IN THE COURT OF APPEALS OF IOWA

No. 8-263 / 97-59

WARREN L. WILLIAMS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Warren L. Williams appeals from a district court ruling denying his application for postconviction relief following his conviction of willful injury. **AFFIRMED.**

Maria Ruhtenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Mahan, and Vogel, JJ.

PER CURIAM.

Applicant-Appellant, Warren Williams, appeals from a district court ruling denying his application for postconviction relief following his conviction for willful injury. Williams contends he received ineffective assistance of counsel in the postconviction relief proceedings. We affirm by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Williams filed an application for postconviction relief, which he later amended. Both the original and amended applications raised a number of issues, only some of which are involved in this appeal. Immediately prior to the postconviction relief hearing, Williams moved to recuse the presiding judge. The motion was denied. The district court subsequently denied Williams' application for postconviction relief.

Williams appeals. He does not directly challenge the court's ruling on his application, but rather argues his postconviction relief counsel was ineffective in presenting several issues at the hearing. At the hearing, Williams claimed he was not present in the judge's chambers at the original trial during a discussion of a question from the jury. Williams argues his postconviction relief counsel was ineffective because he did not depose the attorneys involved in the proceeding and was unprepared when they indicated they had no memory of what transpired.

Secondly, Williams' claimed his trial counsel failed to investigate and present a self-defense theory. Williams contends his postconviction relief counsel was ineffective in investigating the issue and developing facts to show the viability of the

defense at the original trial. The State responds this issue was raised on direct appeal and can not be raised again in the post-conviction relief proceedings.

A third contention raised by Williams was a photo line-up involved during his trial was improper. Williams contends his postconviction relief counsel was ineffective in failing to develop the significance of this allegation. Williams also complains his counsel failed to pursue a revelation by the juror that she had been shot in neck. Williams believes the juror should have been excluded from the jury.

Finally, Williams also argues his postconviction relief counsel was ineffective in handling the motion to recuse. He complains he directed his counsel to seek recusal five months prior to trial, but no motion was made until the time of trial, and his counsel failed to support the motion adequately.

The State contends Williams' ineffective assistance claims may be rejected on direct appeal. In the alternative, the State requests that they be preserved for further postconviction relief proceedings.

Our review of postconviction proceedings is for correction of errors of law. *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996). When the appellant, however, raises constitutional claims, such as ineffective assistance of counsel, our review is de novo. *State v. Hoeck*, 547 N.W.2d 852, 862 (Iowa App. 1996).

Postconviction proceedings are governed by Iowa Code chapter 822. Section 822.8 requires an applicant to raise all grounds available for relief in the application. This is to prevent piecemeal litigation of grounds for relief. *Redding v. State*, 274

N.W.2d 315, 317 (Iowa 1979). Section 822.8 also bars an applicant from seeking relief "on any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived" in the trial or on direct appeal. *Id.*

An applicant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice an applicant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In alleging ineffective assistance, an applicant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

From our de novo review of the record, we find the underlying issues which Williams asserts his postconviction counsel did not effectively present at the postconviction relief hearing were not raised on direct appeal. They would therefore be barred by Iowa Code section 822.8. Since they cannot be raised in the postconviction proceeding, Williams' postconviction counsel cannot be ineffective in presenting them at the postconviction hearing. In addition, the claims were too

general to permit us to address them or preserve them for a later postconviction proceeding. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We therefore affirm the postconviction court's denial of relief on these grounds.

The sole remaining issue is whether postconviction counsel was ineffective in presenting the request for recusal. We conclude the record before us is insufficient to resolve this issue and therefore preserve this claim for further proceedings so that the facts may be developed and the allegedly ineffective attorney may have an opportunity to explain his conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

AFFIRMED.