

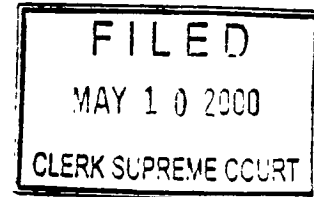
IN THE COURT OF APPEALS OF IOWA

No. 0-139 / 98-1581
Filed May 10, 2000

SYVENO JEWELL WRIGHT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Syveno Jewell Wright appeals from the denial of his application for
postconviction relief from his conviction for sexual abuse in the second-degree.

AFFIRMED.

David K. Basler of Belin, Lamson, McCormick, Zumbach, Flynn, P.C., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney
General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

~~In 1993~~, the State charged Syveno Wright with kidnapping in connection with sexual abuse of an eleven-year-old West Des Moines child. Wright pled guilty to second-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.2 (1993). The court sentenced him to a mandatory twenty-five year prison term. Wright did not appeal.

In 1997, Wright filed an application for postconviction relief alleging his attorney was ineffective in (1) allowing him to plead to second-degree rather than third degree sexual abuse in light of his claimed mental incompetence and (2) failing to insist on a presentence investigation. The district court denied the first claim, but concluded counsel was ineffective in waiving preparation of the presentence investigation report. The court ordered a new report to be prepared and denied Wright's request to set aside his guilty plea and conviction. On appeal, Wright insists his trial counsel was ineffective in failing to apprise the court of his claimed mental incompetency. We affirm.

I. Affirmance on Ground not Urged

Citing the Iowa Supreme Court's recent opinion in *Berryhill v. State*, 603 N.W.2d 243 (Iowa 1999), the State contends Wright waived error by failing to raise his ineffective assistance of counsel claims in a direct appeal. The State did not ~~raise this~~ contention below by filing a motion to dismiss the postconviction relief petition. However, we may uphold a district court ruling on a ground not urged, as long as the ground is supported by facts in the record or can be decided as a matter of law. *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 790 (Iowa 1999); see also *State v. Terry*, 569 N.W.2d 364, 368

(Iowa 1997). As it is undisputed Wright did not directly appeal his conviction, we deem the record adequate to consider the State's waiver of error contention.¹

II. Waiver of Error

Iowa Code section 822.8 requires a postconviction relief applicant to raise all grounds for relief available to the applicant in the applicant's original, supplemental or amended application "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." We have interpreted that section "to impose a burden upon a postconviction relief applicant to show sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal." *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999). Wright must not only show sufficient reason for not properly raising these issues previously but he must also demonstrate actual prejudice resulting from the alleged errors. *Osborne v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984) (modifying holding in *Redding v. State*, 274 N.W.2d 315 (Iowa 1979) to require a showing of actual prejudice in addition to cause)).

¹ Wright testified he did not appeal because he thought his attorney suggested the prosecutor might reinstate kidnapping charges if he did. However, Wright's postconviction relief application does not contain a claim his trial counsel was ineffective in advising him against appealing. Cf. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) (defendant argued he did not waive claims by failing to file direct appeal because his counsel was ineffective in failing to timely apprise him of the basis of his appeal). Even if this contention had been raised, we conclude it does not affect the adequacy of the record for purposes of considering the State's waiver of error argument. Instead, a claim that trial counsel was ineffective in failing to appeal might have been relevant to the issue of whether sufficient reason existed to bypass a direct appeal and raise claims for the first time in a postconviction relief application. *Id.* However, Wright's own statements suggest his attorney had legitimate strategic reasons for recommending against an appeal.

A. Sufficient Reason

Wright maintains he had sufficient reason for not raising the ineffective assistance of counsel claim on direct appeal because (1) the claim required reference to material outside the trial record and an appeal, therefore, would have been frivolous and (2) trial counsel was ineffective in preserving mental competency issues. For reasons to be explained, we will address but will not resolve each contention.

1. *Adequacy of Trial Record.* In *Berryhill*, the Iowa Supreme Court considered and rejected a postconviction relief applicant's contention that the trial record was insufficient to pursue a direct appeal. *Berryhill v. State*, 603 N.W. 2d 243 (Iowa 1999). The court stated, "our frequent preference to preserve ineffective assistance claims for postconviction relief does not alleviate the need to at least raise the claim on appeal." *Id.* at 245-46. The court noted "a rule which requires all claims to be raised on direct appeal is not necessarily inexpedient." *Id.* at 246. However, the court stopped short of holding that an insufficient trial record will never be deemed grounds for bypassing a direct appeal. *Id.* at 245. The court explained "[f]actual or legal matters which were excusably unknown at the time of the trial and appeal may be properly asserted on postconviction relief." *Id.*; cf. *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 33 (Iowa 1979) (noting key inquiry was whether applicant "deliberately and inexcusably" failed to pursue contentions on appeal).² Therefore, our inquiry into

² We note a tension between decisions which have articulated an exception to the direct appeal doctrine based on inadequacy of the trial record and more recent opinions which have found error waived for failure to first raise issues via a direct appeal. Compare *Redding*, 274 N.W.2d at 317 with *Berryhill*, 603 N.W.2d at 245, and *Osborne*, 573 N.W.2d at 921.

the waiver of error issue cannot end with the holding in *Berryhill*. Instead, we must determine whether the issue of Wright's competency was "excusably unknown" so as to provide sufficient reason for Wright's failure to appeal. To resolve this issue, we would have to squarely confront the merits of Wright's ineffective assistance of counsel claim. If we were to find his attorney breached an essential duty in failing to request a competency hearing, the issue of Wright's mental competency would be "excusably unknown," giving him sufficient reason to bypass the appeal. Therefore, we would have to come full circle. Under these circumstances, we decline to resolve the case on this ground.

2. Ineffective Assistance of Counsel. Wright next maintains he was not required to file a direct appeal because his "counsel took no actions to preserve error on any of these issues in the district court." The State contends his argument is circular. We agree with the State. Our courts have recognized counsel's ineffective assistance in failing to preserve error may constitute sufficient reason for failing to file a direct appeal. *Osborn*, 573 N.W.2d at 921; *Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985). However, here, this issue is one and the same as the merits of Wright's ineffective assistance of counsel claim. Accordingly, we also decline to resolve the case on this ground.

B. Prejudice.

We next turn to the "actual prejudice" prong of the test to determine whether a postconviction relief applicant may bypass a direct appeal. Because an analysis of whether Wright had grounds to bypass a direct appeal converges with an analysis of his ineffective assistance claim, we choose to pass on the State's waiver of error contention and proceed directly to the merits.

III. Ineffective Assistance of Counsel

Wright contends his trial counsel: (1) misinformed him of the direct consequences of his guilty plea; (2) failed to insist on a competency hearing; and (3) failed to evaluate the effect of an antipsychotic drug on his competency at the time of the plea hearing. He maintains these errors amounted to ineffective assistance of counsel.

We review an ineffective assistance of counsel claim de novo. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). A postconviction relief applicant must prove by a preponderance of the evidence that (1) trial counsel breached an essential duty, and (2) prejudice resulted. *State v. Arne*, 579 N.W.2d 326, 330 (Iowa 1998); *Osborn*, 573 N.W.2d at 922. The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). In the guilty plea context, the second element requires an applicant to show there is a reasonable probability that, but for counsel's errors, the applicant would have insisted on going to trial rather than choosing to plead guilty. *Id.* at 541.

A. Misinformation Concerning Guilty Plea Consequences. Wright maintains his trial counsel misled him into believing he would be pleading guilty to third-degree rather than second-degree sexual abuse. As trial counsel did not testify at the postconviction relief hearing, we are left with Wright's summary of a conversation he had with his attorney and a transcript of the guilty plea proceeding.

The transcript tends to belie Wright's assertions. Although trial counsel stated that Wright was prepared to enter a plea to third degree sexual abuse, the record suggests this reference was inadvertent. The court and prosecutor confirmed in Wright's presence that the charge was second-degree sexual abuse. Wright waived an opportunity to take additional time to consider the reduced charge and to discuss it with his attorney. The court then repeated the charge and confirmed Wright understood the sentence for second degree sexual abuse was twenty-five years. The court next asked Wright if his plea discussions differed from what he had heard. Wright and his attorney separately responded in the negative. On this record, we cannot conclude Wright's attorney misinformed his client about the charge or the consequences of the plea. Accordingly, Wright's counsel breached no essential duty and his claim must fail.

B. Failure to Insist on Competency Hearing. Wright next asserts his counsel should have insisted on a competency hearing. Iowa Code section 812.3 requires a competency hearing "[i]f at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." In determining whether a competency hearing should be held, a court should consider: (1) the defendant's irrational behavior, (2) any demeanor at trial that suggests a competency problem; and (3) any prior medical opinion on the defendant's competency to stand trial. *State v. Rieflin*, 558 N.W.2d 149, 152-53 (Iowa 1996). The mere presence of mental illness does not equate to incompetency to stand trial. *Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991). The statute "requires a competency

hearing if the record contains information from which a reasonable person would believe a substantial question of defendant's competency exists." *Rieffin*, 558 N.W.2d at 152. The question is a legal one. *State v. Edwards*, 507 N.W.2d 393, 395 (Iowa 1993).

The record contains little information from which a reasonable person could conclude Wright's mental competency was at issue during the plea proceeding. Wright's responses during the plea colloquy suggest he understood the proceeding and the rights he was waiving.

It is true the court-appointed guardian ad litem in the postconviction relief proceeding stated he discussed Wright's mental condition with the prosecutor and with Wright's plea taking counsel and concluded based on those conversations that, "Wright exhibited certain traits which would lead one to conclude that he was dysfunctional and unable to make an informed decision regarding major life decisions." However, this statement does not specify when Wright was dysfunctional and whether he specifically did not understand the plea proceedings. As Wright's attorney did not testify during the postconviction relief proceeding, the record contains no evidence other than Wright's own assertions that he appeared dysfunctional at the time of the plea proceeding. Additionally, we note Wright's original attorney advised the guardian ad litem that Wright was able to make informed decisions when she represented him.

We recognize incompetent defendants are not obligated to raise the issue of their own incompetency. See *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982) However, because nothing in Wright's testimony could have alerted the court to an incompetency issue and the record does not suggest he was acting

irrelevant. ~~Wright's~~ **trial counsel** did not breach an essential duty in failing to request a competency hearing.

C. Effect of Antipsychotic Drugs. Wright next contends his trial counsel was ineffective in failing to explore the effects of Mellaril, an antipsychotic drug he was taking at the time of the plea proceeding. Our court has stated, if a defendant is under the influence of medication, "it would not necessarily be apparent from his monosyllabic responses to the court's questions." *Munz v. State*, 382 N.W.2d 693, 698 (Iowa App. 1985). Therefore, we cannot look solely to the plea taking record to resolve this issue.

At the postconviction relief hearing, Wright contended the drug made him sleepy and groggy, but he introduced no psychiatric testimony as to any adverse effects the drug might have had on his ability to understand the plea proceeding. Therefore, we are left with his bare assertion that the Mellaril adversely affected his ability to understand the proceeding. Given this sparse record, we choose to decide Wright's ineffective assistance claim on the prejudice prong. The State initially charged Wright with first-degree kidnapping, a crime which carries a life sentence. The State subsequently agreed to let Wright plead guilty to second-degree sexual abuse, which carries a twenty-five year sentence. Even if Wright's counsel ~~had~~ arranged for an evaluation of the effects of Mellaril on his competency, Wright has not established he would have insisted on going to trial on a charge carrying a life sentence rather than choosing to plead guilty to a charge carrying a substantially reduced sentence. Accordingly, he suffered no prejudice and we deny his claim.

10. Confirm Wright's guilty plea and conviction.
11. REMED.