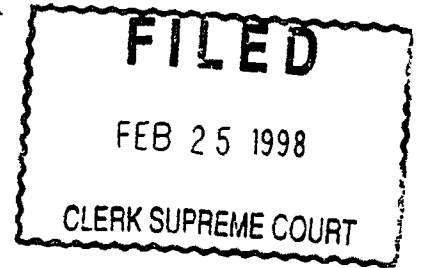


IN THE COURT OF APPEALS OF IOWA

No. 7-757 / 97-0216
Filed February 25, 1998



JAMES LEE BROCKWAY,
Appellant,

vs.

000063

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul,
Judge.

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

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Paul E. Kittredge, Jr., Assistant
County Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Defendant James Brockway appeals from the district court's denial of his application for postconviction relief. He asserts his trial counsel was ineffective in a variety of ways. Defendant did not raise the issue of ineffective assistance of counsel on direct appeal. Different attorneys represented Brockway at trial and on appeal. We affirm the denial of postconviction relief by memorandum opinion pursuant to Iowa Supreme Court rule 9.

The district court denied postconviction relief based on its conclusion the defendant did not prove by a preponderance of the evidence his trial counsel's performance fell outside a normal range of competence and defendant did not show the result would have been different. The district court also refused to second-guess trial counsel's tactics and strategies.

Before Brockway can 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. Iowa Code section 822.8; *Sims v. State*, 295 N.W.2d 420, 422 (Iowa 1980). The defendant's reliance on the exception to error preservation set forth in *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993), is misplaced. The exception in *Earnest* is for not raising the issue at trial, since an attorney cannot be expected to argue his own assistance was ineffective. However, when, as here, appellate counsel was different than trial counsel, and the claims to be raised were known at trial, the defendant has not shown sufficient reason for not

raising the claim on direct appeal. *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). The district court should have denied his claim in the postconviction proceedings as precluded by Iowa Code section 822.8. We decline to address the claim on appeal and affirm the denial of postconviction relief.

Even if Brockway's claim were not barred by statute, our review of the record brings us to the same conclusion as the district court. Brockway did not prove by a preponderance of the evidence trial counsel was ineffective or that he was prejudiced. He made allegations, but provided no affirmative factual basis for his claims. *Cleeson v. State*, 258 N.W.2d 330, 332 (Iowa 1977); *see Sims*, 295 N.W.2d at 423.

AFFIRMED.