FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM W. CAGE, JR.,	)	
Petitioner-Appellant,	)	Filed September 25, 1984
vs.	)	
STATE OF IOWA,	)	4-282 83-1079
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County - Peter Van Metre, Judge.

Petitioner Cage appeals the denial of his application seeking postconviction relief. He asserts that he was denied effective assistance of trial counsel due to counsel's failure to request trial to the court and alleged misadvice to Cage regarding waiver of a jury trial. AFFIRMED.

Charles L. Harrington, Chief Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

The defendant, William Cage, was charged with two counts of possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.401(1)(a), class C felonies. Cage retained attorney John Ackerman to represent him. The matter subsequently was tried to a jury, which found Cage guilty as charged. He then was sentenced to two concurrent, indeterminate ten-year terms of imprisonment. On direct appeal, his convictions were affirmed by the court of appeals.

On December 17, 1982, Cage filed an application for postconviction relief, asserting that his trial counsel was ineffective. At the postconviction hearing, Cage testified that because of the nature and complexity of his case he wanted it tried to the court rather than to a jury; that his lawyer agreed prior to trial to try the matter to the court; but that counsel told him on the morning of trial the case would be heard by a jury. Cage claimed he then told his lawyer he did not want a jury trial, but counsel told him it was too late to change how the case would be tried. Cage's trial counsel testified that he agreed with Cage's version of these pretrial events. However, counsel did not subsequently admit misadvising Cage regarding waiver of jury trial, but rather indicated that Cage acceded to counsel's advice to try the case to a jury.

At the time, Iowa R. Crim. P. 16(1) provided that a defendant could waive jury trial and obtain trial to the court at any time. On appeal, Cage asserts that his trial counsel was ineffective: (1) for misadvising him that a jury trial could not be waived; and (2) for refusing his request to try the case to the court rather than to the jury.

We find that the defendant failed to sufficiently raise the misadvice claim as a basis for ineffective assistance of counsel at the postconviction hearing. The alleged misadvice was not referred to in either the Application for Postconviction relief or in the brief submitted to the postconviction trial court. It is well

established that an issue not presented at trial cannot be raised for the first time on appeal. Snethen v. State, 308 N.W.2d 11, 16 (Iowa 1981) (citations omitted).

While the failure of counsel to request that his case be tried to the court was not strenuously argued to the postconviction trial court, we find that it was sufficiently raised as an issue. The decision whether to waive a jury trial is one for the accused. See Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980).

When a defendant relies on a specific act or omission, such as the failure to demand a jury trial, to prove ineffective assistance, he must show that: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Miles, the Iowa Supreme Court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982). Essentially, the Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (emphasis in original). Id. The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982).

On review of the fifth circuit's decision in Strickland, the United States Supreme Court enunciated this test for prejudice which is more stringent than the standard employed in the lower court decision: "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, ____ U.S. ____, ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). The Court further stated that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at ____, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

While the decision whether to waive a jury trial is one for the defendant, Cage has failed to present any evidence that the attorney's failure to waive a jury trial was prejudicial under the standard set forth in Strickland. In his brief, the appellant sets forth no arguments to justify a finding that he was prejudiced by having his case tried to a jury rather than to the court.

The findings of the trial court are affirmed.

AFFIRMED.