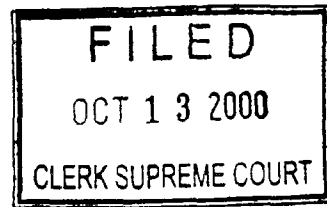


IN THE COURT OF APPEALS OF IOWA

No. 0-391 / 99-0895
Filed October 13, 2000



BENNIE PIERSON, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady,
Judge.

Applicant appeals from the district court order dismissing his application
for postconviction relief. **AFFIRMED.**

Ronald L. Ricklefs, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Todd D. Tripp, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., Miller and Hecht, JJ.

HECHT, J.

Bennie Pierson appeals from the district court order dismissing his application for postconviction relief. He contends the district court erred by denying his application for postconviction relief because (1) trial counsel was ineffective in various respects, and (2) newly discovered evidence raised sufficient doubt as to the accuracy of the jury verdict. We affirm the district court's denial of postconviction relief.

I. Factual Background and Proceedings. On September 15, 1994, Pierson and Michael Heiderscheit spent the evening drinking and talking with friends in Heiderscheit's apartment. After a while, they left the apartment and visited several bars. The last bar they visited together was Bully's in Cedar Rapids, Iowa. The testimony at trial indicated Pierson and Heiderscheit left the bar between 10:30 and 11:30 and Pierson returned alone between 11:30 and 1 a.m. One witness at trial testified she overheard Pierson say before leaving the bar that he was going to take Heiderscheit to the Roller Dam in Cedar Rapids and beat him up.

When Pierson returned to Bully's that evening, Jason Bartels, a friend of Pierson's, testified Pierson had a small amount of blood on his hand and was showing off a substantial amount of cash. Other witnesses testified Pierson showed them a wallet with a large amount of cash in it. Bartels also testified Pierson told him and another friend, Robert Gandy, he hit Heiderscheit. Heiderscheit's body was found three days later at the Roller Dam. He had been beaten badly and died of massive head injuries.

Pierson voluntarily went to the police station twice to give information regarding Heiderscheit's disappearance, once before the discovery of the body, and once after. He told police officers on the night Heiderscheit disappeared, he overheard two men at Bully's say they planned to take Heiderscheit to the Roller Dam, rob him, and kill him. He also told the officers about his actions on that night. He said after leaving the bar, he dropped Heiderscheit off at his apartment and then went to a Texaco gas station to buy beer. He stated he then went to another bar, Checker's, became sick and vomited in the bathroom. He said he got sick because "his insides were turning over because he knew he had done something bad." He maintains he does not remember anything after dropping Heiderscheit off at his apartment, except for hitting Heiderscheit in the face. He testified at the postconviction relief trial that he never returned to Bully's the evening of the murder, contrary to the testimony of many other witnesses.

A jury found Pierson guilty of second-degree murder. The district court sentenced him to fifty years of imprisonment on April 12, 1995. Pierson appealed his conviction to this court. Among other claims, appellate counsel raised the following claims of ineffective assistance of trial counsel: (1) counsel was ineffective for failing to adequately consult with Pierson in preparation for trial; specifically failing to interview witnesses, return phone calls or meet with him, and give him copies of police reports and depositions; and (2) counsel was ineffective for failing to object to leading questions asked by the prosecutor. This court determined his claims were not specific enough to warrant relief and did not preserve them for postconviction relief. *State v. Pierson*, 554 N.W.2d 555, 562-

63 (Iowa App. 1996). His conviction was affirmed on May 31, 1996. See *id.* at 555.

Pierson filed an application for postconviction relief on July 11, 1997. He raised the following claims in the application: (1) trial counsel was ineffective by failing to discover and introduce into evidence a videotape from a HandiMart in Cedar Rapids showing Pierson was in the convenience store the night of the murder; (2) trial counsel was ineffective for failing to pursue evidence of a conspiracy among the State's witnesses to frame Pierson for the murder; (3) trial counsel was ineffective for failing to call a sheriff's deputy to testify at a hearing on the motion to suppress, and (4) newly discovered evidence entitles him to a new trial. Trial was held on March 3 and 4, 1999, and the district court filed its order on May 3, 1999, dismissing Pierson's application.

II. Standard of Review. When a postconviction relief action implicates constitutional issues, our consideration is in the nature of a *de novo* review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). When no constitutional safeguards are at issue, our review is for errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). When reviewing for errors at law, we will not disturb the district court's denial of postconviction relief if the trial court's findings of fact are supported by substantial evidence and are justified as a matter of law. *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa App. 1990).

III. Merits. Pierson raises the following arguments in support of his case for postconviction relief. First, he claims a videotape from a HandiMart security camera shows he was in the convenience store at 12:05 a.m. the night of the

murder. Pierson claims this evidence proves his presence in the convenience store at or immediately after the State's estimation of the time of death. Pierson was in HandiMart twice on the night of Heiderscheit's death, once at 7:45 p.m. with Heiderscheit and then again at 12:05 a.m. alone. The police department discovered the videotape before the murder trial and knew Pierson had been in the store with Heiderscheit before going to the bar together. The tape was not offered in evidence during the murder trial.

Pierson claims the later portion of the tape exonerates him because it makes the State's timeline impossible. He claims it was not possible for him to be at the murder scene at the time of Heiderscheit's death and travel to the HandiMart by 12:05 a.m. Pierson further claims the videotape is exculpatory because it shows him wearing the same T-shirt during both visits to the convenience store, and proves the shirt was, at 12:05 a.m., clean and free from the bloodstains one would expect from the manner in which Heiderscheit was killed. He argues both that trial counsel was ineffective for failing to discover and utilize the later portion of the tape and that the later portion of the tape constitutes newly discovered evidence. Trial counsel testified he was aware Pierson and Heiderscheit had been in the HandiMart together earlier in the evening but could not remember whether he viewed any portion of the videotape.

Second, Pierson claims there is evidence several of his acquaintances, including Jason Bartels and Robert Gandy, participated in a conspiracy to frame him for the murder to hide their own involvement. He points to several inconsistent statements made by Bartels, Gandy, and others made before,

during, and after trial in support of his theory. After giving their initial statements to the police, both Bartels and Gandy spoke to officers again and stated they had heard a hammer had been used in the incident. They both implicated Pierson in their second statements to the police. There is also evidence in the record Bartels told some friends to "keep their mouths shut" regarding the information he had about the crime. Pierson presented evidence Bartels had a motive to frame him for the murder because Bartels and Pierson's brother, Scott Pierson, had been involved in committing a theft together and Scott had told police Bartels was involved. Pierson argues trial counsel was ineffective for failing to investigate the conspiracy and present evidence of it at trial. He also argues statements made by several witnesses after trial provide further evidence of the conspiracy and constitute newly discovered evidence.

Third, Pierson claims counsel was ineffective for failing to call a sheriff's deputy to testify at the hearing on Pierson's motion to suppress. The deputy was present for a portion of Pierson's interview with the police and would have testified some of the statements written down by the officers interviewing Pierson were not accurate reports of what was said during the interview. The deputy also would have testified Pierson did not admit to hitting Heiderscheit but rather indicated he could not remember what happened that evening. Although the deputy did not testify at the suppression hearing, he did testify at trial.

A. Ineffective Assistance of Counsel. The district court determined Pierson had not preserved error on his claims of ineffective assistance of counsel because he presented no evidence of ineffective assistance of appellate counsel

at trial. However, the district court also determined Pierson could not succeed on the substance of his claims because he did not prove the prejudice prong of ineffective assistance of counsel; in other words, he could not prove the outcome of his trial would have been different but for counsel's errors.

Postconviction relief is not a means for relitigating claims that were or should have been properly presented on direct appeal. *Washington v. Scurr*, 304 N.W.2d 231, 234-35 (Iowa 1981). Any claim not properly raised at trial or on direct appeal may not therefore be litigated in postconviction proceedings unless there is sufficient reason for not properly raising it previously. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). In order to raise an issue not previously raised in challenging a conviction, an applicant must show, by the preponderance of the evidence, sufficient reason or cause for failing to challenge the alleged errors, but also show actual prejudice resulting from the errors. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). 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).

Pierson alleges in his application for postconviction relief that the failure to raise these issues on direct appeal resulted from ineffective assistance of appellate counsel. However, at the postconviction relief trial, Pierson presented no evidence as to the ineffectiveness of appellate counsel. Appellate counsel was not deposed prior to trial and did not testify at trial. Without her testimony, it is difficult to perceive the circumstances surrounding appellate counsel's failure

to raise the issues on direct appeal. Furthermore, Pierson does not argue ineffectiveness of appellate counsel in his brief to this court on appeal.

To cure this deficiency on appeal from the denial of postconviction relief, Pierson attempts to show cause for appellate counsel's failure to raise the issue by arguing there was no basis in the trial court record on which to establish the claims of ineffectiveness of trial counsel now asserted on appeal. However, the Iowa Supreme Court has held all claims should be raised on direct appeal, even if the existing record is inadequate, to allow an appellate court to preserve them for postconviction relief. See *Berryhill v. State*, 603 N.W.2d 243, 245-46 (Iowa 1999). It is clear from the murder trial record the portion of the videotape Pierson claims is exculpatory was not presented as an exhibit at trial or otherwise made a part of the record. Accordingly, we affirm the district court's determination Pierson has failed to show sufficient reason for his failure to raise this claim of ineffective assistance of counsel on direct appeal.

As to Pierson's other claims, whether trial counsel was ineffective for failing to present evidence of a conspiracy and for failing to present a witness to testify at the suppression hearing, neither of those claims could have been fully addressed on direct appeal. These claims, like the one based on the videotape, were based on trial counsel's failure to act in some respect, which inherently is a claim not necessarily based on information in the record but possibly on information outside of the record. We acknowledge trial records are often inadequate to fully address ineffective assistance of counsel claims. See *Bugley v. State*, 596 N.W.2d 893, 897-98 (Iowa 1999). However, this merely explains

why claims of ineffective assistance of trial counsel are generally preserved for postconviction proceedings and does not provide sufficient reason for not raising the claim on direct appeal. *Id.* at 898 (citing *Collins*, 477 N.W.2d at 376-77).

Pierson buttresses his current claims of trial counsel's ineffectiveness by arguing they could not have been asserted on direct appeal because there was an absence of any evidence or information about the claims in the trial record. He contends cause or sufficient reason for not raising the issues exists because counsel had no way of knowing about the evidence supporting these claims. However, Pierson, his father, and his girlfriend testified at the postconviction trial they told trial counsel Pierson had been in the HandiMart around midnight on the night of the murder and asked trial counsel to investigate. Pierson also testified at the postconviction relief trial he told trial counsel to investigate the involvement of others in Heiderscheit's murder, including Jason Bartels, whom Pierson is now claiming conspired against him to hide his own involvement in the murder. Pierson's father also testified he told trial counsel to investigate the involvement of Robert Gandy and Jason Bartels. Furthermore, both Pierson and his father testified at the postconviction relief trial they told trial counsel the sheriff's deputy would be able to testify at the suppression hearing as to the validity of Pierson's statement to the police. Trial counsel stated in his deposition he had no recollection of discussing the videotape with Pierson or with his family. He also testified he did not present evidence of a conspiracy because the evidence was not strong enough to support the issue and he did not call the deputy to testify at

the suppression hearing because the witness had changed his story several times.

There is a clear inference from this testimony Pierson, his father, and his girlfriend raised the evidentiary matters to his trial counsel. Pierson did not testify he spoke to appellate counsel regarding the claims and offered no other evidence on the issue tending to prove appellate counsel was apprised of the claims of ineffective assistance of trial counsel raised in this appeal. Although, if proved, Pierson's assertions might be bases for a claim of ineffective assistance of appellate counsel, Pierson failed to prove them in district court. He also failed in this appeal to argue the specific ways in which appellate counsel was ineffective and how the outcome of his case would have been changed by competent representation. See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Pierson seems to be asking this court to make a presumption appellate counsel was ineffective without providing us any evidence or argument on the issue. To the contrary, when reviewing the totality of the circumstances relating to counsel's conduct, we presume counsel performed within the normal range of competence. See *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997).

In *Bugley*, the defendant raised a claim of ineffectiveness of trial counsel to appellate counsel. However, after appellate counsel specifically examined the record he did not raise the claim on direct appeal because he determined the record was inadequate to support it. *Bugley*, 596 N.W.2d at 898. Our supreme court determined this established sufficient cause for failing to raise the issue on direct appeal and permitted the defendant to raise the issue on postconviction

relief. *Id.* However, in the present case, there is no direct evidence Pierson raised the issue to appellate counsel and no evidence appellate counsel investigated the claim and did not raise it because the record was inadequate. As noted above, appellate counsel did not testify at the postconviction relief trial. Therefore, even if we presume Pierson raised the issues to appellate counsel, we cannot determine there was sufficient cause for not raising them on direct appeal because there is no evidence in the record regarding appellate counsel's performance, her actions, or her failures to act, regarding Pierson's case.

B. Newly Discovered Evidence. Pierson also claims the later portion of the HandiMart videotape and additional evidence of a conspiracy constitutes newly discovered evidence that entitles him to a new trial. A person may seek postconviction relief from his or her conviction if "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Iowa Code § 822.2(4). While Pierson raised his claim of newly discovered evidence below, the district court did not rule on the issue in its order denying postconviction relief and Pierson failed to file a motion pursuant to 179(b) of the Iowa Rules of Civil Procedure. A party must file a motion requesting the district court to enlarge or amend its findings in order to preserve an issue for appeal when the court fails to resolve an issue properly submitted to it for adjudication. See *Lawrence v. Grinde*, 534 N.W.2d 414, 418 (Iowa 1995); *Starling v. State*, 328 N.W.2d 338, 342 (Iowa App. 1982). Consequently, we find Pierson has failed to preserve error on his newly discovered evidence claim.

IV. CONCLUSION. After reviewing the record de novo, we affirm the district court's determination Pierson did not preserve his present claims of ineffective assistance of counsel for postconviction relief because he failed to show sufficient reason or cause for not raising them in his direct appeal. In addition, we conclude Pierson failed to preserve error on his claim of entitlement to a new trial to present newly discovered evidence. We affirm the district court's dismissal of Pierson's application for postconviction relief.

AFFIRMED.