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IN THE COURT OF APPEALS OF IOWA

Filed March 31, 1987

CHARLES A. TROBAUGH,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

425

6-444
86-301

Appeal from the Iowa District Court for Jefferson County (No. CL 1090-078) - Dan F. Morrison, Judge.

Petitioner appeals from the trial court's summary denial of his second application for postconviction relief. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender for petitioner-appellant.

Thomas J. Miller, Attorney General; Bradley V. Black, Assistant Attorney General; and Ronald W. Kelly, Assistant Jefferson County Attorney, for respondent-appellee.

Heard by Oxberger, C.J., Snell and Hayden, JJ.

OXBERGER, C.J.

Petitioner Charles Trobaugh appeals from the district court's order summarily dismissing his second application for postconviction relief. The district court entered its order dismissing the application after concluding that the basis for relief alleged therein had previously been disposed of. Trobaugh complains that the dismissal was improvident. We affirm.

The procedural events underlying this proceeding are relatively complex. In 1976, Trobaugh pled guilty to first degree arson in violation of Iowa Code section 707.1(1975) (arson to a dwelling house and parcels thereof). After his conviction and sentence, Trobaugh filed a general notice of appeal. Trobaugh's appellate attorney subsequently filed an application for withdrawal on the ground that the appeal was frivolous, and the supreme court entered a ruling dismissing the appeal. Trobaugh then filed his first application for postconviction relief, alleging that his guilty plea had not been premised upon a factual basis sufficient to support a finding of guilt under section 707.1; rather, Trobaugh maintained that the facts properly supported a conviction under section 707.2 (arson to miscellaneous buildings), which carried a lesser penalty. In support of this contention, Trobaugh argued that the structure which he set ablaze was unoccupied at that time because it was being remodeled, and therefore could not be characterized as a "dwelling house" within the purview of section 707.1. The application was denied, and no appeal was taken.

In July of 1985, Trobaugh filed a second petition for postconviction relief, which provides the basis of this appeal. In this petition, Trobaugh again argued that he had not set fire to a "dwelling house" within the meaning of section 707.1. The district court granted the State's motion for summary dismissal, finding that Trobaugh's argument had been disposed of both by the supreme court's ruling dismissing his direct appeal and the district court's order denying his initial petition

for postconviction relief. Trobaugh challenges this conclusion, alleging that the supreme court's ruling is not dispositive and that he is not barred by the denial of his claim in the first postconviction action because his attorney rendered ineffective assistance in failing to appeal the adverse order entered therein.

Because Trobaugh has alleged a violation of constitutional safeguards, we make our own independent evaluation of the entire record under which the district court's ruling was made. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). This is the equivalent of a de novo review. Id. The burden of proof, however, is upon the petitioner to establish the facts asserted by a preponderance of the evidence. Snyder v. State, 262 N.W.2d 574, 576 (Iowa 1978).

The principles governing our review of a district court's summary dismissal of a postconviction petition are similar to those applicable when reviewing the grant of a motion for summary judgment in civil proceedings. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981). Accordingly, our postconviction procedure permits summary disposition when it appears after an examination of the pleadings and evidence that "there is no genuine issue of material fact." Iowa Code § 663A.6 (1985); see also Boge, 309 N.W.2d at 430. A genuine issue of material fact precluding summary disposition is said to exist if reasonable minds could draw different inferences and reach different conclusions from the facts presented. State v. Dryer, 342 N.W.2d 881, 883 (Iowa Ct. App. 1983). With these principles in mind, we turn to the merits of this appeal.

Initially, we disagree with the district court's conclusion that the supreme court's ruling dismissing Trobaugh's direct appeal precludes him from challenging the factual basis of his plea in a postconviction action. Recently, in Munz v. State, 382 N.W.2d 693 (Iowa Ct. App. 1985), we were confronted with an identical issue. In Munz, we relied upon Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 34 (Iowa 1979), in holding that a defendant may pursue postconviction relief

after the dismissal of his direct appeal if the dismissal was resisted in a timely manner. Munz, 382 N.W.2d at 695; see also Stanford v. Iowa State Reformatory, 279 N.W.2d at 34 ("[A] . . . dismissal which is contested or objected to by the appellant does not prevent issues which could have been presented upon direct appeal from being embraced in a petition for postconviction relief. . . ."). The record in the instant case discloses that Trobaugh timely resisted the dismissal of his appeal; as such, we conclude that the dismissal poses no bar to his postconviction claim.[1]

We agree with the district court's finding, however, that Trobaugh's claim was conclusively determined in the first postconviction action and consequently, that he is precluded from relitigating the identical issue in this proceeding. Iowa Code section 663A.8 bars a postconviction applicant from relitigating any grounds finally adjudicated or waived. In relevant part, that section provides as follows:

> . . . Any ground finally adjudicated or not raised or . . . waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 663A.8 (1985).

Clearly, the record discloses no genuine issue of material fact concerning Trobaugh's presentation of his claim at the first postconviction proceeding and the court's adverse ruling therein. Trobaugh argues, however, that an issue of

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[1]We do not think that this conclusion is at odds with the supreme court's decision in Snyder v. State, 262 N.W.2d 574, 577 (Iowa 1978). In Snyder, the court found that the petitioner was barred from pursuing his request for postconviction relief. In ruling on the dismissal of the direct appeal, however, it appears that the supreme court reached the merits of the precise contentions raised in the postconviction petition; the same cannot be said of the court's general rulings dismissing the appeals in the present case and Munz.

material fact exists concerning his attorney's alleged ineffective representation in failing to appeal that ruling. Trobaugh maintains that his attorney's alleged error thus permits this action under the latter portion of section 663A.8. We disagree.

When a defendant alleges that a specific act or omission on the part of his attorney resulted in the ineffective assistance of counsel, he must prove two conditions in order to prevail: (1) that counsel failed to perform an essential duty, and (2) that prejudice resulted therefrom. Munz v. State, 382 N.W.2d at 697. Our ultimate inquiry is whether, under the record as a whole, counsel's performance was within the normal range of competency. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Moreover, the defendant must demonstrate a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. Munz, 382 N.W.2d at 697 (quoting Strickland v. Washington, 466 U.S. 668, 694-95, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984)). It is incumbent upon the defendant to establish his claim by a preponderance of the evidence. Munz, 382 N.W.2d at 697.

Our de novo review of the record and our examination of the applicable case law persuades us that Trobaugh has failed to establish that he could have prevailed if his attorney had appealed the first postconviction order. Consequently, we conclude that no prejudice has been demonstrated, and that no genuine issue of material fact exists concerning the effectiveness of the attorney's performance.

The statute under which Trobaugh was charged and convicted, Iowa Code section 707.1 (1975), does not define the term "dwelling house." We have recognized, however, that common law definitions of the elements of arson are applicable if the arson statute fails to provide an adequate definition. State v. Ferguson, 233 Iowa 354, 356, 6 N.W.2d 856, 857 (1942). We have examined a number of decisions considering this issue, and have discerned the general rule

that a temporarily unoccupied structure may nevertheless be a dwelling house within the meaning of arson statutes. See 5 Am.Jur.2d Arson and Related Offenses 317 (1962). A number of principles emerge as bearing upon this determination, such as whether the structure is fit for habitation, how long it has been unoccupied, and whether anyone intends to occupy it in the future. See People v. Foster, 103 Mich. App. 311, 313, 302 N.W.2d 862, 864-65 (1981); see also State v. Vickers, 291 S.E.2d 599, 605-06 (N.C. 1982), (requirement of "inhabitation" does not necessitate "occupation" of structure); Smith v. State, 270 N.E.2d 743, 744 (Ind. 1971) (home which was unoccupied but for which landlord was seeking a tenant considered a dwelling house); People v. Losinger, 331 Mich. 490, 496, 50 N.W.2d 137, 143, cert. denied, 343 U.S. 911, 72 S.Ct. 644, 96 L.Ed.2d 1327 (1952) (cabin used only sporadically but to which owner intended to return to retire considered dwelling house). By contrast, those structures which have been held to fall outside the definition of a dwelling house have generally been uninhabitable or abandoned. 6A C.J.S. § 16 (1975); see also e.g., Fillman v. State, 251 A.2d 557, 558 (Del. 1969) (no arson where structure had been uninhabited for nearly five years, dilapidated with broken windows and open door, and no utilities); P.P.M. v. State, 447 So.2d 445, 446 (Fla.App. 1984) (house boarded up and abandoned for four years, no evidence of intent to return); People v. Foster, 103 Mich. App. at 313, 302 N.W.2d at 864 (house abandoned, windows and door broken, infested with rats); People v. Reed, 13 Mich. App. 75, 77, 167 N.W.2d 704, 705-06 (1969) (house unoccupied for over a year, boarded up by fire officials, uninhabitable at time of fire).

The only facts adduced at Trobaugh's first postconviction hearing were that the structure had been unoccupied for a period of three months while it was being remodeled. The record reflects that the owner had intended to move back in when the remodeling was finished. On the basis of these facts, the struc-

ture was clearly a dwelling house as that term has been defined in the cases discussed above. In these circumstances, it is evident that Trobaugh's attorney would not have prevailed if he had appealed the first postconviction court's decision. The facts did not support Trobaugh's claim and as such, it lacked merit. We have repeatedly recognized that an attorney's failure to appeal a nonmeritorious claim is not a denial of effective assistance of counsel. Hall v. State, 360 N.W.2d 836, 839 (Iowa 1985).

We conclude that Trobaugh has waived further review of his claim and that no genuine issue of material fact precluding summary disposition exists. Accordingly, the dismissal is affirmed.

AFFIRMED.