding in order to avoid the preclusive effect of the statute. In the present case we conclude that petitioner has failed to establish a sufficient reason. We therefore affirm the judgment of the trial court.

AFFIRMED.

Donielson and Johnson, JJ., concur; Oxberger, C.J., and Snell, J., dissent.

SNELL, J. (dissenting)

I respectfully dissent.

Petitioner's brief which accompanied his counsel's application to withdraw pursuant to rule 16 asserted that the mandates of Sisco were not complied with by the trial court. However, it did not specifically address the issue of whether petitioner knew he was waiving his right to confront and cross-examine his accusers and his privilege against self incrimination by entering a plea of guilty.

Under section 663A.8 postconviction relief is available to petitioner when the ground for relief asserted was inadequately raised in the original application. In Bledsoe v. State, 257 N.W.2d 32 (Iowa 1977), petitioner's claim was barred because of his failure to sustain his burden of proving why the grounds asserted were not urged in his earlier appeal. In the case at bar the ground for relief asserted was urged but was inadequately raised in the direct appeal proceedings. The supreme court's order dismissing the appeal as unmeritorious after concluding that there was substantial compliance with Sisco was not an adjudication of the issue raised in the proceeding seeking postconviction relief. See State v. Boge, 252 N.W.2d 411, 413 (Iowa 1977). Therefore, I would hold petitioner was not barred by section 663A.8 from raising the issue developed in his application for postconviction relief.

OXBERGER, C. J. (dissenting)

I would decide this case on its merits. The majority holds that defendant is not entitled to postconviction relief because he failed to fully litigate his direct appeal. Defendant filed a notice of appeal; however his attorney applied to withdraw stating that the appeal was frivolous. The supreme court agreed. Notwithstanding the fact that defendant's learned appellate counsel and the supreme court overlooked the point defendant now raises, the majority holds that defendant should have known he had a valid issue to present on direct appeal. I would hold that in cases where a defendant appeals his guilty plea contending his constitutional rights were violated, and the supreme court dismisses the appeal under rule 104, the defendant may raise the constitutionality of the plea in a postconviction petition.

Turning to the merits of this appeal, the record does not show defendant was aware of his constitutional rights to confront and cross-examine his accusers and his constitutional privilege against self-incrimination. In 1969, the United States Supreme Court held that the record of a guilty plea proceeding must show defendant's awareness of these rights. Boykin v. Alabama, 395 U.S. 238 at 242-43, 89 S. Ct. 1709 at 1712, 23 L.Ed.2d 274 at 279-80 (1969); see also State v. Bell, 210 N.W.2d 423, 426 (Iowa 1973). The Brainard requirement of a personal colloquy between trial judge and defendant was not in effect when the instant guilty plea was entered but the requirement of Boykin and Bell that the record reflect defendant's awareness of his rights was in effect.