

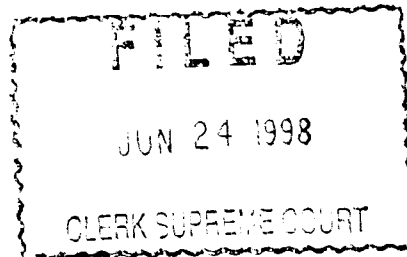
IN THE COURT OF APPEALS OF IOWA

No. 8-209 / 97-1052

RICKY EARL WAGNER,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Guthrie County, William H. Joy,
Judge.

Ricky Wagner appeals from the district court order dismissing his
postconviction relief application on summary judgment. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, and Mary L. Benton, County Attorney, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

CADY, C.J.

Ricky Wagner appeals the district court order summarily dismissing his application for postconviction relief. He claims the district court improperly granted summary judgment and his postconviction counsel was ineffective. We affirm the district court.

Wagner was convicted of first-degree murder, first-degree kidnaping, and first-degree sexual abuse following a jury trial. The district court sentenced him to a term of life imprisonment without parole. The conviction for first-degree sexual abuse was vacated on direct appeal on double jeopardy grounds.

Wagner subsequently filed an application for postconviction relief. In his application he claimed ineffective assistance of trial counsel because of counsel's failure to: (1) make a record after learning the sheriff entered the jury room and spoke with jurors; (2) voir dire a juror after discovering the juror had contact with an employee who was a friend or member of the victim's family; (3) object to spectator misconduct; (4) challenge a potential juror on bias; and (5) emphasize the inconsistencies in a witness' testimony.

The State filed a motion for summary judgment contending Wagner's claims were either waived because they were not raised on direct appeal or counsel was not ineffective as a matter of law. The postconviction court granted the motion. It determined appellate counsel was effective as a matter of law in handling the issue involving the contact between the sheriff and the jury, and Wagner did not show good cause for failing to raise the remaining issues on direct appeal.

On appeal Wagner maintains the postconviction court erred by granting summary judgment on the spectator misconduct claim. He also claims he received ineffective assistance of postconviction counsel.

I. Summary Judgment

Summary judgment may appropriately be considered in postconviction relief actions. Iowa Code § 822.6 (1995). The principles underlying summary judgment procedure in civil actions apply to summary dispositions in postconviction actions. *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994).

We review a summary judgment ruling for errors at law. *See Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 817 (Iowa 1997). However, to the extent Wagner raises constitutional claims, we conduct a de novo review. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

Summary judgment may be entered if the record shows "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 237(c). Thus, we must determine whether a genuine issue of material fact exists and whether the court correctly applied the law. *See Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610, 612 (Iowa 1996). We view the facts in the light most favorable to the party opposing the motion for summary judgment. *See Shriver v. City of Okoboji*, 567 N.W.2d 397, 400 (Iowa 1997). When a conflict in the record concerns only the legal consequences flowing from undisputed

facts, entry of summary judgment is proper. *See Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997).

In order to assert a claim for ineffective assistance of trial counsel in a postconviction proceeding, an applicant must ordinarily demonstrate preservation of his claim for review through a direct appeal. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). However, ineffective assistance of appellate counsel may provide sufficient reason or cause to permit the issue of ineffective assistance of trial counsel to be raised for the first time in a proceeding for postconviction relief. *LeGrand v. State*, 540 N.W.2d 667, 668 (Iowa App. 1995); *see also Collins*, 477 N.W.2d at 376 (ineffective assistance claim may be made in postconviction proceeding if applicant establishes sufficient reason or a cause for not raising it on direct appeal).

In its motion for summary judgment, the State included an affidavit from Wagner's appellate counsel detailing her awareness of the allegations of spectator misconduct based on her review of the record, together with her discussions with Wagner and her review of a letter sent to her by a person named Joyce Ritter. Based on the information, appellate counsel indicated she researched the issue, but did not believe the claim was sufficient enough to obtain a reversal or new trial. She made a professional decision to selectively pursue only those issues on appeal she felt had the best chances of success.

Wagner did not offer affidavits in response to the motion to challenge the professional judgment of appellate counsel. Instead, he claimed good cause existed for the failure to raise the spectator misconduct on direct appeal because his appellate

counsel's judgment was based on incomplete information. He alleged the spectator misconduct should have been pursued on direct appeal because the victim's family "comingled" with jurors in and near the public restroom in the courtroom, and the affidavit of appellate counsel did not reveal she was aware of this specific allegation.

We acknowledge appellate counsel's affidavit did not reveal knowledge of the specific allegation now raised by Wagner. At the same time, there is no evidence of the incident in the trial record, nor did Wagner allege he informed appellate counsel of the specific incident during the appeal.

When a motion for summary judgment is made and is properly supported, the adverse party may not rest on allegations in pleadings, but must set forth specific facts showing a genuine issue for trial. Iowa R. Civ. P. 237(e); *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989). In this case, Wagner failed to set forth facts to show the decision of appellate counsel not to raise the spectator misconduct claim was something other than reasonable appellate strategy. *See Stringer v. State*, 522 N.W.2d 797, 799 (Iowa 1996).

Wagner submitted no affidavits or other evidence to actually support a showing of contact or commingling between family members and jurors. Furthermore, the allegation itself did not refer to any specific improper actions, but merely alleged "commingling." Additionally, Wagner made no claim that he informed his appellate counsel of the allegation.

The State demonstrated the absence of any genuine issue of material fact concerning counsel's decision not to pursue the spectator misconduct claim, and

showed entitlement to judgment as a matter of law. It set forth specific evidence that appellate counsel investigated the issue and made a professional judgment to exclude it as an issue on direct appeal. Wagner was required to respond to this evidence with facts to raise a genuine dispute for trial. He failed to do this. His general allegation of spectator misconduct was insufficient to withstand summary judgment.

II. Postconviction Ineffective Assistance

A defendant can raise a claim of ineffective assistance of postconviction relief counsel. *See Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994). The right to effective assistance of postconviction counsel is statutory rather than constitutional. *Id.*; Iowa Code § 822.5. Insofar as our review involves statutory questions, we review for correction of errors of law. Iowa R. App. P. 4; *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996). When a postconviction applicant asserts a violation of constitutional safeguards, however, we make our own evaluation based on the totality of the circumstances. *Id.*

When considering the adequacy of an attorney's representation, we have observed:

... it is not enough to simply claim that counsel should have done a better job. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome.

Dunbar, 515 N.W.2d at 15.

Wagner claims he received ineffective assistance of counsel from his postconviction attorney by counsel's failure to: (1) submit affidavits in support of his

resistance to the State's motion for summary judgment; and (2) raise the issue of coaching of the State's witnesses by the grandmother of the victim.¹

Wagner's claim that postconviction counsel failed to submit affidavits in support of his resistance to the State's summary judgment motion and raise the issue of coaching the State's witnesses is too general to allow us to address the allegations or preserve them for a second postconviction proceeding. *See Dunbar*, 515 N.W.2d at 15. Wagner states only that his wife and a friend of hers could supply affidavits regarding contact between the victim's family and the jurors. He does not explain what the affidavits would have revealed or that anything improper occurred during the contact. Further, he does not specifically mention which jurors and family members encountered each other in the courthouse. Consequently, we cannot determine the outcome would have changed based upon these *vague* allegations of *possible* misconduct. Further, he has failed to state which witnesses were coached by the victim's grandmother and how it would have affected the outcome of his trial. Wagner has failed to overcome the presumption of counsel's competence and failed to specifically articulate how counsel's performance was so inadequate as to change the outcome of the postconviction court's ruling.

We have considered all of Wagner's claims and affirm the district court.

AFFIRMED.

¹ Initially, Wagner also challenged the trial attorney's handling of inconsistencies in DCI agent Julie Hamilton's testimony. He subsequently conceded the inconsistencies in Hamilton's testimony and the trial attorney's handling of her testimony would not provide a basis for ineffective assistance of counsel.