

FILED

AUG 31 1978

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOSEPH WILLIAM MYERS,

)

Appellant,

)

Filed August 31, 1978

vs.

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STATE OF IOWA,

)

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2-61194

Appellee.

)

Appeal from Jasper District Court - M. C. Herrick, Judge.

Petitioner appeals the denial of his application for postconviction relief.
AFFIRMED.

Lewis M. Girdner, of Brierly, McCall, Girdner & Chalupa, of Newton, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, J. Susan Carney, Assistant Attorney General, and Kenneth Whitehead, Jasper County Attorney, counsel for appellee.

Heard by Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

DONIELSON, Acting C. J.

Petitioner-Joseph William Myers appeals the denial of his application for post-conviction relief from his conviction for shoplifting property having a value in excess of \$20, in violation of § 709.20, The Code 1975. In *State v. Myers*, 215 N.W.2d 262 (Iowa 1974), the supreme court upheld petitioner's conviction without considering the issues now presented.

Myers contends that the trial court erred in (1) ruling that he was not denied the effective assistance of counsel; (2) denying him relief from his sentence on the grounds that (a) he was entitled to be resentenced under the more lenient penalty provisions of the new criminal code, § 801.5(3), The Code, supplement 1977, and (b) it constitutes cruel and unusual punishment; and (3) failing to grant relief because the presentence report contained a material misstatement concerning Myers' prior criminal record.

Postconviction relief proceedings brought pursuant to chapter 663A, The Code, stand as an action at law, triable to the court. The burden of proof in such actions is upon the petitioner, who must establish the facts asserted by a preponderance of the evidence. Section 663A.7, The Code; *Cleesen v. State*, 258 N.W.2d 330, 331 (Iowa 1977); *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977). Ordinarily, in such proceedings our review is not *de novo*. However, when issues as to violation of constitutional safeguards are raised, this court is obliged to make an independent evaluation of the totality of the relevant circumstances shown by the entire record under which rulings on those constitutional rights were made. That is, when a constitutional issue is presented, the evidence relevant to the issue is reviewed *de novo*. *Bledsoe v. State*, 257 N.W.2d 32, 33 (Iowa 1977); *Rinehart v. State*, 234 N.W.2d 649, 658 (Iowa 1975).

Furthermore, in a postconviction action the petitioner has the burden of proof to establish a sufficient reason why any new ground now raised was not previously asserted. *Bledsoe v. State*, *supra*, at 33-34; *see* § 663A.8, The Code. Although the trial court did not make any specific findings in this regard, we are satisfied from our review of the record that, with one exception to be discussed later, sufficient reasons exist why these issues were not asserted earlier.

I. Ineffective Assistance of Counsel

Initially, Myers asserts that he was denied the effective assistance of counsel at

his original trial. After a postconviction hearing, the trial court concluded that there was no showing by Myers that he received inadequate representation from attorney Frank Krohn, who served as both trial counsel on the original charge and appellate counsel on direct appeal.

Since Myers asserts ineffective assistance of counsel, he claims a violation of a basic constitutional safeguard. Therefore, *de novo* review is triggered. *State v. Lemburg*, 257 N.W.2d 39, 45-46 (Iowa 1977); *Long v. Brewer*, 253 N.W.2d 549, 552 (Iowa 1977). In reviewing this issue, we are governed by the "range of normal competency" standard enunciated in *Zacek v. Brewer*, 241 N.W.2d 41, 50-51 (Iowa 1976); see *Long v. Brewer*, supra, at 553. We must determine whether petitioner has established "an affirmative factual basis" demonstrating that his counsel's advice was outside the range of competence demanded of attorneys in criminal cases. *Zacek v. Brewer*, supra, at 51; see *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) and *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).

In attempting to establish "an affirmative factual basis," Myers has assembled a list of instances which, in his judgment, either individually or cumulatively demonstrate the ineffective assistance of counsel he received. In his list, Myers points to the failure of Krohn (1) to request a psychiatric examination; (2) to interview the State's witnesses prior to trial; (3) to permit him to testify in his own behalf; (4) to attempt to suppress a pretrial identification; (5) to correct an erroneous statement in the presentence report; and (6) to preserve two alleged errors argued in his direct appeal before the supreme court.

With regard to the first ground asserted, Myers testified that while he was in jail prior to his trial, he did not know what he was doing and had suggested to his attorney the possibility of a psychiatric examination. However, Krohn testified that there was never any discussion on this subject and that although he was aware of Myers' previous drug involvement, Myers appeared to be "very cognizant of the entire matter." The trial court found that Myers had failed to offer any creditable evidence establishing that his use of drugs and alcohol prevented him from receiving effective assistance of counsel. We agree. Myers failed to meet his burden of proving that grounds existed which would warrant a psychiatric examination.

Myers also points to his attorney's refusal to permit him to testify in his own behalf and failure to interview the State's witnesses prior to trial. Krohn testified that he felt it was not in Myers' best interests to testify because of the possibility of damaging questions concerning his previous drug involvement. He also stated that he did not interview the witnesses because he felt the State's case was weak and any interviews would only highlight those weaknesses, thereby enabling the prosecution to better prepare its case.

These matters raised by petitioner relate to trial strategy. As such, we cannot say that, given the circumstances existing at the time of trial, these tactical decisions were either inappropriate or unwise. However, even if we were to assume that they were, not every mistake in judgment or error in trial strategy serves to deprive an accused of the effective assistance of counsel. *Long v. Brewer*, supra, at 558. We hold that Krohn's trial strategy was within the normal range of competency and did not constitute inadequate representation. See also *Thomas v. Wyrick*, 535 F.2d 407, 414 (8 Cir. 1976).

Myers contends that Krohn should have pointed out to the court that the presentence report contained a misstatement concerning his prior criminal record. The report indicated that he had one previous felony conviction when in fact he had none. The record reflects that Krohn had only a brief opportunity to read the report and that he argued strenuously for probation on the basis that this was petitioner's first felony conviction. Presumably, Krohn did not even spot this error, especially since the correct information concerning his prior criminal record appeared in petitioner's "rap sheet" located elsewhere in the presentence report. Nonetheless, we conclude that his failure to point out the error did not constitute ineffective assistance of counsel. Further, whatever prejudicial impact which may have resulted from this mistake was most likely alleviated, if not completely eliminated, by Krohn's argument at sentencing and the fact that correct information appeared elsewhere in the report.

Petitioner also contends that Krohn should have suppressed an allegedly illegal pretrial identification procedure. Assuming arguendo that the procedure was illegal, we conclude that whatever prejudice which may have resulted was negligible and rendered harmless as a result of the State's failure to introduce any evidence pertaining to the

out-of-court identification and the witnesses' positive and independent in-court identifications of Myers. The trial court correctly concluded that Myers was properly identified at trial and that the identification process was not tainted by the earlier identification at the police station. See State v. Ash, 244 N.W.2d 812, 814 (Iowa 1976), cert. denied, 430 U.S. 918, 97 S.Ct. 1334, 51 L.Ed.2d 597 (1977).

Finally, Myers contends that the failure of Krohn to preserve two alleged errors argued in his direct appeal before the supreme court constitutes ineffective assistance of counsel. However, this last ground was not presented below. Consequently, petitioner cannot raise it for the first time on appeal. State v. Lemburg, supra, at 46; State v. Pepples, 250 N.W.2d 390, 393 (Iowa 1977).

As a general comment, we find several observations made by the trial court in its oral ruling on this aspect of petitioner's application particularly significant here. The court took special note of the fact that Krohn has practiced law for over thirty years and has had a great deal of experience in criminal cases. Further, the court observed that the fact that Krohn was able to secure an acquittal for Myers on an unrelated larceny charge was at least some indication of his effectiveness as counsel. To us, such considerations weigh heavily against petitioner in this case. After reviewing the entire record in light of petitioner's allegations, we hold that the trial court was correct in ruling that Myers was not denied the effective assistance of counsel.

II. Sentencing

After being convicted of shoplifting, petitioner was sentenced to imprisonment in the men's reformatory for an indeterminate period not to exceed five years. Myers now argues that § 801.5, The Code, supplement 1977, entitles him to be resentenced under the new, more lenient provisions of § 903.1(2), The Code, supplement 1977. See § 714.2(4), The Code, supplement 1977. However, this identical argument was recently rejected by the supreme court in Cartee v. Brewer, 265 N.W.2d 730 (Iowa 1978). We do so here as well.

Petitioner also asserts that the sentencing provisions of § 709.20, The Code 1975, constitute cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution, because the length of sentence was disproportionate to the severity of the crime. Although we are not completely persuaded that Myers could not

have raised this issue in his direct appeal, we will address it because it appears that his argument is partially premised upon the penalty provisions of the new criminal code which were not in effect at the time of his original appeal.

Although not specifically raised by the State, our indeterminate sentence provision, § 789.13, The Code 1975, is dispositive of this issue. Under that statute, where any person over sixteen years of age is convicted of a felony (with several exceptions which are not relevant here), the court imposing a sentence of confinement in the penitentiary or reformatory shall not fix the limit or duration of the term, but it shall not in any event exceed the maximum term provided by law for the crime. Consequently, once the sentencing court in the instant case decided upon a term of incarceration in the reformatory, it had no choice but to impose the sentence that it did. See § 709.20, The Code 1975. Therefore, the sentence imposed does not violate Eighth Amendment proscriptions against cruel and unusual punishment. However, even if we were to disregard the impact of § 789.13, The Code 1975, we would reach the same conclusion on the basis of the record before us. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh. denied, 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976); *State v. Remmers*, 259 N.W.2d 779, 782 (Iowa 1977); *State v. Robbins*, 257 N.W.2d 63, 68 (Iowa 1977).

III. Presentence Report

Myers asserts that he was entitled to postconviction relief because the presentence report used by the sentencing judge contained a material misstatement with regard to his prior criminal record. Our review of this issue is not *de novo*, but on errors of law assigned. *Bledsoe v. State*, supra, at 33. Consequently, findings of fact are binding upon us if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure.

In order to prevail on this issue, petitioner must establish that the sentencing court relied on information which was in fact not true. See *United States v. Weiner*, 418 F.2d 849, 851 (5 Cir. 1969); *Santoro v. United States*, 462 F.2d 612, 612-613 (9 Cir. 1972). However, any argument that the sentencing court relied on this misstatement is seriously undermined by the fact that defense counsel strenuously argued for probation on the basis that this was Myers' first felony conviction and the correct information

concerning Myers' prior criminal record appeared in the "rap sheet" contained in the presentence report. The trial court's conclusion that Myers failed to meet the burden of proving that the error in the report adversely affected the judgment of the sentencing court is supported by substantial evidence.

Finally, petitioner argues that the report erroneously stated that the shoplifting offense involved the use of a weapon—a six-inch blade knife. Although this information did appear in the report, there is nothing in the record, including the investigation of Myers' presentence report which was conducted by the Fifth Judicial District Department of Correctional Services, which lends any positive support to his argument that the information is erroneous. Furthermore, even assuming that this information was erroneous, there is no evidence which would indicate that the sentencing court relied upon it in fixing petitioner's sentence.

There is sufficient evidence in the record to support the postconviction trial court's oral finding that in deciding to sentence Myers to a term of incarceration in the penitentiary, the sentencing court properly considered all of Myers' prior conduct, including his juvenile record and his involvement in drug and criminal activity, and that on the basis of all of these factors, incarceration was necessary to protect society and to provide a structured environment for Myers. We cannot say that the sentencing court abused its discretion in fixing a term of incarceration for petitioner. See State v. Randall, 259 N.W.2d 543, 544 (Iowa 1977). Since we find no error, the judgment of the district court is affirmed.

AFFIRMED.