

IN THE COURT OF APPEALS OF IOWA

No. 5-714 95-40

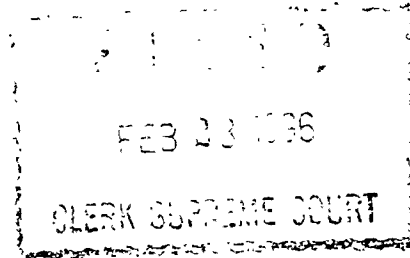
RICHARD STELTZER.

Applicant-Appellant.

vs.

STATE OF IOWA.

Respondent-Appellee.



Appeal from the Iowa District Court for Warren County, Peter Keller, Judge.

Richard Steltzer appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia A. Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Kevin Parker, County Attorney, and Douglas D. Hammerand, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

In 1979, Richard Steltzer was convicted of the first-degree kidnapping and second-degree sexual abuse of Lillian Fedders. Steltzer's convictions were affirmed on appeal. *State v. Steltzer*, 288 N.W.2d 557 (Iowa 1980).

In September 1994, Steltzer filed an application for postconviction relief requesting he, Lillian Fedders, Fedders' oldest daughter, and Fedders' boyfriend at the time of the crime, undergo DNA testing. Fedders' oldest daughter was conceived around the time of the kidnapping and sexual abuse incident. Steltzer alleged such testing would show Fedders' boyfriend was the father of her oldest daughter and thus impeach Fedders' trial testimony Steltzer was the only man with whom she had had sexual contact.

The State filed a motion to dismiss. It asserted Steltzer had previously filed an application for postconviction relief in which he sought the same relief, the application had been dismissed, and no appeal of that dismissal had been filed. Therefore, the State argued, Steltzer's September 1994 application failed to state a claim upon which relief could be granted. It further asserted the application was not timely filed pursuant to Iowa Code section 822.3 (1993).

Following a hearing, the district court noted "this case is exactly the same case" as was previously filed, and dismissed the application "for the reasons set forth in the motion to dismiss filed by the State."

Steltzer appeals.

Steltzer contends the district court erred in summarily dismissing his application for postconviction relief. Review of this civil proceeding is for correction of errors at law. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994).

Steltzer does not appear to dispute the fact both of his requests for postconviction relief raised the same issue. In order to bring an identical claim in a second postconviction proceeding, Steltzer must prove his prior postconviction counsel was ineffective. *See* Iowa Code § 822.8 (1993); *Whitsel*, 525 N.W.2d at 865. Steltzer's burden in showing ineffective assistance of counsel in a prior postconviction proceeding has been set out by the supreme court as follows:

To succeed [the applicant] would first^o have to show by a preponderance of the evidence that there was "sufficient reason" or cause for not having raised the issue in the trial court or on direct appeal or in his first application for postconviction relief. *Hinkle v. State*, 290 N.W.2d 28, 31 (Iowa 1980); *see also* Iowa Code § 822.8. Second, he must prove by a preponderance of the evidence that he suffered actual prejudice resulting from the alleged ineffectiveness of counsel. *See Greiman v. State*, 471 N.W.2d 811, 814 (Iowa 1991); *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984).

Whitsel, 525 N.W.2d at 865.

Rather than make an ineffective assistance of counsel argument, Steltzer contends the first postconviction relief application was improperly dismissed. Steltzer contends the alleged improper dismissal of the first postconviction proceeding is a material issue of fact which prevents the district court from dismissing the present action. *See Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993) (summary disposition

of a postconviction relief application is not proper if a material issue of fact exists). We disagree.

The alleged improper dismissal of the first application is not a factual issue; thus, it cannot be considered a material issue of fact barring the present application from being summarily dismissed.¹ In addition, the proper procedure for challenging a dismissal of an application for postconviction relief is to directly appeal the order dismissing the action.² See Iowa Code § 822.9. Instead of appealing, Steltzer filed a second application for postconviction relief raising essentially the same claim. Steltzer made no attempt at trial, and continues to make no attempt on appeal, to argue his counsel was ineffective for not appealing the dismissal of the first postconviction proceeding.

As Steltzer has not made an argument for ineffective assistance of counsel based on the failure to appeal the dismissal of the first application for postconviction

¹ We also note that before the district court, Steltzer did not identify or argue the alleged improper dismissal of his first petition for postconviction relief was a material issue of fact. At ~~page~~ in Steltzer's pro se brief submitted to the district court, Steltzer states there is an ~~existence~~ of a material issue of fact. However, Steltzer does not specifically identify the alleged material issue of fact. In addition, Steltzer's court-appointed attorney did not argue there was an existence of a material issue of fact in the hearing before the district court on the motion for dismissal. Ordinarily, matters not raised in the trial court will not be considered on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa App. 1994).

² Steltzer uses this second application for postconviction relief to make arguments attacking the dismissal of the first petition. These arguments should have been raised in a direct appeal from the first postconviction proceedings.

relief, the district court was correct in finding the present application must also be dismissed.

AFFIRMED.