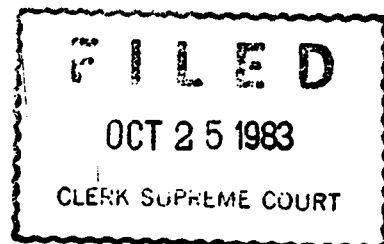


IN THE COURT OF APPEALS OF IOWA



RAY HUBERT BROWN,

)

Petitioner-Appellant,

)

Filed October 25, 1983

vs.

)

STATE OF IOWA,

)

3-289
 2-69450

Respondent-Appellee.

)

Appeal from Black Hawk District Court - Dennis Damsgaard, Judge.

Petitioner appeals from the district court's denial of his application for postconviction relief. AFFIRMED.

W. H. Gilliam of Rapp & Gilliam, Waterloo, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven M. Foritano, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Petitioner appeals from the district court's denial of his application for postconviction relief. We affirm.

On January 23, 1980, a gas station was robbed by a man who fled on foot through fresh snow. Police officers, who responded to the call immediately, followed the tracks to the rear door of a nearby residence. An occupant of the house let the officers inside. Petitioner was found in an upstairs bathroom. Shortly thereafter he was taken back to the gas station where he was positively identified by the attendant as the robber. At trial counsel unsuccessfully sought to exclude the show-up identification as being unduly suggestive on the grounds that at the time of the identification petitioner was not wearing the nylon stocking over his face or the wig which he supposedly wore during the robbery. Another attorney was appointed to represent petitioner on appeal. Petitioner's conviction for first degree robbery was affirmed in State v. Brown, 309 N.W.2d 425 (Iowa 1981).

In the present proceeding petitioner asserts that he was denied effective assistance of appellate counsel since despite petitioner's requests counsel chose not to raise the issue of the identification on appeal. Petitioner also challenges the effectiveness of trial counsel for failing to call certain witnesses.

Ordinarily a proceeding for postconviction relief under Iowa Code chapter 663A is at law and our review is on error. However, where the petitioner asserts violations of constitutional guarantees, we make our own evaluation of the totality of the circumstances. This is the equivalent of a *de novo* review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

I.

Appellate Counsel. The test for determining whether a criminal defendant received effective assistance of counsel is whether, under the entire record and the totality of the circumstances, counsel's performance was within

the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The burden is on petitioner to establish ineffective assistance by a preponderance of the evidence. Id.

The show-up identification procedure in this case comports with the holdings in State v. Emery, 230 N.W.2d 521 (Iowa 1975), and State v. Salazar, 213 N.W.2d 490 (Iowa 1973), and accordingly, we cannot say counsel erred in electing not to pursue this issue on appeal.

II.

Trial Counsel. The issue of effectiveness of trial counsel was not raised on direct appeal even though petitioner had different counsel. Since petitioner has presented no reason for not raising the argument on appeal, we decline to consider it for the first time in this postconviction proceeding. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981).

The court properly dismissed the application for postconviction relief.

AFFIRMED.