

IN THE COURT OF APPEALS OF IOWA

No. 1-116 / 90-920

JEFFREY RAGLAND,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED

MAY 29 1991

CLERK SUPREME COURT

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Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Ragland appeals the district court denial of postconviction relief. **AFFIRMED.**

Lylea Dodson Critelli of Nick Critelli Associates, P.C., Des Moines, and William L. Kutmus of Kutmus & Pennington, P.C., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, E.A. Westfall, County Attorney, and Drew Kouris, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

In 1986 Jeffrey Ragland, then seventeen years old, participated in a parking lot brawl involving two groups of young men. One of Ragland's antagonists was killed in the brawl. Ragland did not strike the fatal blow or touch the victim at any time.

Following a juvenile court's waiver of jurisdiction, Ragland was charged with first-degree murder. The trial information charged Ragland with alternative methods of committing first-degree murder: Premeditated with intent to kill or felony murder with willful injury as the underlying felony. The State offered to accept guilty pleas to voluntary manslaughter and an unspecified additional charge, and to recommend concurrent sentences of up to ten years each. The State subsequently modified the proposed plea and offered to allow Ragland's counsel to argue for concurrent ten-year sentences. Ragland rejected the plea offers and a jury found him guilty of first-degree murder. He was convicted and sentenced to life in prison. Upon direct appeal, the Iowa Supreme Court affirmed the conviction. State v. Ragland, 420 N.W.2d 791 (Iowa 1988).

Ragland filed the present application for postconviction relief challenging his conviction. The district court denied postconviction relief, and Ragland appealed.

Ragland contends his attorney during the 1986 criminal proceedings rendered ineffective assistance in several respects. Ragland complains his counsel failed to adequately explain the felony-murder rule, failed to explain he could be convicted of first-degree murder under that rule, failed to explain that a first-degree murder conviction would result in a mandatory life sentence, and failed to explain adequately the merits of the plea bargain offered by the State. Ragland also complains that his counsel failed to counteract the advice given to him by his father. Lastly, Ragland contends the postconviction court erred by refusing to allow him to appear and testify at the postconviction hearing.

Motions to dismiss portions of the appellee's brief and the appellant's reply brief have been ordered submitted with the appeal. The State moved to have a portion of Ragland's reply brief stricken because he argued for the first time in it that Iowa Code section 663A.8 would be unconstitutional as applied if it barred his postconviction claims. Ragland resisted the State's motion and in the alternative argued the State should not be allowed to argue in its brief that he was barred from litigating his postconviction claims because it did not file a cross-appeal on the issue.

Iowa Code section 663A.8 (1989) states in part:

Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction

or sentence, or in any other proceeding the applicant had taken to secure relief, may not be the basis for a subsequent 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.

"[W]hen a party in a postconviction proceeding asserts a ground for relief which was not asserted in the earlier proceedings initiated by him to secure relief from his conviction that party has the burden of proving a 'sufficient reason' why the ground now relied on was not previously asserted." Rinehart v. State, 234 N.W.2d 649, 657 (Iowa 1975).

In its order, the postconviction court discusses preservation of error with respect to postconviction relief applications but does not directly rule on whether Ragland proved sufficient reason for not raising his ineffective assistance claim on direct appeal. After its recitation of the law related to postconviction hearings, the trial court stated "Ragland has totally and completely failed to meet his burden of proof of his assertions. Not even a scintilla of evidence supports his allegations."

An appellant must set out in his or her first brief all the issues to be presented for review. State v. Schultz, 245 N.W.2d 316, 318 (Iowa 1976)(authorities omitted). The Schultz court quoted with approval the following language from Gates v. Brooks, 59 Iowa 510, 512, 6 N.W. 595, 595-596 (1882):

The appellants for the first time, in their argument in reply, raise the question as to the constitutionality of the statute under which this proceeding was had. If it was desired that so important a question should be passed upon by this court, it should have been presented in such a way that an opportunity would have been allowed counsel for appellee, under the rules, to answer the argument. It is only after the fullest argument, and the most mature consideration, that this court will pass upon so important a question.

Id. at 318-19.

In accordance with the above language, we refuse to consider the issue of whether Iowa Code section 663A.8 is unconstitutional if applied to bar Ragland's postconviction relief request. Consequently, we sustain the State's motion to strike the portion of Ragland's reply brief arguing the constitutionality of section 663A.8. We overrule Ragland's motion that the portion of the State's brief arguing failure to preserve the issue of ineffective assistance of counsel be stricken. The issue was addressed in the trial court's order even though not clearly ruled upon.

Ragland argues the trial court abused its discretion by denying him the right to appear and testify at the postconviction hearing. Ragland claimed his presence and testimony was essential to the matter before the court. The trial court denied Ragland's request and his testimony was obtained by a deposition filed with the court.

Iowa Code section 663A.7 (1989) provides that along with affidavits, depositions, oral testimony, or other

evidence, the court "may order the applicant brought before it for hearing." The decision to allow a postconviction applicant to appear personally lies within the trial court's discretion. Hahn v. State, 306 N.W.2d 764, 767 (Iowa 1981).

To show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)). We do not find the trial court's refusal to allow Ragland the opportunity to appear personally was "for reasons clearly untenable or to an extent clearly unreasonable." Further, Ragland failed to present any reason other than his bald assertion that his presence was essential in support of his request to be allowed to appear.

We next address whether Ragland has proven sufficient reason why he did not raise the present ineffective assistance of counsel claim on his direct appeal. Ragland was represented by different counsel on appeal than his trial counsel. Additionally, Ragland has not presented any evidence about why he did not argue ineffective assistance of counsel on direct appeal nor did he examine appellate counsel during the postconviction proceeding about why the issue was not raised on direct appeal.

In his application for postconviction relief, Ragland alleged that the facts which his application was based upon could not have been discovered prior to the filing of his direct appeal and in the alternative, the failure to raise the issues on direct appeal was the result of ineffective appellate counsel. Ragland failed to present any evidence at the postconviction hearing to substantiate either of the statements in his application asserting good cause for his belated allegation of ineffective assistance of trial counsel.

We find on our review of the record that Ragland has failed to show sufficient reason for failing to raise the issue of ineffective counsel in his direct appeal. See Polly v. State, 355 N.W.2d 849, 857 (Iowa 1984). Because we can affirm on any basis, even though not the one relied upon by the trial court, we affirm the order denying and dismissing Ragland's application for postconviction relief. See Citizens First National Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

In conclusion, we affirm the trial court's order denying Ragland postconviction relief and dismissing his application.

AFFIRMED.