IN THE COURT OF APPEALS OF IOWA

No. 0-78 / 89-286

FILED
APR 24 1990
CLERK SUPREME COURT

HUGHES ANDERSON BAGLEY, JR.,

Appellant,

vs.

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STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Plymouth County, Edwin L. Mitchell, Judge.

Appellant sought postconviction relief to challenge his 1984 conviction for possession of marijuana with intent to deliver. The district court denied postconviction relief, and Bagley has appealed. **AFFIRMED.**

Francis L. Goodwin, Sioux City, for the appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Robert J. Dull, County Attorney; for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

In 1984 a jury found Hughes Anderson Bagley, Jr., guilty of possessing marijuana with intent to deliver. The court granted Bagley a judgment of acquittal on another charge, possessing a simulated controlled substance with intent to deliver.

Bagley was convicted and sentenced on the marijuana charge. In 1986, the Iowa Court of Appeals affirmed the conviction on direct appeal.

Bagley filed the present postconviction action to challenge his conviction. The district court denied postconviction relief. Bagley has appealed.

Bagley contends during the 1984 criminal proceeding the State improperly withheld evidence which would have impeached its witness, Bagley's father, at a suppression hearing. Defendant's father had consented to a search of parts of his home, in which defendant lived. The allegedly improperly withheld evidence was photographs of the basement area which would impeach the father's testimony he stored things in this area of the basement.

The district court denied postconviction relief on the issue of improperly withheld evidence because of a failure to show sufficient reason for not asserting his claim previously and a failure to assert actual prejudice.

On appeal, Bagley argues the issue was novel at the time of the direct appeal and therefore defendant could not have been expected to raise it on direct appeal.

Defendant further raises as error the district court's finding the failure of a prospective juror to honestly answer questions on voir dire regarding the juror's son's prior conviction did not influence the verdict.

Bagley also contends the court in his 1984 criminal trial should have instructed the jury to disregard all evidence concerning simulated controlled substances, since the charge of possessing those substances had been dismissed. He once again argues the postconviction court erred by holding he could not raise this issue in his postconviction action because he had neither raised the issue on direct appeal nor shown a good reason for that omission. He argues he should be allowed to raise the issue in the postconviction action because the denial of due process was so serious.

Our scope of review on postconviction proceedings is for errors of law unless the appellant asserts constitutional violations. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Our reading of Bagley's brief leads us to conclude our review is for errors of law. Although Bagley states errors of a constitutional nature have occurred, he fails to specify the particular nature of those violations or refer us to case law which would help us understand his constitutional claim. We are therefore compelled to review this for errors of law.

I. Defendant claims some photographs allegedly not disclosed to the defense until after the suppression

hearing would have materially impeached a prosecution witness who testifed at the hearing. This claim was not raised at trial or on direct appeal. He asserts the "novel issue" exception utilized by the United States Supreme Court in Reed v. Ross, 468 U.W. 1, 13, 104 S. Ct. 2901, 2902, 82 L. Ed. 2d 1 (1984), is applicable to this case.

This exception is not applicable here. Issues not raised on appeal cannot be raised in a postconviction relief proceeding unless the applicant can show cause for failure to challenge the alleged errors and actual prejudice resulting from those errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). The "novelty of a claim exception," although not adopted by the Iowa Supreme Court, may be considered cause for failure to raise an issue on appeal if a court articulates a principle not previously recognized. Reed v. Ross, 468 U.S. at 17, 104 S. Ct. at 2911, 82 L. Ed. 2d. at 15.

Defendant states in his brief "[a]t the time of trial and the direct appeal in this case, a criminal defendant's right under the due process clause of the United States Constitution to evidence which impeached a critical witness in pretrial suppression matters was not establsihed. In fact, the matter is far from clear now." He does not refer us to a case which articulates a principle not recognized at the time of trial. The "novelty of issue" claim is not applicable to Bagley's case.

II. Defendant argues newly-discovered evidence one of the juror's failed to disclose during voir dire his son had once pled guilty to a drug offense requires a new trial because this ommission impeded his ability to intelligently exercise his right to lodge a peremptory challenge.

The district court concluded the record was devoid of any evidence which would support a finding the juror's failure to disclose his son's prior conviction influenced the verdict. We concur.

In order for jury misconduct for nondisclosure to be a sufficient ground for relief, the applicant must show the misconduct was calculated to and it is reasonably probable it did influence the verdict. State v. Hennessey, 405 N.W.2d 846, 849 (Iowa 1987).

We cannot say the juror's conduct in failing to disclose his son's conviction was calculated to or probably did influence the verdict.

III. Bagley was initially charged with drug trafficking of marijuana and with possession of a simulated controlled substance with intent to deliver. At the close of all the evidence, and before submission of the marijuana charge to the jury, the court entered judgment of acquittal on the simulated controlled substance charge. Bagley now argues the court erred in not admonishing the jury to disregard the evidence regarding possession of a simulated controlled substance.

This claim was neither raised at trial nor on direct appeal. He has not preserved the issue for this appeal.

AFFIRMED.