IN THE COURT OF APPEALS OF IOWA

No. 9-561 / 98-0760
Filed December 27, 1999

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CLERK SUPREME COURT

JAY FRED COTTRELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Hancock County, Bryan H. McKinley, Judge.

On appeal from the denial of his application for postconviction relief, appellant argues the trial court erred in denying his application as his trial counsel was ineffective in the following ways: (1) by failing to redemand and preserve his right to a speedy trial, (2) by failing to adequately investigate potential witnesses and summon those witnesses to testify on his behalf, and (3) by failing to make proper objections to irrelevant evidence introduced in violation of the trial court's order on a motion in limine. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Ted Hovda, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, J.J.

MILLER, J.

Applicant Jay Cottrell appeals from the district court's denial of his application for postconviction relief. He asserts the trial court erred in denying his application as his trial counsel was ineffective in three ways. Upon our de novo review we find two of the claims of ineffective assistance to be without merit, and the other not properly preserved. We affirm.

I. Factual and Procedural Background

The factual and procedural background of this case is somewhat complex. On February 26, 1993, the Garner police received a signal that a motion detector inside the unoccupied Webner property in rural Hancock county had detected motion. The officers dispatched to the scene found footprints in the snow on the back deck of the house, where a sliding glass door was found open, and followed the footprints to the defendant Cottrell, who was hiding in the snow nearby. A second person, Terry Northrup, was also found nearby. The state subsequently filed a joint trial information on April 5, 1993, charging both men with burglary in the third degree.

Arraignment was held on April 20, 1993. Cottrell entered a plea of not guilty and demanded a speedy trial. Trial was set for June 2, 1993. On June 1 the court granted defendant's motion to continue, and reset trial to June 29, 1993. On June 7, 1993, defendant's trial counsel filed a motion in limine seeking an order to prohibit the state from introducing evidence connecting Cottrell with prior break-ins at the Webner residence. One day prior to the June 29, 1993, trial date, the defendant

appeared before the district court, waived his right to a speedy trial, was granted a continuance, and trial was rescheduled for September 8, 1993.

On July 6, 1993, the defendant filed a written plea of guilty to attempted burglary in the third degree. However, he shortly thereafter decided that he did not wish to plead guilty to that offense, and the plea of guilty was apparently never accepted. It is not clear from the record why trial was not then held on September 8, 1993. After the plea agreement did not go forward, the state filed three additional counts of burglary in the third degree against Cottrell on October 15, 1993. At a pre-trial conference on October 18, 1993 the trial was rescheduled to November 30, 1993 at defendant's request.

Arraignment on the three additional counts was held on November 8, 1993. The defendant entered pleas of not guilty, and demanded a speedy trial with respect to those counts. Trial was set for November 30, 1993, the date previously set for trial of the original count of burglary.

A pre-trial conference was held on November 22, 1993, and the parties agreed they were ready for trial and the court set this case as the lead-off trial for November 30, 1993. The record is again unclear as to why the case was not heard on November 30, 1993. At the post-conviction hearing, trial counsel testified that he assumed that the case was not reached in the trial assignment. In proceedings held on March 30, 1994, before commencement of trial on that date, the prosecuting attorney stated that, "[v]arious times this case has been bumped by other cases that were older than it."

On December 2, 1993, trial counsel filed a motion to withdraw, which was denied December 20, 1993. Trial was re-set for March 2, 1994, as the lead-off case. On March 1 a continuance was granted at defense counsel's request, because of the defendant's lack of communication with defense counsel, defense counsel's resulting lack of opportunity to prepare for trial and a strong likelihood that the defendant would not appear for trial. The case was once again rescheduled for trial, as the lead-off case for March 30, 1994.

Trial was finally held on March 30, 1994. The court heard and sustained the motion in limine which defendant's attorney had filed June 7, 1993. The court also granted the state's motion to dismiss the three counts which had been added by way of amendment, and trial then proceeded on the original count of burglary. The jury returned a verdict of guilty of burglary in the third degree. On May 10, 1994, the trial court entered a judgment of conviction and sentenced Cottrell to an indeterminate term of no more than five years.

Cottrell filed a notice of appeal, and a new attorney was appointed to represent him. This court affirmed the judgment of the district court, and preserved for postconviction review Cottrell's claims that trial counsel was ineffective in (1) "fail[ing] to protect his speedy trial rights," and (2) "fail[ing] to include *any* reference to prior burglaries of the Webners' residence in his motion in limine." *See State v. Cottrell*, 548 N.W.2d 195 (Iowa App. 1995) (unpublished opinion).

On April 10, 1996 Cottrell filed an application for postconviction relief. Counsel was appointed, and on October 28, 1996 filed an amended application for postconviction relief. In it, Cottrell claimed, *inter alia*, (1) that trial counsel was ineffective in not protecting his speedy trial rights, (2) that trial counsel was ineffective by not objecting to evidence of prior burglaries (of the Webner residence), and (3) that trial counsel was ineffective in failing to call Terry Northrup as a witness for the defendant.

Cottrell sought and secured leave to amend his amended application for postconviction relief. In an August 15, 1997 amendment he alleged that trial counsel "was ineffective because he did not properly question prospective jurors with regard to contamination and discussion with potential witnesses at the time of jury selection and did not raise those objections when such contamination was later discovered." He further alleged that appellate counsel was ineffective for not raising this issue on appeal and preserving it.

Hearing on the application for postconviction relief was held on February 2, 1998. The district court denied the application on April 10, 1998. It found that Cottrell had not proved that trial counsel was ineffective in not reasserting Cottrell's right to speedy trial and in not objecting to evidence of prior burglaries. It somewhat summarily found other allegations made by Cottrell regarding alleged conduct of trial counsel to be without merit, including the claim counsel had failed to call witnesses. It summarily found an assertion that appellate counsel had a conflict of interest to be

without merit. Cottrell appeals. His claims on appeal are that trial counsel was ineffective in (1) failing to re-demand and preserve his right to a speedy trial, (2) failing to adequately investigate and failing to summon witnesses to testify on his behalf, and (3) failing to object to evidence allegedly introduced in violation of the court's ruling sustaining his motion in limine.

II. Scope of review.

Generally, an appeal from denial of an application for postconviction relief is reviewed for errors of law. *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Id.* (quoting *Giles v State*, 511 N.W.2d 622, 627 (Iowa 1994). This "totality of the circumstances" review is the functional equivalent of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). Although Cottrell's brief does not claim a violation of any specific constitutional provision or provisions, we assume his claims are based on the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Iowa Constitution. Accordingly, our review is de novo.

III. Principles applicable to ineffective assistance claims.

A. Procedural principles - (preservation of claims)

Iowa Code section 822.8 provides in relevant part:

> Any ground [for postconviction relief] 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 has 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.

Iowa Code § 822.8 (1999). Cases interpreting and applying this provision have long held postconviction relief is not a means for relitigating claims that were or should have been properly presented on direct appeal. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998) (citing *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) and *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981)). In order to assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, the applicant ordinarily must show that the claim was preserved for review by being made on direct appeal. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). Thus any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the alleged error. *Osborn*, 573 N.W.2d at 921. Ineffective assistance of appellate counsel may provide the 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. *Id.*

B. Substantive principles.

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of

ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fe ' below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

We may dispose of an ineffective assistance of counsel claim if the applicant fails to prove either the breach of duty or the prejudice prong of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

IV. The ineffective assistance of counsel claims.

A. Failure to re-demand and preserve right to a speedy trial.

Cottrell had waived his right to speedy trial on June 28, 1993. He asserts that in two letters, the first dated July 22, 1993, he asked his attorney to reassert his speedy trial demand on the original burglary charge, that his attorney did not do so, and that his attorney's failure to do so constitutes ineffective assistance of counsel. Cottrell's attorney acknowledged that he did not take measures to reinstate speedy trial rights, and further stated that he was not aware that once the right to speedy trial had been waived one could "reactivate the 90 days."

An attorney who undertakes to represent a defendant in a criminal proceeding should be familiar with applicable law or should make an effort to become familiar with legal principles which may be applicable to the facts of the case. *See, e.g., State v. Schoelerman*, 315 N.W.2d 67, 71-72 (Iowa 1982). Since 1981 Iowa law has been clear that the withdrawal of a waiver of the right to a speedy trial reinstates the right to speedy trial and the defendant must be tried within ninety dates of the date of withdrawal unless good cause to the contrary be shown. *See State v. Hamilton*, 309 N.W.2d 471, 475 (Iowa 1981). We conclude that counsel's failure to know that the right to a speedy trial could be reinstated, and failure to take steps to do so when requested by the defendant, constituted a failure to perform an essential duty, and that Cottrell has proved the first element of an ineffective assistance of counsel claim. The question that remains is whether he suffered prejudice as a result.

Following Cottrell's arraignment on the original burglary charge, trial was set for June 2, 1993, but was continued at the request of the defense to permit depositions

and other discovery. Trial was rescheduled to June 29, 1993. On June 28, 1993 Cottrell waived his right to speedy trial and sought and secured another continuance. Trial was rescheduled to September 8, 1993. It is not clear why trial was not held then. It might reasonably be assumed that the most likely explanation is that after Cottrell filed a written plea of guilty to a lesser charge on July 6, 1993 the trial was canceled and another trial or trials were scheduled for September 8.

After the plea agreement did not go forward, the additional counts of burglary were filed and trial was rescheduled to November 30, 1993. It is again somewhat unclear why the case did not go to trial on that date. However, from the fact Cottrell asked his attorney to withdraw and the attorney filed a motion to withdraw on December 2, 1993, it appears most likely that it was because Cottrell wanted a different attorney and wanted to explore that possibility before proceeding to trial. Cottrell's attorney's motion to withdraw was overruled December 20, 1993, and trial was rescheduled to March 1, 1994.

As of March 1, 1994 Cottrell had for some time failed to maintain contact and communication with his attorney, and had failed to respond to communications from his attorney. As a result, his attorney felt he had not been able to adequately prepare for trial, felt there was a strong likelihood Cottrell would not appear for trial, and appears to have had some concern that Cottrell could be charged with failure to appear if the case remained scheduled for trial. He accordingly sought and secured a continuance to March 30, 1994.

Certain facts can be summarized. Trial was scheduled on five occasions before it actually occurred, twice before Cottrell asked his attorney to reassert his demand for a speedy trial and three times after he did so. The first two continuances were at Cottrell's specific request. The third was most likely a result of Cottrell's filing a written plea of guilty and then changing his mind. The fourth was most likely the result of Cottrell wanting a different attorney. Even as of March 1, 1994, one month before trial in fact occurred, Cottrell's failure to maintain contact and communication with his attorney caused his attorney to reasonably believe another continuance was necessary, and to seek and secure yet another, later trial date.

The several continuances and reschedulings of trial, and resulting delays in trial, were the result of acts and omissions on Cottrell's part and are thus attributable to him. Delays attributable to the defendant will not support a dismissal based on a failure to bring a defendant to trial within the required time. *State v. Keys*, 535 N.W.2d 783, 787 (Iowa App. 1995). Accordingly, even if Cottrell's attorney had reasserted his right to a speedy trial, Cottrell would not have been entitled to dismissal on speedy trial grounds. Further, Cottrell has not claimed or shown that if his attorney had reasserted his right to a speedy trial his acts and omissions would have been different and a speedy trial, rather than the same delays and reschedulings, requiring another waiver of right to speedy trial, would have resulted. We conclude that Cottrell has not proved that any failure of performance on the part of his attorney resulted in prejudice.

B. Failing to adequately investigate and call witnesses.

For two separate reasons we find this claim has not been preserved for our review.

First, the decision affirming Cottrell's conviction on direct appeal does not preserve this claim for postconviction review. Neither does Cottrell claim or show that the attorney who represented him on direct appeal was ineffective for not presenting and preserving this claim. Accordingly, Cottrell has not shown sufficient reason or cause for not raising and preserving it. *See Osborn*, 573 N.W.2d at 921.

Second, the only claim which Cottrell makes in his amended application, and amendment thereto, which has any similarity to this claim is a claim that defense counsel was ineffective for failing to call Terry Northrup as a witness at trial. A review of the trial court decision in this case shows that the trial court did not address that claim. Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). It is well settled that a rule 179(b) motion to enlarge or amend the trial court's findings is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory submitted to it for adjudication. *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). No such motion was filed.

C. Failing to object to evidence allegedly introduced in violation of the court's ruling sustaining the motion in limine.

The decision affirming Cottrell's conviction preserved for postconviction review a claim that defense counsel was ineffective in "failing to include *any* reference to prior burglaries of the Webners' residence in his motion limine." In his amended application Cottrell complained that his attorney "failed to object to testimony as to evidence admitted with regard to other incidents." (We assume the "other incidents" are the "prior burglaries.") On appeal Cottrell now claims that defense counsel was ineffective for failing to object to evidence allegedly introduced in violation of the court's ruling sustaining his motion in limine.

As can be seen, the claim which was preserved for postconviction review dealt with the content of a motion in limine. The claim raised in the trial court dealt with trial objections without reference to the motion in limine or the ruling on it, and the claim on appeal is again different, dealing with trial objections but based on the court's ruling on the motion in limine. Because the present claim on appeal is substantially different than the claim presented to and ruled on by the trial court, and is wholly different that the claim which was preserved for postconviction review, we doubt the present claim has been preserved for our review. We will, however, pass this concern and address the merits of the applicant's claim.

The Webner residence had apparently been broken into several times in the period of about three weeks before the incident which led to the original burglary charge against Cottrell. There were witnesses who would place Cottrell in the immediate area of the Webner residence at or near the times of those prior break-ins.

Cottrell's attorney sought and secured a ruling which prevented those witnesses from testifying in a manner which would connect Cottrell with the prior break-ins.

At trial, witnesses testified without objection that there had been prior break-ins at the Webner residence. The evidence did not in any manner connect or attempt to connect Cottrell to the earlier break-ins. The evidence was relevant, both to explain why a motion detector (which apparently detected Cottrell's presence, resulted in a rapid response by law enforcement, and led to Cottrell's arrest at the scene) had been installed, and to explain to the jury that some of the damage to the home and contents which would be apparent in photographs and testimony had been caused by unknown persons in the earlier break-ins. Cottrell's attorney reasonably and correctly felt that such evidence was admissible and that its admission did not violate the court's ruling on the motion in limine. Cottrell has not proved that counsel failed to perform an essential duty by failing to object to that evidence.

AFFIRMED.