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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

THOMAS FREESE, )

Petitioner-Appellant, )

vs. )

STATE OF IOWA, )

Respondent-Appellee. )

Filed March 31, 1987

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6-424
85-1561

Appeal from the Iowa District Court for Scott County (Nos. 63959 and 70157) - Margaret S. Briles, Judge.

Petitioner appeals from the trial court's denial of his application for post-conviction relief in Scott County Nos. 70157 and 69359 following a consolidated hearing. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General; Ann DiDonato, Assistant Attorney General; and James L. Ottesen, Assistant Scott County Attorney, for respondent-appellee.

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

**OXBERGER, C.J.** **99**

In this appeal, petitioner Thomas Freese challenges the district court's order denying his two related applications for postconviction relief. Freese asserts that he was denied effective assistance of counsel (1) because of his trial attorney's alleged conflict of interest, and (2) because his trial attorney failed to object to allegedly inadmissible testimony. We conclude that the record fails to substantiate these claims, and affirm.

This proceeding arises out of the following facts. In 1981, Freese was convicted of second degree burglary in two separate jury trials concerning two distinct crimes (Scott County No. 20721 and Scott County No. 20818). Both convictions were affirmed on appeal. In December of 1982, Freese filed a petition for postconviction relief challenging the trial court's application of the habitual offender statute in no. 20818. The postconviction court found his complaint meritorious, and resentenced him to a reduced term served concurrently with that imposed in no. 20721. In September of 1984, Freese moved for leave to amend the postconviction petition, seeking to allege an ineffective assistance of counsel claim not originally included. The trial court denied the motion because the petition had been ruled upon and that ruling had not been appealed.

In August of 1984, Freese filed a petition for postconviction relief attacking his conviction in no. 20721. In March of 1985, Freese filed a second petition challenging the judgment in no. 20818. The gravamen of each petition was Freese's assertion that he had not received effective assistance in the original trials. The district court held a consolidated hearing on both petitions, at which the primary issue was an additional claim not raised in either petition, concerning an alleged conflict of interest on the part of Freese's trial attorney. The basis of this allegation was the fact that, at the time of both trials, Freese's attorney was concurrently employed in a prosecutorial capacity as an assistant city attorney

in another city. After the hearing, the district court denied both petitions. The court held that Freese was not entitled to file a second postconviction application challenging No. 20818, and refused to reach the merits of the petition (postconviction No. 70157); the court denied the petition attacking no. 20721 on the merits (postconviction No. 69359).[1]

Initially, we must consider the propriety of the district court's refusal to reach the merits in No. 70157. It is well settled that postconviction actions are not generally available for the correction of errors which should have been raised at a prior proceeding. Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979); Iowa Code § 663A.8 (1985). Accordingly, when a postconviction applicant has previously sought review of his conviction in either a direct appeal or a prior postconviction proceeding, it is incumbent upon him to establish a "sufficient reason" for his failure to have asserted each newly alleged contention in the prior action. Redding, 274 N.W.2d at 317; see also Cuevas v. State, 372 N.W.2d 284, 286 (Iowa Ct. App. 1985). Moreover, in Polly v. State, 355 N.W.2d 849 (Iowa 1984), the supreme court imposed the additional requirement that the applicant "also show actual prejudice resulting from [the alleged] errors." Id. at 856; see also Frank v. State, 376 N.W.2d 637, 639-40 (Iowa Ct. App. 1985).

We agree with Freese's assertion that, because his trial attorney's concurrent role as city attorney was not discovered until just prior to the second postconviction hearing, he has established sufficient cause for failing to raise this claim at the prior proceedings. See Iowa Code § 663A.2(4) (1985); see also Frank v. State, 376 N.W.2d at 640. Nevertheless, we find no error in the district court's dismissal of the petition because Freese has failed to establish actual prejudice;

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[1]Hereafter, the postconviction petitions will be referred to by postconviction number rather than the number of the underlying conviction.

as discussed below, Freese did not meet his burden of establishing a substantial probability that his trial attorney was influenced by a conflict of interest. See Frank, 376 N.W.2d at 640.[2]

In postconviction petition no. 69359, Freese raised the identical argument concerning his attorney's alleged conflict of interest. Freese claims that because his defense attorney simultaneously served as a city attorney for the city of LeClaire, he was denied his constitutional right to the effective assistance of counsel. Because Freese alleges a denial of his constitutional right to the effective assistance of counsel guaranteed by the sixth amendment, we make an independent evaluation of the totality of the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). This is the equivalent of a de novo review. Id.

Freese invites us to hold that, even if no actual conflict of interest is demonstrated, his trial counsel's concurrent role as city attorney per se resulted in a denial of effective assistance. In support of this contention, Freese argues that because city attorneys are required to prosecute misdemeanor cases arising under municipal ordinances, they are likely to develop alliances with city policemen and as a result, are unable to maintain the unimpaired loyalty to criminal clients which is required in order to render effective assistance of counsel. Consequently, he contends that the risk of prejudice is so great that we should forbid such concurrent representation per se.

Although this is a question of first impression in Iowa, our review of similar decisions in other jurisdictions persuades us of the wisdom in declining to adopt

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[2]In postconviction petition no. 70157, Freese also alleged that his trial counsel had been ineffective in failing to adequately investigate certain testimony, and in failing to urge all possible grounds in support of his motion for directed verdict. Freese does not challenge the district court's dismissal of the petition with respect to these allegations, nor has he presented any arguments concerning the reason for counsel's failure to present these claims at the prior proceedings, or the merits of these contentions. As such, we conclude that these issues were not preserved for appellate consideration. See Iowa R. App. P. 14(a)(3).

a per se rule of reversal. Rather, a majority of courts considering claims substantially identical to that advanced by Freese have required a showing of prejudice arising from an actual conflict of interest in order for a defendant to establish ineffective assistance of counsel on this basis. See People v. Kyllonen, 80 Mich. App. 327, 329, 263 N.W.2d 55, 57 (1978); State v. Mitchell, 356 So.2d 974, 977 (Ia. 1978); Karlin v. State, 47 Wis.2d 452, 454-55, 177 N.W.2d 318, 320-21 (1970); People v. Suiter, 82 Mich. App. 214, 216, 266 N.W.2d 762, 763-64 (1978); see also Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 332 (1980) (defendant challenging representation of multiple defendants as causing alleged conflict of interest must establish actual conflict, not merely potential); U.S. v. Hearst, 638 F.2d 1190 (9th Cir. 1981) (Cuyler "actual conflict" standard applicable to conflicts other than those concerning the representation of multiple defendants).

Moreover, we think that those cases in which a per se rule of reversal has been applied are factually distinct. The record in the present case discloses that the defendant's trial attorney, John Mullen, was responsible for prosecuting simple misdemeanor municipal ordinance violations in the city of LeClaire. The defendant's burglary charges arose in the city of Davenport, and did not involve any LeClaire law enforcement officials. By contrast, in People v. Washington, 101 Ill.2d 104, 461 N.E.2d 393, cert. denied, 469 U.S. 1022, 105 S.Ct. 442, 83 L.Ed.2d 367 (1984), the Illinois Supreme Court applied a per se rule reversing the defendant's conviction because one of the witnesses for the prosecution was a police officer in the city where the defendant's attorney served as a city attorney. 101 Ill.2d at 108, 461 N.E.2d at 397. Similarly, a number of courts have applied a per se rule where the defense attorney was also employed as a district attorney for the state. The rationale undergirding these decisions is the recognition of an inherent conflict of interest when effective representation of a defendant mandates that the attorney attack the constitutionality of state

laws or law enforcement procedures "which, in his prosecutorial function, he is required to defend." Howerton v. State, 640 P.2d 566, 567 (Okla. Crim. App. 1982); see also generally Goodsen v. Peyton, 351 F.2d 905 (4th Cir. 1965), People v. Fite, 76 Ill.2d 418, 392 N.E.2d 1345 (1979); State v. Crockett, 419 S.E.2d 22 (Mo. 1967). No similar extenuating circumstances are extant in the present case.

Furthermore, we are disinclined to adopt a per se rule of reversal because in prior cases considering an alleged conflict of interest, the Iowa Supreme Court has required the defendant to establish both a substantial possibility of a conflict and resultant prejudice. See, e.g., Wycoff v. State, 382 N.W.2d 462, 471-72 (Iowa 1986); Nichol v. State, 309 N.W.2d 468, 470-71 (Iowa 1981); Cosgrove v. State, 304 N.W.2d 184, 186-87 (Iowa 1981); cf. Jackson v. Auger, 239 N.W.2d 180, 183 (Iowa 1976) ("Actual prejudice need not be shown."). Accordingly, we conclude that this is the proper manner in which to analyze the alleged conflict in the present case. See also Dawson v. Cowen, 531 F.2d 1374, 1376 (6th Cir. 1976) (Sixth Circuit Court of Appeals declined from adopting a per se rule "without a record that permits us to give weight to [the relevant] considerations.") Our independent evaluation of the record, however, convinces us that no substantial possibility of a conflict of interest has been demonstrated. As noted above, Freese's burglary charges did not implicate any officers with whom Mullen came into contact in his capacity as assistant city attorney, nor has Freese presented any evidence indicating any ties between Mullen and the Davenport law enforcement officials involved in this case. Relatedly, the burglary charges did not involve the type of municipal ordinances under which Freese worked in his prosecutorial capacity.

Freese argues, however, that an actual conflict of interest necessarily resulted because in both trials, he raised defenses concerning improper conduct

on the part of the Davenport police officials. In trial no. 20721, Freese argued that the police planted the knife allegedly used in the burglary on him, and committed perjury at trial; in no. 20818, Freese asserted that his accomplice was pressured by the police officers' threats and promises into testifying against him. Our review of the record indicates that Mullen highlighted both of these defenses during the trial, and elicited testimony during his cross-examination of the officers which exposed the alleged inconsistencies. Notably absent from the record are any allegations that Mullen failed to adequately pursue these defenses; on the contrary, the record indicates that Mullen conducted an effective and vigorous interrogation of the officers.[3]

Finally, Freese argues that aside from the alleged conflict of interest, Mullen's performance was ineffective because he failed to object on three separate occasions to certain testimony admitted in no. 20721. We have reviewed each of these alleged infirmities, and conclude that each is without merit. Before treating these contentions, we set forth the general principles governing our review of a defendant's claim that he received ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance, the petitioner must prove by a preponderance of the evidence: (1) that counsel's performance was so deficient as to deprive him of "counsel" within the meaning of the sixth amendment; and (2) that the deficient performance so prejudiced him that he was denied a fair trial. White v. State, 380 N.W.2d 1,3 (Iowa Ct. App. 1985). Moreover, the petitioner must overcome a presumption of counsel's competency by setting forth an affirmative factual basis demonstrating the alleged inadequacy of representation. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). This requires more

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[3]Because of our conclusion that Freese has failed to establish a substantial possibility of a conflict of interest, it is unnecessary for us to reach the prejudice issue.

than a mere showing that trial strategy backfired or that another attorney would have handed the case differently. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Our ultimate inquiry is whether, under the record as a whole, counsel's performance was within the normal range of competency. Id. With these principles in mind, we now address Freese's allegations.

Initially, Freese asserts that Mullen ineffectively represented him in failing to object to Officer Bladel's testimony that Bladel "had several dealings with Mr. Freese in the past [and knew] him on sight." The record does not substantiate Freese's contention that this testimony tended to implicate him in prior criminal activities. Rather, Bladel offered the testimony solely to illustrate that he was able to identify Freese. In these circumstances, we find that Freese has failed to establish any deficiency in counsel's performance or any prejudice. See White v. State, 380 N.W.2d 1, 3 (Iowa Ct. App. 1985).

We similarly dispose of Freese's contention that he received ineffective assistance because Mullen did not object when the prosecuting attorney asked Freese's accomplice, Andy Knoeferl, whether he knew if Freese had a prior conviction. The record discloses that Freese himself testified that he had previously been convicted of burglary and had served eight years in prison. Freese testified that he was at the scene of the burglary charged in the present case only because he was attempting to talk Knoeferl out of committing the crime. Freese testified that he was trying to convince Knoeferl that, after serving time in prison, he had learned that "it wasn't worth it." In light of this line of defense, we cannot say that the record supports Freese's argument that his attorney's performance was deficient; it is equally as probable that Mullen declined from challenging the question because it tended to corroborate Freese's story. Moreover, because Freese himself advanced the testimony of his prior conviction, no prejudice can be said to have resulted from the prosecutor's question.

Lastly, Freese asserts that Mullen's failure to object to alleged hearsay testimony resulted in ineffective assistance. We disagree. This allegation stems from Officer Martin's testimony that another officer at the scene of the crime, Officer Hammes, was the one who found the knife which Freese allegedly used in attempting to perpetrate the burglary. We agree with the State's argument that this testimony was not inadmissible hearsay. The testimony was not offered to prove the truth of the matter asserted, but rather to explain how Officer Martin found the knife. As such, we think that this testimony falls squarely within the ambit of the supreme court's decision in State v. Nowlin, 244 N.W.2d 596 (Iowa 1976), where the court noted that "Evidence of an utterance which is offered to explain subsequent action of the person to whom it is addressed is not hearsay. Such evidence is not offered as an assertion, but to give character to conduct." Id. at 600; see also State v. Reynolds, 250 N.W.2d 434, 440 (Iowa 1977).

We hold that the petitioner's claim of ineffective assistance must fail, and affirm the district court in all respects.

**AFFIRMED.**