

IN THE COURT OF APPEALS OF IOWA

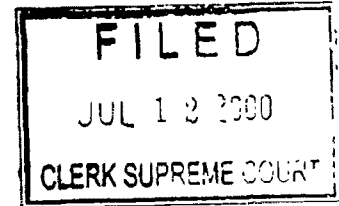
No. 0-337 / 99-1239

Filed July 12, 2000

KENNETH SHUE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Clay County, Joseph Straub,
Judge.

The applicant appeals from the summary dismissal of his application for
postconviction relief. **AFFIRMED.**

Pamela Wingert of Stoller & Wingert, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Michael L. Zenor, County Attorney, and Michael J. Houchins, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

In this appeal from summary disposition of an application for postconviction relief, Kenneth Shue contends the plea taking court should have allowed him to withdraw his guilty plea to third degree sexual abuse. The postconviction relief court rejected this contention on the merits and dismissed Shue's postconviction relief application. We affirm, concluding Shue waived error.

I. Background Facts and Proceedings

Shue pled guilty to third degree sexual abuse, in violation of Iowa Code section 709.4(2)(c)(4) (1995). On November 13, 1996, the district court entered judgment and sentenced him to an indeterminate prison term not to exceed ten years and a fine of \$500. Shue appealed. His appointed appellate counsel moved to withdraw pursuant to Iowa Rule of Appellate Procedure 104, governing frivolous appeals. Counsel attached a letter to the motion which reflected he had advised Shue of his intent to seek to withdraw and of Shue's right to challenge the motion by writing to the clerk of court within thirty days. Shue did not resist the motion and the Iowa Supreme Court dismissed the appeal.

On October 30, 1998, Shue filed an application for postconviction relief, claiming: (1) he was coerced by the prosecution and defense attorney into changing his "not guilty" plea to "guilty"; (2) the court did not consider evidence that the victim recanted; and (3) his plea was not knowing and voluntary. Shue's appointed counsel amended his application and reframed the issues. Counsel alleged Shue was not notified of an intent to reject his plea, the decision to accept or reject the plea was not deferred, and Shue was not given an

opportunity to withdraw the plea. The parties filed cross-motions for summary disposition which addressed the merits of Shue's postconviction relief application. The district court considered the motions and dismissed the application.

On appeal, the State asks us to affirm dismissal of the application on the alternate ground that Shue waived error. We may uphold a district court ruling on a ground not urged before the district court, as long as the ground is supported by facts in the record or can be decided as a matter of law. *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 790 (Iowa 1999); see also *State v. Terry*, 569 N.W.2d 364, 368 (Iowa 1997). We agree with the State that this appeal may be resolved as a matter of law on this alternate ground.

II. Waiver of Error

This case implicates at least two error preservation concepts. First, a defendant who wishes to challenge a plea must file a motion in arrest of judgment within 45 days after a plea is taken. Iowa R. Crim. P. 23(3)(a), (b); *State v. Gant*, 597 N.W.2d 501, 504 (Iowa 1999). Failure to file the motion will preclude a defendant from challenging the plea on appeal, unless the failure is due to ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Second, Iowa Code section 822.8 requires a postconviction relief applicant to raise all grounds for relief available to the applicant in the applicant's original, supplemental or amended 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." We have interpreted this section ". . . to impose a burden upon a postconviction relief

applicant to show sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal." *Bugley v. State*, 596 N.W.2d 893, 896 (Iowa 1999). Shue must not only show sufficient reason for not properly raising these issues previously but he must also demonstrate actual prejudice resulting from the alleged errors. *Osborne v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984) (modifying *Redding v. State*, 274 N.W.2d 315 (Iowa 1979) to require a showing of actual prejudice in addition to cause). We have stated ineffective assistance of appellate counsel or postconviction counsel may furnish sufficient reason for failure to raise an issue on direct appeal. *Osborne*, 573 N.W.2d at 921; *Collins v. State*, 588 N.W.2d 399, 402-03 (Iowa 1998).

Shue had a number of opportunities to challenge the plea proceedings. He could have: (1) filed a motion in arrest of judgment within forty-five days after his plea was taken; (2) raised the plea withdrawal issue on direct appeal by asserting his trial counsel was ineffective in failing to raise the issue in an arrest of judgment motion; or (3) raised the issue in his original or amended application for postconviction relief by asserting trial and appellate counsel were ineffective in failing to raise the issue earlier. Shue did not avail himself of any of these opportunities. First, he did not file a motion in arrest of judgment to challenge his plea. Second, the only issue he raised on direct appeal was whether the trial court erred in sentencing him to a prison term rather than granting him probation. He did not raise the plea withdrawal issue he now raises, nor did he assert that trial counsel was ineffective in failing to raise this issue in an arrest of judgment motion. Additionally, Shue filed no resistance to his appellate attorney's motion

to withdraw, although he was given an opportunity to do so. *See Bugley*, 596 N.W.2d at 897 (noting applicant who fails to resist a rule 104 motion may be precluded from asserting grounds in a subsequent postconviction relief action if applicant fails to establish sufficient reason for raising the grounds in a resistance). Finally, neither Shue's original nor amended postconviction relief application alleged that trial or appellate counsel was ineffective in failing to raise the plea withdrawal issue.

Shue raised his ineffective assistance of counsel claim for the first time in his appeal brief to this court, stating, "this error was compounded by ineffective assistance of Shue's trial and appellate counsel and by the post conviction court's failure to correct the error." Shue further stated in his reply brief that he "was deprived of his right to a direct appeal by the actions of his appellate counsel who moved to dismiss Shue's appeal without his approval."¹ However, Shue furnished no evidence to refute appellate counsel's assertion that he advised Shue to contact the clerk of court if he disagreed with the contents of counsel's motion to withdraw. We conclude Shue's belated and unsupported assertions that his trial and appellate counsel were ineffective do not constitute

¹ Appellate postconviction relief counsel was the same as trial postconviction relief counsel. This counsel asserted on appeal that trial and appellate counsel were ineffective in failing to raise the plea withdrawal issue. She did not, however, assert that she herself was ineffective in failing to raise ineffective assistance of trial and appellate counsel in Shue's amended application for postconviction relief. Nevertheless, we have stated it would not be reasonable to expect counsel to raise her own ineffectiveness. *Bear v. State*, 417 N.W.2d 467, 472 (Iowa App. 1987). Therefore, in analyzing whether sufficient reason exists to bypass a direct appeal, we have disregarded the fact that present counsel did not assert she was ineffective and have analyzed only whether the reason she proffered on appeal for bypassing a direct appeal is "sufficient."

sufficient reason for bypassing direct appeal. Accordingly, we conclude Shue waived error and we affirm dismissal of his postconviction relief application.

AFFIRMED.