

IN THE COURT OF APPEALS OF IOWA

No. 4-372 / 93-1174

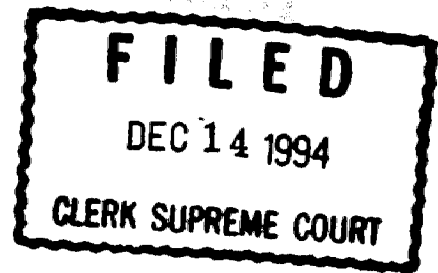
ISAAC LESLEY NEAL, JR.,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Scott County,
Charles H. Pelton, Judge.

The defendant challenges the order denying his
application for postconviction relief. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Assistant Attorney General, and William E. Davis, County
Attorney, for appellee.

Considered by Habhab, P.J., Huitink, J., and Perkins,
S.J.*

*Senior judge from the Fifth Judicial District serving
on this court by order of the Iowa Supreme Court.

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PERKINS, S.J.

This is an appeal from dismissal of an application for postconviction relief.

Isaac Lesley Neal, Jr. was convicted of first-degree kidnapping after a 1982 jury trial. Neal took direct appeal of his conviction to our supreme court. On appeal, Neal raised issues of insufficiency of the evidence and ineffective assistance of counsel for failing to attack allegedly suggestive identification procedures. The supreme court affirmed Neal's conviction. State v. Neal, 353 N.W.2d 83 (Iowa 1984).

By application filed June 29, 1987, Neal sought postconviction relief on the basis of ineffective assistance of counsel in several particulars. That petition was denied by the trial court. Neal appealed again to our supreme court. On April, 16, 1990, the appeal was dismissed as frivolous under Iowa Rules of Appellate Procedure 32 and 104.

On June 26, 1991, Neal filed a second application for postconviction relief in the trial court. Neal claimed the jury pool did not reflect a fair cross-section of the community. In addition to the constitutional claim, Neal alleged the jury pool was inadequate under provisions of the Iowa Code. Specifically, Neal alleged the jury pool was selected from only two sources and the Iowa Code required use of additional sources.

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In its motion of summary judgment filed August 21, 1991, the State pointed out that under Iowa Code section 609.1 (1981), the jury commission was required to use only one source list. This requirement was in effect at the time of Neal's 1982 trial.

In the resistance to summary judgment, Neal admitted the statute requiring more than one source list was enacted after his trial. However, Neal continued to argue the constitutional issue involving a fair cross-section of the community was valid and must be litigated.

The trial court ruled on October 23, 1991. The trial court granted the State's motion for summary judgment on the statutory issue.

After partial dismissal was granted, the State filed a second motion for summary judgment. The State argued the constitutional claim was not preserved. Further, the State claimed Neal could not establish minorities were systematically excluded from the jury pool.

The trial court ruled Neal had waived the constitutional challenge by failing to allege ineffective assistance of counsel on that issue on direct appeal, or in his first postconviction action. The trial court concluded Neal did not show sufficient reason for not raising the constitutional challenge in the prior proceedings. Neal appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290

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N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Neal did not raise this ineffective assistance ground on direct appeal. If a defendant fails to raise the issue of ineffective assistance of trial counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Postconviction proceedings are not an alternative avenue for litigating issues that were not properly preserved for review on direct appeal. Polly v. State, 355 N.W.2d 849, 855 (Iowa 1984) (citations omitted).

To properly present a new claim of error on postconviction, Neal must show "cause" for failure to challenge the error at trial and actual prejudice resulting from the alleged error. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989) (citations omitted). A defendant will not ordinarily be allowed to claim postconviction relief for issues not presented on direct appeal. Id.

Neal has failed to carry his burden of showing sufficient reason why his claim of ineffective assistance of counsel on these grounds was not raised on direct appeal

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or in the first postconviction relief action. The facts of the trial proceedings giving rise to this claim were known to Neal at the time his direct appeal was taken. The facts were also known, of course, at the time of his first postconviction relief action. Neal is not relying on any facts outside the record which he developed on postconviction to support his ineffective assistance claim. He did not make any new evidentiary record on postconviction. We decline to consider an issue Neal had an opportunity to raise not once, but twice before.

We hold that Neal has exhausted his remedies by previously making assertions of ineffective assistance of counsel on both direct appeal and in the first application for postconviction relief, both of which failed. He is now precluded from relitigating the same issue. Thus, the trial court was correct in granting the State's motion for summary judgment.

Judgment of the trial court affirmed.

AFFIRMED.