FILED
JUN 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHNNY RAY HALL,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed June 26, 1984 369

4-173
83-90

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Petitioner Hall appeals the denial of his application seeking postconviction relief from his 1980 conviction of possession of firearms by a felon in violation of Iowa Code section 724.26 (1979). VACATED AND REMANDED.

Charles Harrington, Appellate Defender and Fern S. Shupeck, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Richard L. Cleland, Assistant Attorney General, for respondent-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

Petitioner Hall appeals the denial of his application for postconviction relief from his 1980 conviction of possession of firearms by a felon in violation of Iowa Code section 724.26 (1979). On appeal Hall asserts that he was denied effective assistance of postconviction counsel due to counsel's failure to offer any reason why issues raised in the application for postconviction relief had not been raised previously at trial or on direct appeal.

In April, 1980, petitioner Hall was convicted of possession of firearms by a felon in violation of Iowa Code section 724.26. His conviction was affirmed on appeal. State v. Hall, 301 N.W. 2d 729, 731 (Iowa 1981).

In November 1981, petitioner Hall filed a pro se application for postconviction relief. A substituted and amended application was subsequently filed by Hall's court-appointed counsel, Karla Fultz. In this petition Hall sought to challenge the validity of the search warrant and the admissibility of statements he made during execution of the search warrant. The state answered that Hall's failure to raise these issues at trial or on direct appeal precluded postconviction relief pursuant to Iowa Code section 663A.8.

In neither the substituted application for postconviction relief, nor at a subsequent brief hearing, did petitioner's counsel offer any explanation as to why the issues asserted in the application had not been raised previously. In a subsequent written trial brief, counsel did assert generally that ineffective assistance of Hall's trial and appellate counsel constituted sufficient reason for failing to raise the issues earlier.

Trial court subsequently denied postconviction relief, concluding that Hall had shown no reason for failing to raise his postconviction issues earlier in the trial court or on direct appeal and, further, that Hall failed to present any evidence in support of his claims of ineffective assistance of trial and appellate counsel.

On appeal Hall asserts that his postconviction counsel was ineffective and

that he is therefore entitled to a remand and new postconviction proceeding. The state asserts that Hall is not entitled to pursue postconviction relief on the merits of his warrant and admissibility claims unless he can prove ineffective assistance of trial, appellate and postconviction counsel; that the present record is insufficient to determine ineffective assistance of postconviction counsel; and that trial court's judgment therefore should be conditionally affirmed pending a remand to afford Hall an evidentiary hearing on his claim of ineffective assistance of postconviction counsel.

The issue presented is whether Hall's postconviction counsel was ineffective for failure to allege and prove that Hall's trial and appellate counsel were ineffective in failing to challenge the search of Hall's premises and the admissibility of certain statements made by Hall at the time of the search. Both the defendant and the state assert, and we agree, that the present record is insufficient to determine ineffective assistance of postconviction counsel. Absent a finding that Hall's postconviction counsel is ineffective, he is precluded from pursuing his claims of ineffective assistance with respect to trial and appellate counsel. See Iowa Code §663A.8 (1983)(requiring some showing by applicant of reason why issues raised on postconviction were not submitted at trial or appellate level). Because such a determination cannot be made on this record, the district court's order denying Hall's application for postconviction relief is vacated and the cause is remanded for the limited purpose of determining whether Hall's postconviction counsel was ineffective. Should such a finding be made, Hall is then entitled to proceed on the merits of his claim of ineffective assistance with respect to trial and appellate counsel.

VACATED AND REMANDED.