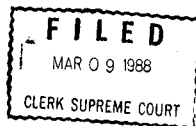


IN THE COURT OF APPEALS OF IOWA



PERCY EDWARD BRADY,)

Applicant-Appellant,)

vs)

STATE OF IOWA,)

Respondent-Appellee)

Filed March 9, 1988

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7-533
86-1817

Appeal from the Iowa District Court for Wright County (No. 4289),
Gilbert K Bovard, Judge

Defendant was convicted of second-degree burglary in violation of Iowa
Code section 713.5 and sentenced as an habitual offender pursuant to Iowa Code
section 902.8 **AFFIRMED.**

Earl Hill of Hill & Siegrist, Kanawha, for applicant-appellant.

Thomas J Miller, Attorney General, Christie J Sease, Assistant Attorney
General, and Lee E Poppen, Wright County Attorney, for respondent-appellee.

Considered by Donelson, P J , and Hayden and Sackett, JJ

DONIELSON, P.J.

Petitioner, Percy Edward Brady, appeals from the district court's decision denying his application for postconviction relief. We affirm.

Brady was charged in connection with the burglary of a business in Eagle Grove. Following a search of Brady's residence, several bottles of liquor, allegedly stolen from the business, were found. At trial, an accomplice of Brady testified as to Brady's involvement. Brady admitted that he had twice before been convicted of felonies. Following conviction and sentencing based on the habitual criminal statute, Brady appealed. Brady's conviction was upheld on appeal by the court of appeals and Brady now brings this action.

I. Brady contends that his trial and appellate counsel were ineffective in several respects. Brady alleges, inter alia, that his trial counsel failed to challenge the search warrant, the complaint, the magistrate's finding of probable cause, the trial information, and the method of jury selection. Also, Brady contends that his attorney failed to investigate his prior felony convictions and failed to properly advise his client as to sentencing. Brady further contends that his appellate counsel was ineffective in failing to argue these points.

Our scope of review is de novo; we make an independent evaluation of the totality of the relevant circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

We find that Brady's various claims of ineffective assistance of trial counsel relate to acts and omissions which occurred prior to the time of Brady's direct appeal which should have been preserved and presented on direct appeal; but because Brady has raised the issue of ineffective assistance of appellate counsel for failure to assert these points, we proceed to consider these claims since ineffective assistance of appellate counsel constitutes sufficient reason for failure to raise these issues on direct appeal. Iowa Code § 663A.8 (1985);

Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981). The same standards apply to a claim that appellate counsel was ineffective as do with a claim of ineffectiveness of trial counsel. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). It must be shown that (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Petitioner bears the burden to establish these two elements by a preponderance of the evidence. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

We have reviewed Brady's assignment of errors and agree with the district court's finding that under the totality of the circumstances, he should be denied postconviction relief based on ineffective assistance of both trial and appellate counsel as their performance was well within the range of normal competency. Snethen, 308 N.W.2d at 14. Brady has not carried his burden in proving that counsel at the trial and appellate levels failed to perform an essential duty nor that prejudice resulted to the extent he was denied a fair trial. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). Brady has not proven that but for counsel's alleged professional errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984).

II. Brady also argues that Iowa Code section 902.8 as applied in this case denied him equal protection of the laws. The enhanced sentence was imposed because Brady refused to plea bargain his right to a trial in exchange for not imposing an enhanced sentence. Brady, in his own capacity, argues in his postconviction trial brief that this section is unconstitutional on its face.

We find that the enhanced sentencing provision used during the plea negotiations was proper. See Iowa R. Crim. P. 9(1). Brady's claim of denial of equal protection is rejected; he does not allege this contention based on race, religion,

sex, or some other arbitrary classification. See State v. Durrell, 300 N.W.2d 134, 135 (Iowa 1981).

We incorporate into this decision our ruling on the State's motion to limit issues and Brady's resistance thereto as they relate to Brady's request that the court consider other constitutional challenges to Iowa Code section 902.8 raised in a pro se brief at the district court level and abandoned by counsel on appeal. We confine our decision to those issues raised by Brady in his appellate brief asking for postconviction relief.

III. Finally, Brady contends that the eyewitness accomplice has now recanted his testimony, thereby requiring a new trial. We agree with the district court's finding that Brady has failed to establish that the witness accomplice testified falsely. We defer to the district court's assessment that since the jury heard and observed the witness, as well as the other evidence in the case, that an assertion of perjury two years later during a ten-minute conversation should not be allowed as the basis for a new trial.

We affirm the conviction and affirm the district court's denial of postconviction relief.

AFFIRMED.