FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL ALLEN FISHER,)
Petitioner-Appellant,) Filed May 31, 1979
vs.)
STATE OF IOWA,) 117
2-62058
Respondent-Appellee.)

Appeal from Polk District Court - Harry Perkins, Jr., Judge.

Petitioner appeals from denial of his application for postconviction relief. Affirmed.

W. H. Gilliam, of Cedar Falls, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Kermit L. Dunahoo, Assistant Attorney General, for appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Petitioner Paul Allen Fisher appeals from the trial court's denial of his application for postconviction relief. Petitioner was convicted of larceny over $20 in violation of section 709.5, The Code 1973, and was granted probation which was later revoked. His direct appeal was dismissed by the supreme court as a "frivolous appeal" under Iowa R. App. P. 16 (now rule 104). Petitioner contends that he was denied the effective assistance of counsel at his district court trial and his right to counsel under the sixth amendment by the rule 16 dismissal of his direct appeal. Petitioner also contends that he may properly maintain an action seeking postconviction relief, and the state concedes that this action is not barred.

Review of postconviction relief actions involving constitutional issues is de novo, requiring an independent evaluation of the totality of circumstances under which the postconviction ruling was made. Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978); Cleeson v. State, 258 N.W.2d 330, 331 (Iowa 1977). The burden of proof in postconviction relief proceedings is on the petitioner who must establish facts asserted by a preponderance of the evidence. Id.

I. Effective assistance of counsel. Petitioner contends that the trial court erred in finding that he was not denied effective assistance of counsel. He maintains that his attorney failed to interview or call certain crucial defense witnesses, refused to allow petitioner to take the stand, and failed to apprise the trial court of juror misconduct.

The sixth amendment right to counsel means the effective assistance of an attorney. Cleeson, 258 N.W.2d at 331. A determination of competency is made by asking whether, under all the circumstances, counsel's performance was within the range of normal competency. State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978). Such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. Rand, 268 N.W.2d at 648.

In this case, petitioner has not shown a sufficient factual basis to prove by a preponderance of the evidence that his attorney's efforts fell outside the range of normal competency. The evidence adduced at the postconviction hearing showed considerable efforts on the part of defense counsel. The trial court specifically found

that the attorney met with his client; interviewed prospective witnesses for the defense; deposed witnesses for the prosecution; successfully resisted an attempt by the state to force defendant to reveal in advance of trial the names of potential witnesses; participated in a pre-trial conference with his client present; was indirectly responsible for the state conceding it could not prove the offense charged, i.e., larceny in the nighttime, and reducing the charge to larceny over $20; visited the scene of the crime; and discussed trial strategy with his client.

Petitioner was initially unwilling to testify on his own behalf, but apparently changed his mind during the course of the trial, when counsel succeeded in dissuading him from testifying. Petitioner alleged misconduct by the jury occurred when jurors began talking among themselves when the judge, petitioner and attorneys were in chambers, but was unable to produce any witnesses who directly observed the incident or who overheard what topic the jurors were discussing. Trial counsel did not remember petitioner reporting this incident to him.

The evidence of each alleged deprivation is at best vague and conflicting; in such a situation, we accord weight to the trial court's findings since it is in a better position to determine the credibility of the testifying witnesses. Iowa R. App. P. 14(f)(7). Petitioner has failed to meet his burden of proof.

II. Rule 16 dismissal. Petitioner further contends that the procedure under rule 16 (now rule 104) whereby appellate counsel is permitted to withdraw as counsel after determination that the appeal is frivolous is unconstitutional, denying him effective assistance of counsel, due process and equal protection of the law. Rule 16 complies explicitly with the guidelines set down in Anders v. California, 386 U.S. 738, 744-745, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493, 498 (1967), and is not constitutionally defective. See Walker v. Brewer, 189 N.W.2d 605, 610 (Iowa 1971). Petitioner's contention that his appellate counsel rendered him ineffective assistance in failing to pursue an appeal that counsel (and the supreme court) determined on the basis of the trial record was frivolous is not supported by the record. See State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1977).

The trial court's denial of petitioner's application for postconviction relief is affirmed.

AFFIRMED.