**IN THE COURT OF APPEALS OF IOWA**

No. 0-305 / 99-0514
Filed June 14, 2000

FILED
JUN 14 2000
CLERK SUPREME COURT

**DARREN LAMONT WARREN,**
**Applicant-Appellant,**

**vs.**

**STATE OF IOWA,**
**Respondent-Appellee.**

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Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

On appeal from the denial of his application for postconviction relief, Darren Warren argues the trial court erred in denying his application as (1) the original trial court erred in denying his request to re-open the trial, and (2) appellate counsel was ineffective for failing to raise the issue on direct appeal. **AFFIRMED.**

Carol J. Walker, Davenport, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

**SACKETT, C.J.**

Petitioner-Appellant, Darren Lamont Warren was convicted of first-degree robbery and being a felon in possession of a firearm as the result of a robbery of a convenience store in Davenport, Iowa. Warren claimed he did not rob the store. An attempt to introduce recently discovered alibi evidence was denied by the district court. Warren contends in this postconviction action he was prejudiced by the denial and is entitled to a new trial. We affirm.

Warren was charged after the convenience store employee identified him from a photo array, in a lineup, and at trial. She did, however, hesitate in identifying Warren at a deposition. No physical evidence connected Warren to the robbery.

The State contends the issue raised here was not properly preserved for appellate review and we must agree. Defendant appealed his conviction. The only issue raised in that appeal was whether there was sufficient evidence supporting his conviction. The conviction was affirmed by this court. *See State v. Warren*, No. 7-144 (Iowa App. May 29, 1997).

Warren filed this action in district court contending his trial attorney was ineffective for not making a timely introduction of his alleged alibi evidence and that the district court abused its discretion in not re-opening the record to allow him to do so.

Warren initially identified for his trial attorney a person who was to have verified he was working at Hardee's at the time of the robbery and his attorney filed notice of an alibi defense. Before trial the attorney learned Warren had been fired prior to the robbery and the witness would not be credible. After both

sides had rested Alvino Pena arrived at the courthouse with records from his Boxing Club showing Warren had signed into the club on the day of the robbery. This was the first time trial counsel learned of this alleged alibi. A motion to re-open the case was denied and Warren's attorney made an offer of proof as to Alvino's testimony. Alvino would have testified that Warren signed into the club on the day of the robbery. He further would have testified that it was Warren's habit to stay at the club from 4:00 p.m. to 7:00 p.m. The robbery had occurred around 6:00 p.m.

The district court found in ruling on the postconviction application that defense counsel had made an adequate effort to have Warren identify alibi witnesses and the problem was the result of Warren's failure to provide his attorney with notice of the witness until after both sides had rested. The court went on to find that the evidence would not have changed the result of the trial because the club did not have a specific time-in and time-out log and the witness could not specifically testify to the specific time Warren was at the boxing club. The district court found no evidence to support Warren's claim his trial counsel breached an essential duty.

The district court further found that the issue contending the district court abused its discretion in admitting the testimony could only be raised in a claim challenging the effectiveness of appellate counsel. The district court found even if the issue had been raised in Warren's application, he presented no evidence on a claim of ineffectiveness of appellate counsel. Warren does not challenge this finding on appeal. His only claim is that the district court erred in denying his request to re-open the trial to present the alibi evidence.

Iowa Code section 822.8 (1997) provides that postconviction relief may not be granted on assignments not asserted in prior applications for relief in the absence of a showing of good cause. Postconviction relief is not a means for re-litigating claims that were or should have been properly presented on direct appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993); *Washington v. Scurr*, 304 N.W.2d 231, 235 (Iowa 1981). Thus any claim not properly raised on direct appeal may not be litigated in a postconviction proceeding unless there is a showing of "sufficient reason" or "cause" for not properly raising it previously, and of actual prejudice resulting from the alleged error. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Warren's claim that the trial court erred in denying defendant's request to re-open the trial because of a new alibi witness could have been raised on direct appeal. Warren has failed to show a reason for not raising on direct appeal the issue of the district court's refusal to re-open the trial and receive the alibi evidence.

Warren did not claim in either his original petition for postconviction relief or his amended petition that his appellate counsel was not effective. Consequently we agree with the State that the issue raised in Warren's appellate brief is not preserved for our review and we do not address it. We affirm on this basis.

**AFFIRMED.**