

IN THE COURT OF APPEALS OF IOWA

No. 1-383 / 90-1276

FILED

OCT 29 1991

CLERK SUPREME COURT

DANIEL L. BROESSEL,

Appellant,

vs.

STATE OF IOWA,

Appellee.

57

Appeal from the Iowa District Court for Scott County,
Edward B. deSilva, Judge.

Defendant appeals, contending his trial, appellate, and
postconviction attorneys rendered ineffective assistance.

AFFIRMED.

R. Douglas Wells of Wells, McNally & Bowman, Davenport,
for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson,
Assistant Attorney General, William E. Davis, County
Attorney, and Teri Sandeman, Assistant County Attorney, for
appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

In 1987 Daniel Broessel was accused of selling cocaine to an undercover police officer in a bar. Broessel acknowledged being in the bar on the night in question but denied selling cocaine. Broessel theorized the undercover officer bought cocaine from a different person on a different night. At trial the factual issues included whether the undercover officer's identification of Broessel was reliable and whether the officer had been present in the bar on the night in question.

In 1988 Broessel was convicted of delivery of cocaine. On direct appeal, we affirmed the conviction. We preserved for postconviction proceedings Broessel's claim his trial attorney rendered ineffective assistance by failing to depose a state witness and by failing to secure the presence of a potential defense witness.

Broessel filed the present application for postconviction relief to challenge the conviction. The district court denied postconviction relief. Broessel appeals, contending his attorneys rendered ineffective assistance.

I. Burden of Proof and Judicial Review. Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L.Ed.2d 674, 699

(1984)). We review de novo the totality of the circumstances relating to counsel's conduct, mindful of the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

II. Assistance of Counsel. Broessel claims trial counsel's representation was ineffective in three respects: (1) Because the attorney failed to take a reported deposition of the undercover police officer, he lost a chance to impeach the officer regarding the color of jacket worn by the drug seller; (2) The attorney failed to call other bar patrons to testify whether they had observed him make a drug sale or had observed the undercover officer in the bar on the night in question; and (3) The attorney failed to develop evidence that no "buy money" was found on his person after the drug sale. With respect to this final claim of ineffective assistance, Broessel contends his attorneys in the direct appeal and the postconviction proceeding also rendered ineffective assistance by failing to raise the claim.

A. Deposition. Broessel argues because trial counsel did not take a reported deposition of the undercover police officer, he was unable to effectively impeach the State's witness and obtain a jury instruction regarding prior inconsistent statements. We are not persuaded this claim has any merit. In assessing trial counsel's effectiveness,

we note "the use of discovery depositions can be a valuable tool in preparation of criminal trials. We cannot say, however, that [a deposition] is an absolute requirement for preparation." Kellogg v. State, 288 N.W.2d 561, 564 (Iowa 1980). On cross-examination and in closing argument trial counsel presented the apparent discrepancy in the officer's testimony to the jury. The defendant's ability to cast doubt on the officer's recollection of the jacket color worn by the drug seller did not obviate the officer's positive identification of the defendant. We hold counsel's failure to have the deposition reported was not ineffective representation. Further, it did not prejudice Broessel.

B. Failure to Subpoena Other Bar Patrons. Defendant claimed on direct appeal his trial counsel was ineffective by failing to secure one tavern patron, Danny Harris, as a potential defense witness. In his amended postconviction application, defendant expanded this claim by asserting trial counsel was ineffective by failing to subpoena various patrons of the tavern. The State contends this issue is preserved only as to Danny Harris but not with respect to "everyone present in the tavern."

It is well established postconviction proceedings are inappropriate for presentation of issues not properly preserved and raised in prior proceedings. See Iowa Code § 663A.8 (1991). Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction

unless there is sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). Thus, the only way defendant can obtain review of his expanded claim and avoid waiver is to prove by a preponderance of the evidence "sufficient reason" for not raising the expanded issue on direct appeal. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). Defendant must also show by a preponderance of the evidence actual prejudice resulting from the alleged error. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). Ineffective assistance of appellate counsel, if established, would provide "sufficient reason" to permit Broessel to raise for the first time in postconviction the expanded claim. Hinkle, 290 N.W.2d at 31.

We are not satisfied defendant has demonstrated sufficient reason for his failure to raise earlier his expanded claim. Broessel's appellate counsel was different from his trial counsel. There is no claim appellate counsel was ineffective for failing to raise this expanded claim. We note, however, under both the waiver doctrine and the ineffective assistance of counsel claim, defendant must prove prejudice. Gavin v. State, 425 N.W.2d 673, 675 (Iowa App. 1988). For that reason, we will review defendant's claim with respect to all patrons present, including Danny Harris, to determine if defendant demonstrated he was prejudiced.

Under the Polly "actual prejudice" standard, more than a mere possibility of prejudice must be shown. The postconviction applicant "must shoulder the burden of showing [the errors] worked to his or her actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Polly, 355 N.W.2d at 855.

With respect to other bar patrons, we find nothing in the record to indicate their testimony would obviate the officer's positive identification of Broessel. It appears their testimony would have been cumulative. We conclude Broessel failed to demonstrate actual prejudice resulting from the alleged error.

With respect to Mr. Harris, although trial counsel had reservations about calling him as a witness, counsel attempted to secure Harris's presence at trial by causing a subpoena to be issued. The process server, however, was unable to locate Mr. Harris at the address provided to trial counsel. Counsel indicated Mr. Harris's testimony might adversely affect defendant's case. Counsel also indicated Mr. Harris's testimony would be similar to the two witnesses who did testify. We determine counsel's failure to obtain Mr. Harris's presence at trial did not prejudice defendant.

C. Buy Money. Broessel asserts counsel's failure at trial to submit evidence of the absence of "buy money" on his person hours after the drug buy constitutes ineffective

assistance, because such evidence could have corroborated his denial defense. Defendant did not raise this claim at trial, on direct appeal, or in his postconviction relief application as a basis for the claim of ineffective assistance of trial counsel. It is well established an issue not presented at trial cannot be raised for the first time on appeal. Snethen v. State, 308 N.W.2d 11, 15-16 (Iowa 1981). Therefore, error has not been preserved with respect to this issue.

III. Conclusion. We hold defendant suffered no prejudice and his prior attorneys were not ineffective. We affirm in all respects.

AFFIRMED.

Oxberger, C.J., concurs; Schlegel, J., specially concurs.

SCHLEGEL, J. (specially concurring)

I have no doubt the majority has correctly followed precedent in its decision in this case. The appellate courts of several states, including the Iowa Supreme Court and this court, and the United States Supreme Court have adopted the rule of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requiring a showing that counsel failed in an essential duty and that prejudice resulted. The courts have required that a showing of prejudice involve proof by a preponderance of the evidence that but for such failure the result would have been different. See Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984). The burden to prove all this, it is said, is upon the defendant. Id. No case has really given any direction on how a defendant, or petitioner in a postconviction relief proceeding, might prove the result would have been different. These considerations aside for the moment, I am not able to agree that counsel's failure to depose the undercover police officer by sworn testimony was not a breach of an essential duty. Consider the problems posed by this failure.

First, the most important reason for questioning the officer would be to determine what his testimony was likely to be at trial. If that officer testified to any fact in a different manner than he did at the deposition, it might be possible to impeach him by his prior inconsistent sworn

testimony. Second, if the prior inconsistent testimony was not recorded either by a sworn deposition or a signed sworn statement, counsel for the defendant can only ask the witness whether he made a prior inconsistent statement. If the witness denies it, the only thing left to counsel would be to testify himself. This, of course, would be impossible if he is to continue to represent the defendant.

For these reasons, the taking of the deposition, while not an absolute requirement in all cases, was vital to the cross-examination of the officer. I believe the failure to depose the witness under oath and to properly report the deposition was a violation of an essential duty.

It is not proper to second guess counsel with the benefit of 20/20 hindsight, but it is proper to expect that counsel will do those things necessary to carry out the process he himself has decided is important in the case. We are not speaking here of a decision counsel should have made. He made the decision to depose the witness and then failed to do so. It is not appropriate now for him to claim that the deposition was unnecessary.

Because I know no way a defendant can prove a particular failure on the part of counsel would have changed the result, there appears to be no showing of prejudice in this case under the rules adopted by this court and the Iowa Supreme Court. That the result would have been different would be impossible to demonstrate even with a new trial. The opportunity to show the officer's

possible want of credibility, in connection with the prior inconsistent statement, has gone. A deposition in preparation for a new trial would not contain the same inconsistency that would have appeared in the first trial.

Because of the understandable failure of the petitioner to prove prejudice, I have no choice but to concur in the result. I do, however, disagree on the issue of whether counsel violated an essential duty in the defense of the petitioner.