IN THE COURT OF APPEALS OF IOWA

No. 0-373 / 89-1198

4

ADOLFO RODRIGUEZ AGUILAR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Harry Perkins, Judge.

Aguilar sought postconviction relief to challenge his 1981 conviction for first-degree murder. The district court denied postconviction relief, and Aguilar has appealed. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; James Smith, County Attorney; and William Thomas, Assistant County Attorney, for appellee.

Considered en banc.

DONIELSON, J.

In 1981 Adolfo Rodriguez Aguilar was convicted of first-degree murder, following a jury trial. The Iowa Supreme Court affirmed this conviction upon direct appeal. State v. Aguilar, 325 N.W.2d 100 (Iowa 1982).

In 1987 Aguilar challenged his murder conviction by applying for postconviction relief. The district court denied postconviction relief and Aguilar has appealed.

Aguilar contends he received ineffective assistance of counsel during his 1982 direct appeal. He asserts his appellate attorney failed to argue on appeal that Aguilar should have been granted a mistrial because the prosecutor had used peremptory challenges and strikes to remove non-white persons from the jury. We now affirm.

Proceedings under Iowa Code Chapter 663A are civil actions at law and ordinarily reviewed on error. When there is an alleged denial of constitutional rights, however, we make our own evaluation of the totality of the circumstances in a de novo review. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984). A postconviction claim of ineffective assistance of counsel asserts a violation of constitutional safeguards, see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985), and therefore our review is de novo.

It is undisputed that Aguilar did not raise the jury selection challenge on appeal. Iowa Code section 663A.8 generally bars applicants in postconviction actions from assigning grounds for relief which were not asserted on direct appeal, unless the court finds "sufficient reason" for the failure to assert the ground in that proceeding. In order to assign new error challenging a conviction, an applicant must not only show "sufficient reason" for failure to challenge the alleged errors on direct appeal, but also show actual prejudice resulting from these errors. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989), and authorities.

Ineffective assistance of counsel may satisfy the "sufficient reason" of section 663A.8. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984). To establish a claim of ineffective assistance of appellate counsel, the postconviction relief applicant must show: (1) that counsel's performance was so deficient as not to be functioning as "counsel" guaranteed by the sixth amendment; and (2) that the deficient performance prejudiced the defense. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). Representation by counsel is presumed to be competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

In Aguilar's postconviction hearing, Aguilar's counsel from the direct appeal (who was also trial counsel) testified that he elected not to assign the jury selection challenge as error on appeal because he had researched the issue but did not discover any favorable case law to support a successful challenge.[1] He also testified that, as a general practice, he raises on appeal only those issues offering a defendant the best chance for reversal of the conviction.

Iowa courts have recognized that an appellate lawyer can reasonably decide not to press a particular issue on appeal, even though the issue is not frivolous. An attorney does not render ineffective assistance in making a professional judgment as to the strength of an argument. "Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal." Kane, 436 N.W.2d at 627-28, citing Cuevas, 415 N.W.2d at 633.

Aguilar has made no showing he could have produced evidence of systematic exclusion of minorities from juries by the prosecutor in Polk County. Counsel's testimony reveals no indication a showing of systematic exclusion over a period of time could have been made on Aguilar's appeal. Under the governing case law of the time, such a

---

1. Aguilar's appeal was prosecuted before Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986), was decided. At the time of Aguilar's appeal, equal protection challenges to jury selection practices were governed by Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). See Wright-Bey v. State, 444 N.W.2d 772 (Iowa App. 1989). Under Swain, no prima facie showing of purposeful discrimination could be made based on the striking of minorities from the jury in one particular case. Id. at 221, 85 S. Ct. at 836, 13 L. Ed. 2d at 773. A criminal defendant, contending the prosecutor excluded minorities from juries by misusing the peremptory-challenge system, was required to show that the prosecutor had systematically excluded blacks from juries over a period of time. Id. at 227, 85 S. Ct. at 839, 13 L. Ed. 2d at 776.

showing was required in order to successfully raise an equal protection challenge to the jury selection process. See Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965). Appellate counsel's decision not to raise this issue on direct appeal was a "judgment call which we find was reasonably warranted." Kane v. State, 436 N.W.2d 624, 628 (Iowa 1989).

Appellate counsel's performance has not been shown to be deficient. Finding no ineffective assistance of counsel, Aguilar has not shown "sufficient reason" for failure to preserve error on the jury selection challenge and is therefore barred by Iowa Code section 663A.8 from raising this new ground for postconviction relief. The denial of Aguilar's application for postconviction relief is affirmed.

AFFIRMED.

All judges concur except Schlegel, J., who specially concurs.

SCHLEGEL, J. (specially concurring)

I concur in the result reached by the majority. I am constrained, however, to write this special concurrence because I do not agree with the reasoning by which the result was reached.

I accept the fact that the direct appeal was prosecuted before Batson v. Kentucky, 476 U.S. 79 (1968), was decided. To hold that defendant's counsel was ineffective for failing to raise the issue of jury selection in minority cases would attribute to counsel the ability to foresee the future. Counsel's actions were guided or reasonably influenced by Swain v. Alabama, 380 U.S. 202 (1965). The fact that Batson should have been the law much earlier cannot be held against appellate counsel in this case. For that reason I would affirm the trial court's denial of postconviction relief on this issue.

My concern, however, lies in the majority's reliance upon counsel's testimony that "as a general practice, he raises on appeal only those issues offering a defendant the best chance for reversal of the conviction." The majority then cites Kane v. State, 436 N.W.2d 624, 627-28 (Iowa 1989), for the following proposition:

> Iowa courts have recognized that an appellate lawyer can reasonably decide not to press a particular issue on appeal, even though the issue is not frivolous. An attorney does not render ineffective assistance in making a professional judgment as to the strength of an argument. "Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal."

This unfortunate language comes from the case of State v. Cuevas, 415 N.W.2d 630 (Iowa 1987). In that case the court observed that counsel in the first appeal was a highly experienced trial lawyer and former attorney general of the State of Iowa. Cuevas now has proceeded by habeas corpus proceedings into the federal courts and stands reversed, as of this writing, presumably awaiting appeal to the 8th circuit Court of Appeals.

Any reliance upon the thought that "highly competent" appellate counsel generally assign only the "strongest points" is unfortunate. The holding of Cuevas is that the failure to assign the court's refusal to instruct on lesser-included offenses was not ineffective assistance of counsel. Likewise, in Kane, the court quoted Cuevas and held that the failure to assign the trial court's error in communicating with the jury out of the presence of Kane, in violation of Iowa Rule of Criminal Procedure 18(5)(g), was not ineffective assistance of counsel. I submit, however, that the Iowa Supreme Court is not prepared to hold that the omission of an important assignment of error cannot be ineffective assistance.

It is difficult for me to accept the idea that "most experienced appellate lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint." Kane, 436 N.W.2d at 627 (quoting Cuevas, 415 N.W.2d at 633) (emphasis added). Such an explanation by experienced appellate counsel implies that assignments of error, except, perhaps, frivolous assignments, will not get the attention of the appellate court and that the appellate court somehow will punish the appellant for raising too many issues. I must protest such an implication. Our appellate courts are much too thorough to permit such an implication. To excuse appellate counsel because he or she believes that raising an issue is a "tactical blunder, often devastating to an appellant" is to admit tacitly that we do not consider all the issues raised in an appeal. As I have said, I see my duty differently.

The appellate counsel who raised the issue of selection of jurors in minority cases in Batson v. Kentucky may well have thought it was nearly frivolous, but he or she obviously didn't fear reprisals to himself or his client for raising it. The same has to be said for counsel in Miranda v. Arizona, and many other cases.

I have no trouble affirming the trial court's denial of postconviction relief in this case because the law was, until Batson, settled. I would not continue to give strength to the dictum in Kane and Cuevas for the reasons given above.