IN THE COURT OF APPEALS OF IOWA

No. 0-24 / 99-286
Filed February 23, 2000

FILED
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CLERK SUPREME COURT

MARK ALLEN McGONIGLE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Fayette County, John Bauercamper, Judge.

Appellant contends his postconviction counsel was ineffective in failing to assert that his trial counsel was ineffective in failing to challenge his guilty plea as involuntary on the basis of intoxication. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, W. Wayne Saur, County Attorney, and Karl A. Moorman and Joel Dryer, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

Mark McGonigle seeks to preserve his claim of ineffective assistance of postconviction counsel after making an ambiguous and unsolicited claim at his postconviction trial that he was intoxicated at the time of his guilty plea. Because we find the statement too speculative to even ascertain the true nature of his claim, we deny his request and affirm the trial court.

I. Background Facts & Proceedings.

Mark McGonigle pleaded guilty to stalking in violation of Iowa Code section 708.11(3)(b)(4) (1997) and two counts of first-degree harassment under Iowa Code sections 708(1)(a) and 708(1)(b). The court sentenced him, and he did not appeal.

McGonigle filed a postconviction relief application alleging his trial counsel was ineffective for failing to claim the harassment and stalking offenses merged and failing to investigate a potential alibi defense and information others perpetrated the crimes. At the postconviction hearing, McGonigle was testifying about his trial attorney's willingness to pursue certain defenses when the following exchange took place:

> Q: Did he [defense counsel] ever give you a theory on how he wanted to present the trial? A: No, he did not.
>
> Q: In fact in the criminal case at one point, he ended up filing with the Court an application that he had no witnesses? A: Right.
>
> Q: Did you agree with him that you had no witnesses? A: No, I did not.
>
> Q: Did he talk to you about that? A: No, he did not.
>
> Q: Okay, now, did you tell him you wanted to go to trial? A: I told him when we pled guilty to it, I was under the influence of alcohol and drugs.

The postconviction court interpreted McGonigle's statement to mean he was intoxicated at the time of his guilty plea, but refused to consider this claim as it had not been raised in the application. The court rejected McGonigle's additional contentions and affirmed the conviction.

McGonigle appeals, claiming postconviction counsel was ineffective in failing to assert trial counsel was ineffective. McGonigle claims postconviction trial counsel was ineffective because he failed to attack the plea on the ground it was involuntary due to McGonigle's now-alleged intoxication.

II. Standard of Review.

Normally, a trial court's denial of an application for postconviction relief is reviewed for correction of errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). If, however, the applicant asserts violations of constitutional safeguards, our review is de novo. *Giles v. State*, 511 N.W.2d 622, 627 (Iowa 1994).

III. The Merits.

Claims of ineffective assistance of postconviction counsel must be sufficiently clear "to allow us to address [the] allegations or preserve them for a second postconviction proceeding." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). McGonigle's claim is so ambiguous and unclear we can neither address the allegation nor preserve it for a second postconviction proceeding. First, it is not clear whether McGonigle was claiming he was intoxicated at the time of the offense or at the time of the plea. If his statement is read in the context of the subject matter being discussed at that particular point in trial, he appears to claim

he was intoxicated at the time of the offense. The series of questions leading up to McGonigle's plucky assertion dealt with whether trial counsel refused to pursue possible theories of defense. It was in that context McGonigle stated, "I told him when we pled guilty to it, I was under the influence of alcohol and drugs." This interpretation is further bolstered considering McGonigle spent all sixty-five days prior to the plea in jail. Although there is some remote possibility he could have procured both drugs and alcohol while in jail, a more reasonable conclusion is he was referring to his intoxication at the time of the offenses. Additionally, McGonigle's statement was not responsive to the question posited by postconviction counsel, nor did he clarify his statement when given the opportunity as part of an offer of proof. To permit a postconviction petitioner to guarantee further proceedings by interjecting unsubstantiated, nonresponsive, and completely ambiguous statements into the record would constitute an extreme waste of judicial resources. McGonigle's claim is simply too speculative for this court to preserve. The trial court is affirmed.

AFFIRMED.