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IN THE COURT OF APPEALS OF IOWA

No. 3-105 / 91-1730

ROBERT ANTHONY WILLIAMS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Robert Anthony Williams appeals the denial of his application for postconviction relief which challenged his 1977 conviction for first-degree murder. **AFFIRMED.**

Francis C. Hoyt, Jr., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Thomas D. McGrane, Assistant Attorney General; and John Sarcone, County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

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DONIELSON, J.

Richard Anthony Williams, the defendant, appeals the denial of his application for postconviction relief.

In 1969, Williams was convicted of first-degree murder for the December 24, 1968, death of Pamela Powers. The conviction was subsequently overturned by the United States Supreme Court. Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). In 1977, Williams was retried and convicted, following a jury trial, of first-degree murder. Williams then appealed his conviction to the Iowa Supreme Court. The supreme court affirmed the conviction and preserved Williams' two claims of ineffective assistance of counsel for postconviction relief. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979).

Williams then filed a petition for habeas corpus relief in the United States District Court for the Southern District of Iowa which was denied in 1981. Williams v. Nix, 528 F. Supp. 664 (S.D. Iowa 1981). Williams appealed and the Eighth Circuit Court of Appeals reversed the decision of the United States District Court. Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983). In 1984, the United States Supreme Court reversed the Eighth Circuit and remanded the case for further proceedings. Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). On remand, the Eighth Circuit resolved the remaining issues in favor of the State, and the Supreme

Court denied certiorari. Williams v. Nix, 751 F.2d 956 (8th Cir. 1985), cert. denied, 471 U.S. 1138 (1985).

In 1985, Williams filed this application for postconviction relief. In 1986, the State filed a motion to dismiss which argued Williams had bypassed the State postconviction process by litigating his claim in federal court. In 1987, the district court denied the State's motion to dismiss finding the petition was Williams' first petition for postconviction relief and it pursued issues which had not been previously examined by any court.

In March 1991, a hearing commenced on Williams' petition for postconviction relief. Williams argued he received ineffective assistance of counsel by the following: (1) counsel's advice that Williams not testify in his own defense, (2) counsel's failure to introduce the testimony of Richard Boucher, (3) counsel's failure to properly address the issue of Dr. Wooters' change of testimony, and (4) counsel's failure to properly raise numerous issues to preserve them for appellate review. Williams also argued the cumulative effect of counsel's errors was so prejudicial so as to warrant a new trial. Finally, Williams' claimed he was denied a fair trial due to prosecutorial misconduct.

In October 1991, the district court entered its ruling denying the application for postconviction relief. The district court found Williams had preserved for postconviction relief only the two ineffective assistance

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of counsel claims which were raised in his direct appeal. The district court concluded Williams' trial counsel had not breached any essential duty by advising Williams to not testify or by failing to offer the testimony of Richard Boucher. The court found Williams failed to preserve error on the other claims presented in his petition. However, notwithstanding his failure to preserve error, the district court examined Williams' other claims and determined Williams had failed to establish ineffective assistance of counsel or prosecutorial misconduct.

Williams now appeals. He contends the district court erred in denying his application for postconviction relief. Specifically, Williams argues he was denied a fair trial due to ineffective assistance of counsel and prosecutorial misconduct.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

I. **Ineffective Assistance of Counsel.** Williams contends he was denied effective assistance of trial counsel in several respects.

We first examine whether Williams has properly preserved error on the claims of ineffective assistance of counsel. We concede Williams properly preserved error on the claims raised on direct appeal, including whether his trial counsel were ineffective "because they advised him not to testify in his own behalf, and because they failed to introduce the testimony of a witness which he claims supported his theory of the case." State v. Williams, 285 N.W.2d 248, 270 (Iowa 1979). However, in his application for postconviction relief, Williams raised two additional claims of ineffective assistance of counsel, including counsel's failure to properly address the issue of Dr. Wooters' change of testimony and counsel's failure to preserve numerous issues at trial for appellate review.

Williams contends he preserved error on these other claims because he raised the issue of ineffective assistance of counsel on direct appeal. We find Williams has not properly preserved error on these two additional claims. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless the defendant can establish, by a preponderance of the evidence, both sufficient reason for not having raised the issue at trial and on direct appeal and actual prejudice resulting from such error. State v. Jones, 479 N.W.2d 265, 271 (Iowa 1991).

Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct

appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Williams has made no showing he received ineffective assistance of appellate counsel. Further, where the defendant has been represented by the same attorney at trial and on direct appeal, there may be sufficient reason for the failure to raise the issue of ineffective assistance of counsel on direct appeal. Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982). However, here, unlike Jones, Williams' appellate counsel did raise the issue of ineffective assistance counsel on direct appeal, even though one of the appellate counsel was also one of the trial counsel. We find Williams has not demonstrated sufficient reason for not having raised on direct appeal the additional claims of ineffective assistance of counsel.

We therefore will only address the issues properly raised on direct appeal. Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality

of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

A. Counsel's Advice That Williams Not Testify. Williams first contends he received ineffective assistance of counsel because he was advised to not testify in his own defense at trial. Williams apparently planned to testify he had discovered the victim's body in his YMCA room, picked it up, and then concealed the body as he left the YMCA and fled in his car. Williams contended the reason he had fled with the body was "fear" as he had recently left a state hospital in Missouri.

At the postconviction hearing, Williams' trial counsel testified he believed if Williams had testified, certain

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otherwise inadmissible evidence could have been offered into evidence to impeach his testimony. Such evidence could have included the fact of his prior hospitalization or proof of a prior criminal proceeding in which Williams was found not guilty by reason of insanity of the sexual assault of two young girls. Furthermore, Dr. Gambill, a psychiatrist to whom Williams had made several admissions, could have been called to impeach any contradictory testimony Williams might have given at trial. Williams had told Dr. Gambill two different versions of what had happened, one being that he had molested and killed the victim. If Williams had testified he did not kill the victim, Dr. Gambill's testimony would have been admissible to impeach Williams. See State v. Tyron, 431 N.W.2d 11, 16 (Iowa App. 1989) (testimony of psychiatrist who examined defendant was admissible to impeach defendant and not subject to physician-patient privilege).

The decision to advise Williams to not testify in his own defense at trial was well within the range of normal competency. We find no breach of an essential duty in advising Williams to not testify.

B. Counsel's Decision to Not Introduce the Testimony of Richard Boucher. Williams also contends he received ineffective assistance of counsel by trial counsel's failure to introduce the testimony of Richard Boucher, a witness whose testimony Williams claims would have supported the theory of his case. At trial, the defense

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theory was to establish someone besides Williams actually killed the victim. In a deposition taken in 1977, Boucher testified he was a resident at the YMCA at the time of the murder. On the day in question, he heard "belligerent" sounds coming from the room of Albert Bowers, another resident at the YMCA. He believed Bowers had accosted the maid, but later discovered the maid was not involved. He then attributed the commotion to Bowers' drinking problem. After Boucher learned of the disappearance of the victim, he saw Bowers was packing and he reported this to the police.

By the time of Williams' trial, Bowers had died. In preparation for trial, defense counsel was exploring a theory that the murder was committed by a sterile male. In an attempt to shift the blame for the murder to Bowers, trial counsel had Bowers' body exhumed to determine if he was sterile. However, upon exhumation it was found Bowers was not sterile. Therefore, counsel did not wish to mention Bowers' name.

The decision to not call Boucher under these circumstances was a tactical decision. Nothing Boucher said in any way incriminated Bowers. At the time Boucher heard the "belligerent" noises, the victim had already disappeared. When counsel found they could not point to Bowers as a sterile male who may have been the perpetrator, they determined Boucher was not a necessary witness. The decision to not present Boucher's testimony under these

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circumstances was well within the range of professional competency. We find no breach of an essential duty in counsel's decision to not introduce Boucher's testimony.

Finally, Williams contends that even if the individual errors of counsel do not require a new trial, the cumulative prejudicial effect of the alleged errors does. On our review of the claims properly preserved by Williams, we have found no errors of counsel. Nevertheless, we determine any prejudicial effect which might have resulted from the above in no way warrants a new trial.

II. Prosecutorial Misconduct. Williams next contends the State engaged in prosecutorial misconduct and he was thus denied a fair trial. Specifically, he contends the State induced Dr. Wooters, a defense witness, to change his testimony and the State did not make two photographs of the victim's body available to the defense at the suppression hearing.

Again, we first must address whether Williams has properly preserved the issue of prosecutorial misconduct for postconviction relief. The claim of prosecutorial misconduct was never raised on direct appeal. Williams must show sufficient reason for not having raised this issue on direct appeal. State v. Jones, 479 N.W.2d 2265, 271 (Iowa 1991). Williams has demonstrated no reason for his failure to raise this issue on direct appeal. Therefore, we decline to address this issue.

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We find the district court properly denied Williams postconviction relief.

The costs of this appeal are taxed to Williams.

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.