IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

RICHARD J. TURNER,
Petitioner-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

8-625
88-287

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Appeal from the Iowa District Court for Linn County (LA 15159), Kristin L. Hibbs, Judge.

Defendant appeals the denial of postconviction relief after he pleaded guilty in 1956 to a charge of sodomy. **AFFIRMED.**

Raymond E. Rogers, Acting Chief Appellate Defender, and Barbara M. Anderson, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas D. McGrane, Assistant Attorney General, for respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

The petitioner, Richard J. Turner, brought a postconviction action to challenge a guilty plea entered in 1956. He pleaded guilty to a charge of sodomy and received a sentence of ten years in prison. He has raised a challenge to that plea now, since he was sentenced on a felony conviction in 1984, and was sentenced as an habitual offender in part on account of the 1956 conviction. The trial court denied his petition for postconviction relief and he appeals. We affirm.

On appeal from this denial, Turner contends that the State did not meet its burden of adequately reconstructing the record after the transcript of the 1956 guilty plea proceeding was lost or destroyed. He urges that his 1956 guilty plea was not voluntarily and intelligently made because he was not advised of the constitutional rights he waived and the consequences of entering a guilty plea. He also contends that he was not advised of his rights to appeal the sodomy conviction.

At the hearing on Turner's petition for postconviction relief, the State offered testimony by two attorneys who represented Turner during the period when he entered his plea. Neither attorney could remember specifics of the transaction with Turner. Both, however, stated their usual practice in representing defendants in criminal cases, and traced the procedure they followed. In most respects, it appeared that they followed the usual procedure for such a

representation. In one instance, however, it is unlikely that the attorney accurately recollected his procedure in those times when he stated: ". . . and I did explain to all the people I represented, and I'm sure this would be true with Mr. Turner as well, that he had a right to a jury trial, that he wouldn't have to testify at that jury trial if he elected not to, he could remain silent, that could not be held against him, they couldn't argue in final argument to the jury that he didn't present any evidence of his own, that is testimony of his own." We note that it was not until State v. Johnson, 257 Iowa 1052, 1055, 135 N.W.2d 518, 520-21 (1965), that the Iowa Supreme Court, following Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1965), ruled that an instruction permitting the jury to consider a defendant's failure to take the stand was a violation of his constitutional right against self-incrimination and not until State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975), did our supreme court rule that it was error for the prosecutor to comment upon a defendant's failure to testify.

Turner's guilty plea antedated State v. Sisco, 169 N.W.2d 542 (1969), by thirteen years. In that case, the supreme court, quoting the American Bar Project on Minimum Standards for Criminal Justice, stated:

> A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo

> contendere should be made and preserved. The record should include (i) the court's advice to the defendant (as required in section 1.4), (ii) the inquiry into the voluntariness of the plea (as required in section 1.5), and (iii) the inquiry into the accuracy of the plea (as required in section 1.6).

Id. at 549-50. Prior to Sisco, there was no constitutional requirement that a record be kept or that the court itself personally address the defendant.[1] It was not until 1974 that the supreme court required that the trial judge shall address the defendant personally to determine the defendant understands that by pleading guilty, he waives certain constitutional rights, including the right to persist in his plea, right to trial by jury, right to remain silent, and right to be confronted by witnesses. Brainard v. State, 222 N.W.2d 711, 713-18 (Iowa 1974).

From the record in this case, we find that the plea entered by Turner was voluntarily and intelligently made. As the court held in State v. Snook, 260 Iowa 160, 162, 146 N.W.2d 252, 254 (Iowa 1966):

> Under the state of this record, regularity and not irregularity is presumed. The rule is well

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1. The requirements of Sisco were held not to be retroactive. See State v. Jackson, 173 N.W.2d 567, 570 (Iowa 1970). In Jackson, the court also noted the following:

> Simply because we have now adopted what we consider to be a better method of establishing the validity of a criminal plea does not mean all pleas prior thereto were bad. The great majority were voluntarily and intelligently made.

> established in this jurisdiction that we presume the regularity of actions by officials and courts unless the contrary is made to appear. (cases cited). We must assume the court determined that defendant's plea was made freely and without undue influence, as nothing else remained to be determined.

While we assume the court determined that Turner's plea was made freely and without undue influence, Turner argues that the State did not meet its burden to establish an exception to the rule requiring it to produce the record prescribed by Iowa Code section 663A.6. The State has the burden to "produce sufficient evidence of what occurred during the original proceedings to lend factual support to the original judgment of conviction and sentence." Once the State has met that burden, "[t]he applicant [has] the burden to prove by a preponderance of the evidence, facts supporting the pleaded claims for postconviction relief." McKnight v. State, 356 N.W.2d 532, 537 (Iowa 1984).

Under the record made in this case, we believe the State has met its burden with respect to what occurred during the original proceedings so as to lend factual support to the original judgment of conviction. We hold that Turner failed to prove by a preponderance of the evidence the pleaded claims he makes for postconviction relief. We hold that his plea was voluntarily and intelligently entered and that he was not subjected to undue influence or misrepresentation. We do not accept Turner's argument that the delay in bringing this action was justified on the basis of his lack of knowledge of his

rights. Thirty-two years without complaint cannot be justified for a delay in bringing this postconviction action. We believe the long period of delay is, in itself, evidence that his plea was knowingly and voluntarily made. We affirm the trial court's dismissal of Turner's postconviction action.

AFFIRMED.