

FILED

MAR 24 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HAROLD LEON CHRISTOPHER,)

Filed March 24, 1981

Petitioner-Appellant,)

vs.)

0-408
64635

STATE OF IOWA,)

Respondent-Appellee.)

Appeal from Polk District Court - C. Edwin Moore, Senior Judge.

Defendant appeals the denial of his application for post-conviction relief.

AFFIRMED.

James Cleary, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney
General of Iowa, for respondent-appellee.

Heard by Oxberger, C. J., and Danielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant, Harold Leon Christopher, appeals the denial of his application for post-conviction relief. In a jury trial defendant was convicted of robbery in the second degree in violation of sections 711.1 and 711.3, The Code Supp. 1977, and was sentenced to a period of incarceration not to exceed ten years. Defendant then filed an application for post-conviction relief under Chapter 663A, The Code, alleging that he received ineffective assistance of counsel at trial and that his fifth amendment right against self-incrimination was violated at trial. We affirm the post-conviction court's denial of defendant's application.

When a post-conviction applicant asserts constitutional violations, we make an independent evaluation of the totality of the circumstances. Sims v. State, 295 N.W.2d 420, 422 (Iowa 1980); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of a de novo review. Id.

I The sixth amendment to the United States Constitution guarantees criminal defendants the right to counsel. Gideon v. Weinwright, 372 U.S. 335, 342-43, 83 S. Ct. 792, 795-96, 9 L. Ed.2d 799, 804 (1963). The sixth amendment is made obligatory on the states by the fourteenth amendment to the United States Constitution. Id. The right to counsel means the right to effective assistance of counsel. McMann v. Richardson, 379 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14, 25 L. Ed.2d 763, 773 n.14 (1970); Ogden v. State, 215 N.W.2d 335, 337 (Iowa 1974); State v. Williams, 207 N.W.2d 98, 104 (Iowa 1973). The test for judging the quality of representation accorded a criminal defendant who challenges the competency of his attorney is whether in all the circumstances counsel's performance was within the range of normal competency. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978); State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978); State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Defendant has the burden of proving ineffectiveness of counsel. Veverka, 271 N.W.2d at 750; State v. Brant, 268 N.W.2d 210, 211 (Iowa 1978). In order to sustain his burden defendant must establish by a preponderance of the evidence, Sims, 295 N.W.2d at 423; Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977), an affirmative factual basis demonstrating counsel's inadequacy of representation, Long v. Brewer, 253 N.W.2d 549, 553 (Iowa 1977); Zacek v. Brewer, 241 N.W.2d 41, 51 (Iowa 1976). An applicant for post-conviction relief is confronted with a presumption that

counsel is competent, which must be overcome by the applicant in order for an ineffective assistance of counsel claim to lie. Sims, 295 N.W.2d at 423. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. Sims, 295 N.W.2d at 423; Hinkle, 290 N.W.2d at 31; State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979).

Defendant contends that his trial attorney, Gary Garrison, rendered ineffective assistance of counsel by negligently and erroneously advising him concerning his appeal rights. Defendant states that Garrison erroneously advised him by stating that defendant probably would be released from prison within a year and that an appeal would take that long. Defendant points to sections 246.38-41, The Code 1979, in support of his claim that Garrison's advice was erroneous. Although reading these Code sections alone makes it appear as though defendant could not possibly be released from prison within one year in light of his sentence to a maximum of ten years, these are not the only Code provisions relevant to an early release from prison. Code section 906.5 creates the possibility of defendant's release from prison within a year. It may be that Garrison's advice to defendant was based on a practical, working awareness that a prisoner in defendant's position might be granted an early parole. For this reason defendant has not proved by a preponderance of evidence Garrison's advice to be erroneous.

Defendant also alleges that Garrison rendered ineffective assistance because he never discussed with defendant grounds for appeal, merits of the issues, or chances of success on appeal. There is conflicting testimony on this point. It is agreed that Garrison and defendant did discuss the possibility of taking an appeal. Defendant testified that he exhibited a desire to take an appeal. Garrison testified that defendant exhibited no desire to take an appeal. Defendant testified that while he was incarcerated in Anamosa he instructed a friend to contact Garrison and to ask Garrison to take an appeal. Garrison testified that he was never so contacted. Defendant testified that Garrison told him that he could not win an appeal. Garrison testified that he never made any indication to defendant that an appeal would be without merit. Defendant testified that Garrison did not go over with him the errors made at trial or the chances of succeeding in alleging them in an appeal. Garrison testified that he was

sure he discussed with defendant certain grounds of appeal but that he had no specific memory of the grounds discussed. The trial court concluded that the evidence clearly establishes that defendant knowingly, deliberately, and inexcusably failed to advise Garrison of any desire to pursue an appeal. We agree with the trial court's conclusion, and believe that the extent to which Garrison's discussion of the aspects of an appeal may have been incomplete, which the record leaves unclear, did not amount to ineffective assistance in light of defendant's failure to demonstrate any interest in taking an appeal. Defendant, therefore, has not met his burden of establishing by a preponderance of the evidence an affirmative factual basis demonstrating Garrison's inadequacy of representation.

II. Defendant contends that the State's use of his silence against him at trial constituted a violation of his rights under the fifth amendment to the United States Constitution. The State contends defendant may not raise this issue for failing to raise it on direct appeal. However, we will address the issue on the merits, giving defendant the benefit of doubt that his interpretation of his counsel's advice on early release may have discouraged his appeal. The fifth amendment prohibits the State from commenting on the fact that a criminal defendant remains mute in the face of accusation. Miranda v. Arizona, 384 U. S. 436, 469, 86 S. Ct. 1602, 1625, 16 L. Ed.2d 694, 720 (1966). The fifth amendment has been held applicable to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L. Ed.2d 653, 658 (1964). After Richard Jones of the Des Moines Police Department testified that defendant and his companions were advised of their Miranda rights upon arrest, the State elicited the following testimony from him.

Q. What did they say?

A. They indicated that they did not understand their rights and that they didn't wish to make any further statement.

Defendant moved for a mistrial on the grounds that Jones' reference to defendant's refusal to speak constituted a violation of defendant's fifth amendment rights. The trial court overruled the motion, and defendant now seeks relief under Chapter 663A, The Code 1979.

Assuming, without deciding, that Officer Jones' remark constitutes prosecutorial error, it constitutes harmless error. A defendant is not entitled to reversal of his conviction on the basis of constitutional error if the error is shown to be harmless. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 827, 17 L. Ed.2d 705, 709 (1967); State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975). In evaluating error the test is whether it appears beyond a reasonable doubt that the error did not affect the accused's right to a fair trial. State v. Porter, 283 N.W.2d 351, 253 (Iowa 1979). The reference to defendant's silence was made only once, see Chapman v. United States, 547 F.2d 1240, 1250 (5th Cir. 1977), and did not form the basis of subsequent argument by the State, Id. We conclude that it appears beyond a reasonable doubt that the reference did not affect defendant's right to a fair trial, and therefore the post-conviction court did not err in denying defendant's application for relief.

AFFIRMED.