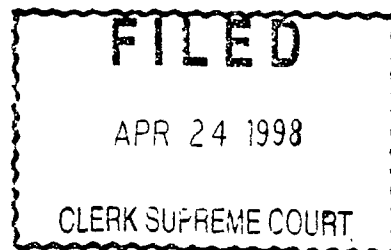


IN THE COURT OF APPEALS OF IOWA

No. 8-007 / 96-2252
Filed April 24, 1998



DANIEL MAURICE CLAYBON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Daniel Claybon appeals a ruling of the district court partially denying his
application for reinstatement of his action for postconviction relief. **AFFIRMED.**

Delmer D. Werner, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Daniel Maurice Claybon appeals the district court's denial of his application for postconviction relief. We affirm.

I. Background Facts and Proceedings.

A jury convicted Claybon of first-degree murder on September 6, 1990. The district court sentenced Claybon to life in prison. This court affirmed Claybon's conviction, and the supreme court denied his application for further review.

Claybon subsequently filed an application for postconviction relief alleging ineffective assistance based on counsel's failure to challenge the jury selection process and trial court errors including denial of Claybon's motion for a change of venue and admission of prior bad acts evidence. On December 15, 1995, the district court dismissed Claybon's claims involving his motion for venue change and admission of prior bad acts evidence, because those issues were resolved on direct appeal. The court subsequently granted Claybon's motion to reinstate his application as to his claim of ineffective assistance of counsel pursuant to rule 215.1,¹ because that issue was not resolved on direct appeal. In its ruling on Claybon's reinstated claim, the district court found Claybon's trial counsel was effective.

¹ Iowa Rule of Civil Procedure 215.1 provides, in part,
The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake, or other reasonable cause, reinstate the action or actions so dismissed.

On appeal, Claybon asserts the district court erred in failing to reinstate the issues of change of venue and admission of prior bad acts evidence.

II. Standard of Review.

We review a trial court's ruling on a defendant's motion to dismiss for an abuse of discretion. *State v. Connelly*, 551 N.W.2d 329, 331 (Iowa App. 1996). "An abuse of discretion will not be found unless the defendant shows that the court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Rodenburg*, 562 N.W.2d 186, 187 (Iowa 1997). To the extent constitutional safeguards are implicated, we evaluate the totality of circumstances. Essentially, evidence relevant to constitutional issues is reviewed de novo. *State v. Swartz*, 541 N.W.2d 533, 536 (Iowa App. 1995).

III. Error Preservation.

The State contends the district court's December 15, 1995, dismissal of Claybon's postconviction claims disposed of the petition as a whole. It argues Claybon has waived any claim related to his petition because he failed to appeal the court's dismissal within thirty days.

Claybon claims the district court order was a partial summary judgment, because the court did not address the jury selection issue; therefore, he was not required to seek an interlocutory appeal.

In its December 15, 1995, order the district court granted the State's motion to dismiss. In its motion the State alleged two grounds for dismissal: "a.

Applicant's/Defendant's Motion to Change Venue should have been granted by the trial court. b. The Respondent/State of Iowa's admission of prior bad acts evidence of the Applicant/Defendant should have been precluded by the court." The State argued the court had previously passed on these issues on direct appeal.

We find the district court's order dismissed only the issues presented in the State's motion, namely change of venue and admission of prior bad acts evidence. Accordingly, we find Claybon has properly preserved error on these claims. We retain subject matter jurisdiction on these issues.

IV. Denial of Claybon's Motion for Change of Venue.

The district court denied Claybon's motion to reinstate the issue of change of venue. This court affirmed on direct appeal, and the supreme court denied Claybon's petition for further review.

Claybon contends the district court erred in failing to reinstate this issue. He argues he could not receive a fair trial, because inflammatory and pervasive pretrial publicity created prejudice against him in the community. The State argues Claybon is barred from raising this issue, because it was fully litigated on direct appeal.

We find Claybon is precluded from litigating this issue in postconviction proceedings. *Jones v. Scurr*, 316 N.W.2d 905, 911 (Iowa 1982)("[a] person is barred from relitigating in a postconviction proceeding any ground which was finally adjudicated on direct appeal"). Even if we allowed Claybon to proceed, we find the court did not abuse its discretion in denying Claybon's motion.

Claybon asserts case law arising after his appeal entitles him to relief and warrants reinstatement of this issue. He cites *State v. Hardy*, 492 N.W.2d 230 (Iowa App. 1992); *State v. Liggins*, 524 N.W.2d 181 (Iowa 1994); and *State v. Nance*, 533 N.W.2d 557 (Iowa 1995), for the proposition evidence of a defendant's gang affiliation is inherently prejudicial.

In *Hardy*, *Liggins*, and *Nance*, admission of exhibits connecting the defendants with gang activities was held to be error, because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *State v. Hardy*, 492 N.W.2d at 234 (evidence of defendant's prior assault convictions, his references to a movie about a serial killer, and testimony of his prior rape victims admitted); *State v. Liggins*, 524 N.W.2d at 189 (evidence of defendant's cocaine delivery and distribution admitted); *State v. Nance*, 533 N.W.2d at 562 (exhibit depicting illegible "gang notes" admitted); see Iowa R. Evid. 403.

We find it unnecessary to determine whether the cases Claybon cites should be retroactively applied to this case. The cases are distinguishable and do not support Claybon's position. Claybon claims he was prejudiced due to pretrial publicity. The prejudice in *Hardy*, *Liggins*, and *Nance* arose from admission of evidence. Moreover, recent case law has rejected claims similar to Claybon's. See *State v. Hoeck*, 547 N.W.2d 852, 861-62 (Iowa App. 1996)(motion for venue change properly denied despite pretrial publicity regarding gang activity). We affirm on this issue.

V. Admission of Prior Bad Acts Evidence.

Claybon maintains the district court erred in failing to reinstate the issue of prior bad acts evidence. He asserts evidence of his participation in two prior assaults was wrongfully admitted because it was substantially more prejudicial than probative.

Iowa Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The district court found the evidence of Claybon's prior assaults was relevant to show Claybon engaged in sprees of random violence with fellow gang members and admissible to prove the parties' intent to conspire. On direct appeal, this court found the district court did not err. We also held the court's admission of the evidence, though prejudicial, did not warrant a reversal of the case, because "[t]here is substantial evidence in the record without the challenged testimony to support a finding that the defendant was guilty of first-degree murder and that the crime occurred while he was operating as a part of a gang." *State v. Claybon*, 487 N.W.2d 372 (Iowa App. 1992)(slip. op. at 8). The supreme court denied Claybon's request for further review on this issue, and there was no rehearing.

We accordingly find Claybon is precluded from relitigating this issue in postconviction proceedings. *Jones v. Scurr*, 316 N.W.2d at 911. Even if we allowed Claybon to raise this issue, we find the court did not abuse its discretion in denying

Claybon's motion to reinstate the issue of admission of prior bad acts evidence. We affirm on this issue.

We affirm the decision of the postconviction court in its entirety.

AFFIRMED.