FILED
MAY 22 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JACK E. WHITNEY,	)	
Petitioner-Appellant,	)	Filed May 22, 1984
vs.	)	255
CALVIN AUGER, WARDEN, IOWA STATE MEN'S REFORMATORY, STATE OF IOWA,	)	4-159 83-1050
Respondents-Appellees.	)	

Appeal from the Iowa District Court for Warren County - Richard D. Morr, Judge.

Petitioner appeals the denial of his application seeking postconviction relief from his 1978 conviction of two counts of burglary in the first degree. See Iowa Code §§ 713.1, 713.2 (Supp. 1977). Petitioner asserts on appeal that: (1) there was a fatal variance between the trial information and the State's alleged failure to prove that petitioner possessed a dangerous weapon during the commission of the crime; and (2) he was denied effective assistance of trial counsel. AFFIRMED.

Richard B. Clogg of Elgin, Hoyman, Clogg & Patin, Indianola, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondents-appellees.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

In 1978, petitioner Jack E. Whitney and Steven E. Green were jointly charged with two counts of first-degree burglary in violation of Iowa Code section 713.2 (Supp. 1977). The information specifically stated:

> And while so committing the burglary the person or persons did have in their possession a dangerous weapon, to-wit: a knife with at least a three-inch blade all contrary to the provisions of Section 713.2, Code of Iowa (1977 Supplement).

It did not allege any aiding and abetting. The minutes of testimony indicated that law enforcement officers would testify that both Whitney and Green were armed with knives fitting the definition of dangerous weapons shortly after the burglaries. A notice of additional testimony regarding Steven Green did not specify that he would testify about possession of a dangerous weapon during commission of the burglaries. At trial, however, Green testified, without objection from Whitney's trial attorney, that he had a dangerous weapon on his person during commission of the burglary. A jury subsequently found Whitney guilty of both counts as charged. Trial court imposed an indeterminate twenty-five year term of imprisonment on each count, with the sentences to run consecutively.

Whitney appealed, asserting that certain evidence was improperly admitted at trial, that there was insufficient evidence to show he was armed during commission of the burglaries, and that trial court abused its sentencing discretion by imposing consecutive sentences. We affirmed both convictions on appeal, concluding, inter alia, that there was sufficient evidence to prove Whitney was armed with a dangerous weapon during commission of the burglaries. We modified the sentence, however, ordering that the sentences run concurrently.

In July 1982, Whitney filed a pro se application for postconviction relief, asserting: (1) that he had been improperly charged or that there was a variance between the information and the evidence regarding his alleged possession of a

dangerous weapon and the failure in the information to allege aiding and abetting; and (2) that his trial counsel was ineffective for failing to timely challenge the information and the alleged variance between the information and the evidence. At the postconviction hearing, Whitney also asserted, inter alia, that his trial counsel was ineffective for failing to object to Green's testimony about possession of a dangerous weapon, which testimony allegedly was beyond the scope of the minutes of testimony. Whitney also apparently asserted that his appellate counsel was ineffective for failing to raise these issues on direct appeal.

Whitney was the only witness at the postconviction hearing. Following the hearing, postconviction court dismissed Whitney's application. The postconviction court concluded that the information properly notified Whitney that he or his accomplice were alleged to have possessed a dangerous weapon during commission of the burglaries and that it made no difference whether Whitney was charged and/or tried as a principal or an aider and abettor. The court also concluded that Whitney had failed to prove ineffective assistance of trial counsel.

Our scope of review for postconviction proceedings is as an action at law, except when there are issues raised as to a constitutional violation. Then we must independently evaluate the totality of the relevant circumstances shown by the record under which rulings on those constitutional rights were made. Evidence relevant to the issue is received de novo. Bledsoe v. State, 257 N.W.2d 32, 33 (Iowa 1977).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981); Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973); § 663A.8.

On this postconviction appeal, Whitney first asserts that the postconviction

court erred in finding the petitioner was properly charged in the underlying criminal case and that he was properly charged as a matter of law. This claim was not properly raised at trial or on direct appeal. Whitney also claims the minutes of testimony did not disclose that his alleged accomplice would testify that he was armed with a dangerous weapon during the commission of the crime and that the testimony therefore should have been excluded. No objection was made to the trial court and the issue was not raised on direct appeal. Thus, these issues may not be litigated in a postconviction proceeding unless there is sufficient reason for not properly raising them previously. Washington v. Scurr, 304 N.W.2d at 234; Horn v. Haugh, 209 N.W.2d at 120.

The reason Whitney gives for not raising these issues previously is that he received ineffective assistance of counsel at the trial level. Ineffective assistance of counsel would be a violation of a basic constitutional safeguard. Consequently, we make our own evaluation of the claim under the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977).

The ineffective assistance of trial counsel claim was raised for the first time in the postconviction proceedings. Where defendant fails to raise the issue of ineffective assistance of counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. Washington v. Scurr, 304 N.W.2d at 235. Whitney's appellate counsel was different from his trial counsel, so there is no reason why the issue could not have been raised on direct appeal. Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. Id.; Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). However, Whitney has not claimed that his counsel on direct appeal was ineffective. We discern no other reason to excuse Whitney from raising these issues previously.

Furthermore, Whitney's claim has no merit. The postconviction court found, and we agree:

> from the evidence produced at this hearing that Petitioner's attorney at trial knew that the State would be offering evidence so as to either put the Defendant actually or constructively in possession of a knife or knives with the blade or blades greater than three inches at the time of the burglaries, and the Court further finds that [Whitney's] attorney . . . was aware that such evidence would reasonably come from witness Steven Green.

Defendant was fully and fairly alerted to the general source and nature of the evidence against him. See State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). He was neither surprised nor prejudiced by Green's testimony. See State v. Waterbury, 307 N.W.2d 45, 51 (Iowa 1981). The postconviction court properly dismissed Whitney's application for relief.

AFFIRMED.