IN THE COURT OF APPEALS OF IOWA

No. 3-103 / 91-1030

FILED
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RONALD L. MAY,
Applicant-Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Clinton County, James R. Havercamp, Judge.

May appeals from the district court's order denying him postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.

A police officer saw Ronald L. May driving his pickup truck around midnight on February 21, 1988, and again around 2:00 a.m. on February 22, 1988. The bed of the pickup had been empty when first seen but at 2:00 the truck was carrying a full load. The officer followed the pickup for several blocks. May stopped the truck and started to walk away, but then came over to the patrol car. When the officer asked about the cargo May said it was scrap metal he had bought for his scrap metal business. The details of his story were inconsistent with the officer's observation of the empty truck two hours previously. When confronted with this, May offered a second version which was also contradicted by the officer's observation. When challenged on his second story, May walked away. Police officers examined the cargo and discovered it was stolen aluminum conduit. The tread of the tires of May's pickup were consistent with tracks at the site where aluminum conduit had been stolen that night.

May was tried on second-degree burglary and second-degree theft charges. The theft was by receiving stolen property. May's theory of defense was that he did not know the conduit was stolen when he bought it at a reasonable price from a red-headed stranger called "Jim."

After a jury trial, May was convicted of theft but acquitted of burglary. On June 10, 1988, the court sentenced him to a prison term not to exceed five years.

May claims he asked his counsel to appeal at sentencing but was told to think it over and contact counsel in writing if he still wanted to appeal. No appeal was filed.

On December 31, 1990, May filed a pro se application for postconviction relief. After a hearing, for which May was appointed counsel, the district court found that the trial court adequately instructed the jury and that May had failed to notify counsel of his desire to appeal. The court issued an order denying him relief.

May appeals. He applied for appointment of appellate counsel and preparation of trial transcripts at public expense. May was found not indigent but refused to employ an attorney. The district court then appointed the State Appellate Defenders Office and ordered the trial transcripts to be prepared at public expense, with costs to be taxed against May as court costs. A series of stays related to the provision of counsel to May delayed the ready date until January 27, 1993.

Discussion

May appeals, claiming he was denied effective assistance of counsel at his original trial because counsel (1) failed to appeal and (2) failed to request a jury instruction on his theory of the defense.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction

petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

May failed to raise an ineffective assistance of counsel claim on direct appeal because no direct appeal was taken. As a general rule, issues not presented on appeal may not be presented at a postconviction hearing. See e g. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation.

However, in order to raise issues not properly preserved, a defendant must establish, by a preponderance of evidence, sufficient reason or cause for not raising the issue on direct appeal and prejudice resulting from the alleged errors. Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991). Thus, in order for May to be successful in his postconviction relief application, he must first establish by a preponderance of evidence sufficient reason or cause for failure to take direct appeal.

Ineffective assistance of counsel may satisfy the "sufficient reason" element of this test. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989). To establish a claim of

ineffective assistance of trial counsel, we have indicated the applicant must show: (1) that counsel's performance was so deficient as not to be functioning as "counsel" guaranteed by the Sixth Amendment; and 2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Id.

May's trial attorney, Mervin Woodin, testified at the postconviction relief hearing. From his notes, he testified he discussed the possibility of appeal with May on June 10, 1988, following the sentencing hearing. Woodin testified he informed May his chances of successful appeal were limited. He also testified he told May he would not file a Notice of Appeal without a written request from May. He further testified he told May he would, following receipt of a written request, file the Notice of Appeal and a request that the State Appellate Defender's Office be appointed to represent May on appeal. May wrote Woodin in early July, but the correspondence involved an unrelated matter. May again wrote Woodin on an unrelated matter in early August. It was not until August 27, 1988 that Woodin received any indication from May that he planned to appeal. By that time, the deadline for appeal had passed.

We do not believe Woodin's request that May notify him in writing of his desire to appeal resembles conduct so deficient as not to be functioning as "counsel" guaranteed by the Sixth Amendment. Testimony of both May and Woodin indicates May had full knowledge of Woodin's request for

written notice. May testified he had looked for Woodin's address and had contacted his mother to assist him. In addition, May contacted Woodin twice by mail about two unrelated matters, indicating he did, in fact, know how to contact Woodin. We find May has failed to show sufficient grounds or cause of his failure to take a direct appeal. We affirm the district court's refusal of May's postconviction relief application.

May next contends his trial counsel was ineffective because of failure to request a jury instruction on his theory of defense. He claims the jury should have been instructed on the statutory defense of Iowa Code section 714.4 (1987), which provides:

> No person who takes, obtains, disposes of, or otherwise uses or acquires property, is guilty of theft by reason of such act if the person reasonably believes that the person has a right, privilege or license to do so, or if the person does in fact have such a right, privilege or license.

Once again, in order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

At the postconviction hearing, Woodin testified he did not request this instruction because there was no

legitimate explanation for May's possession of the conduit. Woodin investigated the possibility of witness testimony supporting May's contention that he believed the material was not stolen. However, the only witness unearthed was May's business partner, who would have testified contrary to May's claims.

We find no failure to perform an essential duty in this case. Woodin investigated the possibility but determined it would be damaging to his client.

Accordingly, we affirm the decision of the district court and deny May's application for postconviction relief.

AFFIRMED.