FILED
OCT 25 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RICHARD K. GORDON,)

Plaintiff-Appellant,) Filed October 25, 1983

vs.)

STATE OF IOWA,) 3-245
2-69117

Defendant-Appellee.)

Appeal from Johnson District Court - August F. Honsell, Jr.

Plaintiff appeals from the district court decision denying his application for postconviction relief. AFFIRMED.

Philip Mears of Mears, Zimmermann & Mears, Iowa City, Iowa, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and Joseph P. Weeg, Assistant Attorney General, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden and Sackett, JJ.

SACKETT, J.

Plaintiff appeals from the district court decision denying his application for postconviction relief, asserting that the state's refusal to honor a "plea bargain" denied him fundamental fairness and that his subsequent entry of a guilty plea did not waive the issue.

After an evidentiary hearing the district court dismissed the application, finding that the circumstances did not warrant specific performance of the "bargain" and that the subsequent guilty plea had waived any defect. We affirm the trial court's denial of postconviction relief.

Postconviction relief actions under Iowa Code chapter 663A are law actions triable to the court and ordinarily are reviewed only on error. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981); Thomas v. State, 316 N.W.2d 182, 183 (Iowa Ct. App. 1981). However where, as here, there is an alleged violation of a constitutional safeguard, this court will make an independent evaluation of the totality of circumstances under which the postconviction ruling was made. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Thomas v. State, 316 N.W.2d at 183. This is the equivalent of a **de novo** review. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). The burden of proof in a postconviction action is on the petitioner to establish the facts asserted by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977).

Richard Gordon was picked up and arrested on June 27, 1978, on an old probation violation. At that time the police questioned Gordon about the June 16, 1978, death of Orville Iverson, and Gordon requested an opportunity to see counsel. On July 3, 1978, Gordon was interviewed at the Linn County jail by officer Evans of the Iowa City Police Department and Jeff Johnson, Gordon's probation officer. During the course of the interview, officer Evans stated:

> Now, as I . . . we will charge you with manslaughter, I believe, in the 2nd Degree which is an aggravated misdemeanor and that means you were present at the time

> of the death but it was a mutual thing . . . an agreement . . . you didn't have any premeditation. It was something you were both doing and it just happened to cause his death, which is an aggravated misdemeanor which is punishable by two years in jail, at the most, that's the top . . . . This has been agreed to by the Johnson County Attorney, who has jurisdiction, and myself, we were present when things were being said and this is the way it will be.

In fact, officer Evans was not authorized to make any plea bargain, so another statement was taken on July 5, 1978. During the course of that interview Gordon was told by Michael Dooley of the Bureau of Criminal Investigation that "I can't make you any deals. There's no police officer around here that can make you a deal. This has to be done by the county attorney after he gets a chance to look at all the statements and all the evidence involved and make the decision."

On July 12 Gordon was charged by information with second degree murder. Subsequent plea negotiations culminated in an agreement that Gordon would plead guilty to voluntary manslaughter in exchange for a dismissal of the second degree murder charge and a promise that he would not be charged with forgery in Linn County. The guilty plea was entered on September 20, 1978. Gordon did not, at that time, mention any prior agreements. The trial court found that the plea was voluntarily entered and had a factual basis. On October 19, 1978, Gordon was sentenced to a term not to exceed 10 years. He filed a pro se notice of appeal on December 20, 1978, and the Iowa Supreme Court granted Gordon's application for a delayed appeal. The basis for the appeal was that his guilty plea was not voluntarily and intelligently entered because the trial court failed to establish that he understood the nature of the charge. This court, on a review of the record, found the appeal to lack merit and affirmed the conviction. Gordon did not, at any time during his first appeal, raise the arguments now asserted.

Before postconviction relief may be granted, the postconviction applicant must show sufficient reason why any new ground for relief had not been previously asserted. Fryer v. State, 325 N.W.2d 400, 404 (Iowa 1982); Bledsoe v. State, 257

N.W.2d 32, 33-34 (Iowa 1977). The controlling statute is section 633A.8, The Code, which provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground 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. [emphasis added].

Even issues of constitutional magnitude will not be addressed in a postconviction action if they were not first raised in the trial court. Wenman v. State, 327 N.W.2d 216, 218 (Iowa 1982).

In this case the applicant, Richard Gordon, failed to raise the issue presented to this court at the trial court level. Gordon was clearly aware at the time he entered his guilty plea of the promise upon which he now relies in seeking relief. Gordon further failed to assert the issue at the time judgment and sentence was entered against him, as well as on his previous appeal to this court. The burden is upon the applicant in a postconviction proceeding to establish sufficient reason for his failure to previously assert any new ground for relief. Where, as here, the burden is not sustained, the applicant is not entitled to relief. Gordon's failure to establish a "sufficient reason" for not raising the issues now asserted at the trial court level is fatal to his application and constitutes a bar to the relief sought.

Because we find that Gordon has not carried his burden to justify his failure to raise the argument below bars the relief requested, we do not decide whether, in fact, an agreement existed or whether Gordon's subsequent entry of a guilty plea bars the relief sought.

AFFIRMED.