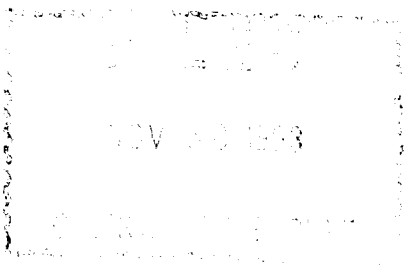
IN THE COURT OF APPEALS OF IOWA

No. 8-519 / 97-0590
Filed November 30, 1998

MACK CULP,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

On appeal from the district court order denying postconviction relief, the applicant claims the court erred in failing to find trial counsel was ineffective. **AFFIRMED.**

Robert W. Thompson of the Thompson Law Office, Reinbeck, for appellant.

Thomas J. Miller, Attorney General, and Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

HUITINK, J.

Mack Culp appeals from the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

On May 5, 1995, Waterloo police responded to a report of a man who was unconscious in his car. When Officer Jeffrey Harrington arrived, he found Culp's vehicle parked partially in the street and partially in the driveway of a residence. The vehicle's headlights were on. He noticed the motor was not running, but found Culp sleeping in the driver's seat with the keys in the ignition, turned to the "on" position. As Officer Harrington attempted to rouse Culp, he noticed an odor of alcohol and vomit on Culp's shirt. Culp had slurred speech, was incoherent, and had difficulty walking and standing. When Officer Harrington obtained Culp's driver's license, he learned the defendant was partially parked in his own driveway. The officer charged the defendant with operating while intoxicated, in violation of Iowa Code section 321J.2 (1993).

Culp was convicted following a jury trial. He timely appealed his conviction, but voluntarily dismissed the appeal on April 3, 1996.

In November 1996, Culp filed an application for postconviction relief, alleging his trial counsel was ineffective. The court denied the application, finding Culp's trial counsel was not ineffective for failing to move to suppress the officer's testimony regarding the investigation. It concluded the officer's investigation did not violate

any constitutionally protected right because the investigation was justified on public safety grounds. The district court also noted the direct appeal was withdrawn and dismissed, and Culp failed to preserve the issues for postconviction relief.

Culp appeals. He claims the district court erred in finding trial counsel was not ineffective for failing to file a motion to suppress.

The State argues Culp did not preserve his ineffective assistance of counsel claim for postconviction review because he dismissed his direct appeal, and has neither shown cause for failing to raise the issue on direct appeal nor actual prejudice resulting therefrom.

II. Standard of Review.

Our review of postconviction relief proceedings is ordinarily for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction petitioner asserts violations of constitutional safeguards—such as ineffective assistance of counsel—we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.*

To prevail on a claim of ineffective assistance, the defendant must show: (1) his counsel failed to perform an essential duty; and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.; Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984).

III. Error Preservation.

An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. *See* Iowa Code § 822.8 Before Culp may raise a claim of ineffective assistance of trial counsel for the first time in postconviction proceedings, he must demonstrate a "sufficient reason" for not raising the claim on direct appeal. *See id*; *Polly v. State,* 355 N.W.2d 849, 855 (Iowa 1984); *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). Ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995).

At no point in his application for postconviction relief or his appellate brief has Culp attempted to make a showing of a sufficient reason or cause for his failure to raise his claim of ineffective assistance of trial counsel on direct appeal. In fact, he made no claims whatsoever on direct appeal, as he voluntarily dismissed his timely filed appeal.

Culp has failed to prove a sufficient reason or cause for not having raised the issue of ineffective assistance of trial counsel in his direct appeal. He failed to present to the postconviction court the issue of ineffective assistance of appellate counsel, and he has failed to prove, in any other manner, a sufficient reason for not having previously raised this claim. Similar postconviction claims of ineffective assistance of trial counsel have been barred because of an applicant's failure to assert the ineffective assistance of appellate counsel. *See LeGrand*, 540 N.W.2d at 669; *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). We decline to address the claim on appeal and affirm the denial of postconviction relief.

AFFIRMED.