

IN THE COURT OF APPEALS OF IOWA

No. 0-571 / 89-1918

FILED

MAY 29 1991

CLERK SUPREME COURT

RONALD LEON NESBIT,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Black Hawk
County, George L. Stigler, Judge.

Nesbit appeals the district court denial of
postconviction relief. **AFFIRMED.**

Stephen J. Rapp, Waterloo, for appellant.

Bonnie J. Campbell, Attorney General, Mark Joel
Zbieroski, Assistant Attorney General, Thomas J. Ferguson,
Acting County Attorney, and Thomas N. Bower, Assistant
County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett,
JJ.

OXBERGER, C.J.

In 1986 a jury convicted Ronald Nesbit, who is black, of delivery of a controlled substance. We affirmed Nesbit's conviction on direct appeal and the supreme court denied further review in July 1988.

Two black persons were called as prospective jurors during Nesbit's 1986 trial. The State struck both of the prospective black jurors with peremptory challenges. In 1989 Nesbit challenged his conviction by filing the present application for postconviction relief alleging his trial attorney rendered ineffective assistance by failing to object to the exclusion of the two black panelists from his jury.

After a hearing, the district court denied postconviction relief. The district court held that although Nesbit's trial attorney rendered ineffective assistance by failing to object to the exclusion of the two black panelists, the inadequate performance did not by itself entitle Nesbit to postconviction relief because he failed to show prejudice. The district court stated Nesbit had to demonstrate a reasonable probability he would have been acquitted if the two stricken panelists had been seated on the jury in order to show prejudice.

Nesbit appealed. Nesbit agrees with the district court's conclusion his trial attorney rendered ineffective representation. However, Nesbit argues the district court

erred in concluding he failed to show prejudice from the ineffective representation.

Nesbit first contends the prejudice standard enunciated in Wright-Bey v. State, 444 N.W.2d 772 (Iowa App. 1989), which the district court relied upon should be interpreted (or modified) to allow a finding of prejudice if a defendant shows that use of the stricken panelists would, with reasonable probability, have resulted in a more fair trial rather than an acquittal.

In the alternative, Nesbit contends he should prevail on the prejudice issue even if the district court used the correct standard. He argues he showed a reasonable probability that use of the stricken panelists would have resulted in his acquittal because the evidence against him was quite weak.

The State responds that Nesbit has waived his present ineffective assistance claims. It argues Nesbit is precluded from arguing about the composition of his jury because he failed to present the issue on direct appeal. Kane v. State, 436 N.W.2d 624, 626-28 (Iowa 1989). We agree. Iowa Code section 663A.8 (1989) states in part:

Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

"[W]hen a party in a postconviction proceeding asserts a ground for relief which was not asserted in the earlier proceedings initiated by him to secure relief from his conviction that party has the burden of proving a 'sufficient reason' why the ground now relied on was not previously asserted." Rinehart v. State, 234 N.W.2d 649, 657 (Iowa 1975).

In his pro se application for postconviction relief Nesbit stated "Appellate counsel failed to properly charge trial counsel's incompetent - ineffective representation for failing to properly preserve an adequate trial Court record for appellate review." At the postconviction hearing Nesbit did not call the attorney who represented him during his direct appeal to explain why the issue of discriminatory use of peremptory challenges was not raised in the appeal. Nesbit testified he did not remember why the issue was not raised on direct appeal, but he did remember discussing with appellate counsel his concerns about the jury composition.

Mr. Guernsey, who was Nesbit's trial counsel, testified he remembered holding a conversation with appellate counsel several months after the trial regarding the composition of the jury. Mr. Guernsey testified he told appellate counsel he had no records reflecting the race of any of the jurors and he did not perceive any "racial overtones" during the trial.

Nesbit does not dispute that the issue of the discriminatory use of peremptory challenges was not raised in his direct appeal. Further, he has presented no specific reason for this omission. Nesbit testified he spoke with his appellate counsel about the composition of his jury but gave no specific testimony about why the issue was not raised on direct appeal. Additionally, Nesbit has made no argument, other than the cryptic statement in his pro se postconviction application, that his appellate counsel on direct appeal rendered ineffective assistance. More importantly, Nesbit failed to call his appellate counsel to testify about why the issue was not raised.

Nesbit has failed to present a sufficient reason why his appellate counsel failed to raise the issue of discriminatory use of peremptory challenges on direct appeal. Therefore, we find that because Nesbit failed to show cause for his failure to raise the issue on direct appeal, he is barred from litigating the issue in postconviction proceedings. Because we find a basis for denying Nesbit postconviction relief, even though it is not the one relied upon by the district court, we affirm. See Citizens First National Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980).

AFFIRMED.