IN THE COURT OF APPEALS OF IOWA

000229

No. 7-325 / 96-0012

FILED
JUL 30 1997
CLERK SUPREME COURT

JOHN ANDREW HOWARD,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

John Howard appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Donna M. Humpal of M.W. Liebbe Law Office, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ.

VOGEL, J.

John Howard appeals the district court's denial of his application for postconviction relief, based on both ineffective assistance of trial and postconviction trial counsel.

Background facts. In 1993 James Howard was charged with first-degree robbery, two counts of attempted murder, willful injury and going armed with intent. In February 1994 Howard pleaded guilty to willful injury and the other charges were dismissed. The court sentenced Howard to a term of imprisonment not to exceed ten years and, finding he was in possession of a firearm, imposed a five-year minimum sentence pursuant to Iowa Code section 902.7 (1993). Howard did not file an appeal.

Scope of review. Ordinarily we review postconviction relief proceedings on error. *Polly v. State*, 355 N.W.2d 849, 854 (Iowa 1984). However, when constitutional rights are implicated, we make our own evaluation of the totality of the circumstances, equivalent to a de novo review. *Id.*

Preservation of error. The State argues Howard's claims for ineffective assistance was not raised on direct appeal and he did not offer a satisfactory explanation therefor, citing *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). Where, as in this case, there is a failure to raise the issue on direct appeal, and thereby preserve the claims, we look to see if a defendant can establish by a preponderance of the evidence whether: (1) a "sufficient reason" exists for not having done so, and (2) actual prejudice resulted from such error. *See Bailey v. State*, 493 N.W.2d 419,

421 (Iowa App. 1992). We find Howard prevails on the first prong as a sufficient reason exists for Howard failing to preserve this matter for direct appeal: The very basis of Howard's claim of ineffective assistance of counsel stems from trial counsel's failure to appeal his sentence. We therefore find Howard has established sufficient reason for not raising the issue of ineffective assistance of counsel on direct appeal. However, we do not find Howard has demonstrated prejudice and therefore we affirm the trial court.

The prejudice prong. Howard argues the court erred in finding his trial counsel was not ineffective for failing to explain the theory of aiding and abetting under which he was charged, failing to explain a motion in arrest of judgment, failing to file an appeal, and failing to properly investigate the case. Moreover, Howard contends his postconviction counsel provided ineffective assistance by failing to call codefendants' counsel to testify as to their pretrial efforts serving their clients.

At the postconviction relief hearing, Howard's trial counsel testified as to his investigation of the charges, discussions with Howard, and other pretrial work. Howard argues his statement to the court during the sentencing, "I want to appeal. This ain't no justice, man," should have alerted his counsel he was not satisfied with the process. Just prior to Howard's comment, the court addressed Howard, informing him of his right to appeal. The court, addressing trial counsel, added: "I trust if your client has questions in this regard, you can answer them for him?" Trial counsel responded, "I will be glad to, Your Honor." At the postconviction hearing, when trial

counsel was asked, "Did, at any time *after* the plea, he talk with you about wanting to appeal or wanting a motion in arrest of judgment," counsel responded, "I don't believe he did." The postconviction court weighed the credibility of the witnesses and did not find trial counsel deficient in his representation of Howard.

After a thorough review of the foregoing allegations and the records adduced at trial and the postconviction trial, we are unable to conclude Howard suffered any prejudice from the performance of his trial counsel. Howard admitted to the charges initially when talking to police and subsequently when entering the plea.

With regard to his plea, the record reflects the trial court went through an extensive plea colloquy with Howard, with counsel present. A detailed factual basis was given by Howard to support the findings by the court. We note Howard was facing conviction on five offenses. Trial counsel was able to negotiate a plea agreement under which Howard would plead guilty to only one of those offenses (willful injury). Consequently, all other charges (including two counts of attempted murder, burglary in the first degree, and going armed with intent) were dismissed. We do not find Howard suffered prejudice as a result of counsel's actions.

Howard's final argument that his postconviction counsel was ineffective is without merit.

Having carefully considered all issues on appeal, we affirm the district court's denial of Howard's application for postconviction relief.

AFFIRMED.