

IN THE COURT OF APPEALS OF IOWA

No. 1999-77 (9-264) / 98-1099

Filed May 26, 1999

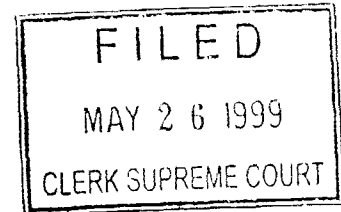
CHARLES DERRICK WATKINS,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Charles Watkins appeals the denial of his postconviction relief action.

AFFIRMED.

Mark E. Weinhardt of Belin Lamson McCormick Zumbach Flynn, P.C., Des
Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Charles Watkins appeals the denial of his postconviction relief action. As we find that error has not been preserved on his claims, we affirm.

Background facts. Watkins was convicted of first-degree kidnapping and second-degree theft in 1989. His convictions were affirmed on direct appeal after a limited remand. *See State v. Watkins*, 463 N.W.2d 411 (Iowa 1990); *State v. Watkins*, 494 N.W.2d 438 (Iowa App. 1992). In 1995 Watkins filed an application for postconviction relief alleging he was denied effective assistance of counsel. Following a hearing, Watkins' application was denied by the district court. He now appeals.

Scope of review. Generally, an appeal from the denial of an application for postconviction relief is review for errors at law. *See Goodwin v. State*, 585 N.W.2d 749, 751 (Iowa App. 1998). However, as Watkins raises the constitutional issue of effective assistance of counsel, our review is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

Preservation of error. The State claims Watkins has failed to preserve error on any of the claims in his application because he did not raise them on direct appeal. On direct appeal, the only issue Watkins raised was a Sixth Amendment claim that the jury in his case had not represented a fair cross-section of the community. In his present application, Watkins claims that his trial counsel was ineffective for failing to protect him from prejudicial pretrial publicity, failing to request an eyewitness

identification instruction, failing to take the deposition of the complaining witness, and failing to locate and present important evidence.

Claims not raised on direct appeal are barred from postconviction relief unless an applicant shows sufficient reason or cause for his failure to raise them in prior proceedings. *See* Iowa Code § 822.8; *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). In addition, an applicant must also establish actual prejudice as a result of the claimed error. *See Osborn*, 573 N.W.2d at 921; *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

Watkins asserts that there are sufficient reasons for his failure to raise these claims on direct appeal. He first asserts that none of these claims could have been raised on direct appeal because they each required reference to material from outside the trial record. However, none of these claims are based on information that was unknown to Watkins at the time of trial. In fact, Watkins testified that he discussed many issues with his trial counsel which are the foundation for his current claims.

Watkins also appears to imply that because most ineffective assistance claims are preserved for postconviction proceedings, he did not need to raise his claims on direct appeal. However, our case law is clear that if a defendant fails to raise the issue of ineffective assistance of trial counsel on direct appeal, he still has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. *See Collins*, 477 N.W.2d at 376-77; *Washington v.*

Scurr, 304 N.W.2d 231, 235 (Iowa 1981); *Watson v. State*, 294 N.W.2d 555, 556 (Iowa 1980).

Watkins further asserts that his trial counsel “took no actions to preserve error on any of these issues in the district court.” We do not find the case law cited by Watkins on this point to be persuasive. Furthermore, counsel’s failure to preserve issues such as the change of venue are still matters that could have been raised by way of ineffective assistance claims on direct appeal.

Finally, Watkins does not allege that his appellate counsel was ineffective for failing to raise these claims on direct appeal. *See Scurr*, 304 N.W.2d at 235 (noting that while ineffective assistance of appellate counsel may be sufficient reason for an applicant’s failure to raise a claim on direct appeal, the applicant must still raise the claim that appellate counsel was ineffective).

As we find that error was not preserved on any of Watkins’ claims, we affirm the district court’s denial of his application for postconviction relief.

AFFIRMED.

No. 98-1099. [1999-77 (9-264)] WATKINS v. STATE

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (4 pages \$1.60)

Charles Watkins appeals the denial of his postconviction relief action. **OPINION HOLDS: *Preservation of error.*** On direct appeal, the only issue Watkins raised was a Sixth Amendment claim that the jury in his case had not represented a fair cross-section of the community. In his present application, Watkins claims that his trial counsel was ineffective for failing to protect him from prejudicial pretrial publicity, failing to request an eyewitness identification instruction, failing to take the deposition of the complaining witness, and failing to locate and present important evidence. However, Watkins asserts that there are sufficient reasons for his failure to raise these claims on direct appeal. He first asserts that none of these claims could have been raised on direct appeal because they each required reference to material from outside the trial record. However, none of these claims are based on information that was unknown to Watkins at the time of trial. In fact, Watkins testified that he discussed many issues with his trial counsel which are the foundation for his current claims. Watkins also appears to imply that because most ineffective assistance claims are preserved for postconviction proceedings, he did not need to raise his claims on direct appeal. However, our case law is clear that if a defendant fails to raise the issue of ineffective assistance of trial counsel on direct appeal, he still has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. Watkins further asserts that his trial counsel “took no actions to preserve error on any of these issues in the district court.” We do not find the case law cited by Watkins on this point to be persuasive. Furthermore, counsel’s failure to preserve issues such as the change of venue are still matters that could have been raised by way of ineffective assistance claims on direct appeal. Finally, Watkins does not allege that his appellate counsel was ineffective for failing to raise these claims on direct appeal. As we find that error was not preserved on any of Watkins’ claims, we affirm the district court’s denial of his application for postconviction relief.