

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KENT R. BENADUM,)

Petitioner-Appellant,)

Filed January 26, 1983

vs.)

STATE OF IOWA,)

2-457

2-68298

Respondent-Appellee.)

Appeal from Boone District Court - R. K. Richardson, Judge.

Petitioner appeals from the trial court's denial of his application for postconviction relief under Iowa Code ch. 663A. AFFIRMED.

Steven K. Nalean of Nalean & Nalean, Boone, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for respondent-appellee.

Considered en banc.

PER CURIAM

Petitioner appeals from the trial court's denial of his application for postconviction relief under Iowa Code ch. 663A. As grounds for reversal, he claims: 1) he received ineffective assistance of counsel; 2) the trial court abused its discretion in failing to order a psychiatric evaluation of petitioner prior to his sentencing; and 3) the presentence investigation report contained inadequate and inaccurate information. We affirm.

I. The latter two claims may be dispensed with summarily. The trial court did not abuse its discretion in failing to order a psychiatric evaluation of petitioner. First, such an evaluation is not required; instead, one "may" be ordered "with the approval of the court." Iowa Code § 901.3. In addition, the record contains no evidence that such an evaluation was indicated. The fact that petitioner has had behavioral problems in the past is certainly not enough to mandate an evaluation. He admitted that he requested to be committed to the mental institution in Cherokee merely to avoid incarceration. Regarding the claim of inaccurate and inadequate information in the presentence investigation report, the mistakes mainly involved information such as age of petitioner's parents which could have had no bearing on his sentence. Petitioner does not claim any prejudice in this alleged error and none is evident from the record.

II. Petitioner also raises a claim of ineffective assistance of counsel prior to and during his entry of a guilty plea. The principles of our review of such claims were summarized as follows:

In a postconviction proceeding the petitioner has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. Snethen v. state, 308 N.W.2d 11, 14 (Iowa 1981). The petitioner must overcome a presumption that counsel is competent. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. When the claim of ineffective assistance of counsel is premised on the failure of counsel to take some action, the petitioner must demonstrate that (1) counsel failed to perform an essential duty, and (2) prejudice resulted.

Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). Here, the claim is that petitioner's original trial counsel was ineffective in failing to show petitioner the presentence report and thereby discover the inaccuracies therein and in failing to request a presentence psychiatric evaluation.

The postconviction court correctly ruled that petitioner did not receive ineffective assistance of counsel. As we have already stated, the inaccuracies in the presentence report were largely irrelevant to the sentencing decision and there was no basis for requesting a psychiatric evaluation in any event. In fact, we are convinced that petitioner received very effective assistance of counsel in a case which held little hope for petitioner. There was overwhelming evidence of his guilt in the three charges of breaking and entering, yet his counsel was able to negotiate a plea bargain whereby petitioner would plead guilty to one of those three charges while the other two, as well as a criminal trespass charge and some Nebraska charges, would be dismissed. In addition, petitioner's counsel was able to get the county attorney to agree not to recommend incarceration on the remaining charge. Counsel's performance was well within the "range of normal competency" referred to in Henderson.

Petitioner's application for postconviction relief was properly denied by the lower court. We affirm that decision.

AFFIRMED.