

IN THE COURT OF APPEALS OF IOWA

No. 7-673 / 96-2240

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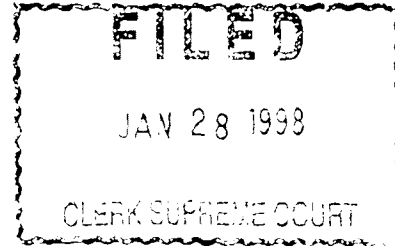
ROBERT EUGENE BENN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Clarke County, David L. Christensen,
Judge.

Applicant appeals the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Thomas M. Walter and Robert E. Breckenridge of Johnson, Hester, Walter,
Harrison & Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, and John D. Lloyd, County Attorney⁺, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

PER CURIAM.

Applicant-appellant Robert Eugene Benn appeals following the trial court's denial of his application for postconviction relief. We affirm.

Benn was convicted of first-degree murder following a jury trial in 1991. He appealed that conviction, alleging ineffective assistance of trial counsel. The conviction was affirmed. *State v. Benn*, No. 91-1562 (Iowa App. Dec. 29, 1992). In August 1994, Benn filed an application for postconviction relief *pro se*. His application was amended by counsel in May 1995. The trial court denied the application in November 1996, holding Iowa Code section 822.8 prevented it from considering different ineffective assistance of counsel claims not raised on direct appeal.

On direct appeal, Benn raised the following issues: (1) trial counsel has a duty to raise and preserve all valid defenses; and (2) trial counsel breached this duty by failing to object to the State's exhibits 26 and 42, which were gruesome photographs of the victim, and by failing to move for a mistrial after the prosecutor asked questions about the "murder" and the "murder weapons."

In his application for postconviction relief, Benn contended his trial counsel was ineffective: (1) in failing to preserve errors for appeal by raising objections; (2) in failing to make pretrial motions to suppress evidence; (3) in failing to request an additional change in venue; (4) in failing to move to strike expert testimony of Dr. Walsh since he is not an expert and his testimony would confuse the jury rather

than assist it; (5) in failing to object to Dr. Walsh's testimony concerning Benn's ability to form the necessary intent for murder; (6) in failing to inform Benn of his rights not to testify; (7) in failing to object to prosecutorial misconduct; and (8) in failing to object to cross examination questions that went beyond the scope of direct exam. In addition, Benn contended his appellate counsel was ineffective in failing to raise all trial counsel issues on appeal.

During the postconviction proceeding, Benn further contended his trial counsel was ineffective in: (1) failing to make motions to suppress evidence; (2) failing to rehabilitate the defense expert Dr. Nordine; (3) waiting to make the defense opening statement until after the State's case; (4) allowing improper admission of character evidence concerning Benn's violent nature; (5) being inept in their impromptu presentation of a self-defense theory without notice; (6) inadequately presenting the diminished capacity defense; and (7) coercing Benn to testify and to perjure himself. In addition, Benn contended his appellate counsel was not effective in failing to discuss the appeal with Benn.

Benn contends (1) he properly presented his claims of ineffective assistance of counsel in postconviction proceedings, and (2) he was denied a fair trial because his trial counsel was ineffective. He asserts he did not know what claims his appellate counsel would raise until he saw the brief filed.

Generally, an appeal from denial of an application for postconviction relief is reviewed for errors of law. *Mabrier v. State*, 519 N.W.2d 84, 85 (Iowa 1994); *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, if as here the defendant raises

constitutional issues, review is made "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994). This review has been interpreted as being the equivalent of de novo review. *Hinkle*, 290 N.W.2d at 30. We can affirm the district court's decision on any basis appearing in the record. *See State v. McCowen*, 297 N.W.2d 226, 227 (Iowa 1980).

Our review of the record leads us to the same conclusions reached by the district court in denying Benn postconviction relief. First, the claim of ineffective assistance of trial counsel was raised and decided on direct appeal. Iowa Code section 822.8 prevents Benn, absent good cause, from using "any ground finally adjudicated" as "the basis of a subsequent application for postconviction relief." Iowa Code § 822.8 (1993).

Second, Benn offers new ways his trial counsel was ineffective. All of these claims could have been raised on direct appeal, but were not. The record does not provide any "sufficient reason" for not asserting these claims on direct appeal. Benn's only argument is that he did not know what issues would be raised on appeal until after the appeal was filed. He presented no other evidence concerning appellate counsel. Therefore, Iowa Code section 822.8 prevents Benn from raising them in his postconviction relief application. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981); *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995).

AFFIRMED.