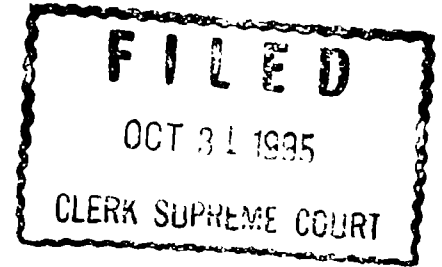


IN THE COURT OF APPEALS OF IOWA

No. 5-367 / 94-0571



SAMMY JOE BARBOUR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jackson County, David H. Sivright,
Judge.

Applicant appeals the district court ruling denying postconviction relief.

AFFIRMED.

John J. Wolfe, Clinton, for appellant.

Thomas J. Miller, Attorney General; Julie H. Brown, Assistant Attorney
General; and Phillip Tabor, County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

Sammy Joe Barbour was convicted of first-degree kidnapping. This court affirmed his conviction in an unpublished opinion on April 25, 1989. *Procedendo* issued on July 5, 1989. Barbour filed an application for postconviction relief on June 23, 1992. Barbour now appeals the denial of his application for postconviction relief. He claims his prior counsel were ineffective in failing to address the issues of specific intent and diminished responsibility/intoxication. We find review of the former issue is time-barred and we affirm the postconviction court with respect to the latter.

I. SPECIFIC INTENT.

Barbour claims his trial, appellate, and postconviction counsel were ineffective in not challenging the specific intent instructions warranted when a conviction for first-degree kidnapping is predicated on the commission of statutory rape. *See* Iowa Code §§ 709.4(5), 710.1(3), 710.2 (1987). He did not raise this claim in his postconviction application and it was not considered by the district court during the course of the postconviction proceedings.

All grounds for postconviction relief available to an applicant must be raised in the original, supplemental, or amended application. Iowa Code § 822.8 (1993); *Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991). The normal rules of error

preservation **apply** to actions for postconviction relief. *Williams v. State*, 421 N.W.2d 890, 893 (Iowa 1988). Appellate challenges are limited to those issues raised by the applicant in his application in the postconviction court. *See, e.g., Williams*, 421 N.W.2d at 893; *Jasper*, 477 N.W.2d at 857; *Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985); *Snethen v. State*, 308 N.W.2d 11, 16-17 (Iowa 1981).

Postconviction applications are required to be “all-inclusive.” Iowa Code § 822.8 (1993). Barbour’s claim pertaining to the specific intent issue would have been timely had he raised it in his postconviction application. *See* Iowa Code § 822.3 (1993) (three-year limitation on filing of postconviction relief applications). By not raising the issue below, Barbour has failed to preserve it for appellate review. He cannot circumvent the three-year time bar by now raising the issue on appeal and alleging the ineffective assistance of his postconviction counsel. *Cf. Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994) (ineffective assistance of counsel will not except claim from the time bar when underlying claim could otherwise have been timely raised).

II. DIMINISHED CAPACITY/INTOXICATION DEFENSE.

Barbour’s postconviction application did challenge the effectiveness of his prior counsel in not raising the issues of diminished capacity and intoxication. To

prevail on **his claim** of ineffective assistance of counsel, Barbour must ultimately show his **attorney's** performance fell outside a normal range of competency, and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim counsel should have done a better job. *Id.* The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Representation is presumed competent and a defendant has the burden to prove by a preponderance of the evidence his counsel was ineffective. *Id.* Our review of the alleged denial of Barbour's constitutional right to effective counsel is de novo. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989).

We find there was no breach of an essential duty with respect to this claim. Trial counsel were aware the defendant had been drinking on the night in question. However, **his** **intoxilyzer** test registered under the legal limit (.072) and a law enforcement **official** who observed the defendant after his arrest testified it was his opinion Barbour was not intoxicated.

The record indicates the defense of diminished capacity was considered by defendant and his counsel, and the testimony of Barbour's trial counsel reveals it

would have ~~been~~ pursued had there been sufficient evidence to support it. However, the evidence to support this claim was weak, and the defendant and his counsel focused on their main defense that the victim had willingly gone with the defendant and was not removed against her will. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). The defense strategy was appropriate given the strong evidence refuting an intoxication defense. There was no breach of an essential duty in not pursuing the issues of diminished capacity/intoxication and we affirm the denial of postconviction relief.

AFFIRMED.