

IN THE COURT OF APPEALS OF IOWA

DELBERT EUGENE WILKINS,)

Applicant-Appellant,)

vs.)

STATE OF IOWA,)

Resister-Appellee.)

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189

Appeal from the Iowa District Court for Wapello County
(CL2604-0586 & 229-9), Phillip Collett, Judge.

Defendant appeals the district court's denial of
postconviction relief after a jury found him guilty of
first-degree murder. **AFFIRMED.**

Philip B. Mears of Mears, Zimmerman & Mears, Iowa City,
for applicant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark
Joel Zbieroski, Assistant Attorney General, for
resister-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, J.

490

Defendant appeals the district court's denial of postconviction relief after a jury found him guilty of first-degree murder. He alleges ineffective assistance of counsel because his trial attorney failed to investigate or offer at trial a defense of intoxication and diminished capacity; and further, he was persuaded to reject the plea bargain by his attorney's wrongful assurances. For the reasons set out below, we affirm the decision of the trial court.

I.

Defendant, Delbert Wilkins, was convicted of murdering Harry Harvill at Rusty's Tavern in Ottumwa, Iowa, on April 13, 1982. A jury found defendant guilty of first-degree murder. The district court overruled defendant's motion for a new trial based on ineffective assistance of counsel and sentenced him to life imprisonment. The Iowa Supreme Court affirmed the trial court's decision in State v. Wilkins, 346 N.W.2d 16 (Iowa 1984). In seeking postconviction relief, defendant again argued ineffective assistance of counsel and was again denied relief by the district court. He now appeals from that adverse decision.

II.

Defendant's argument is based on the alleged failure of his trial attorney to competently investigate or present at

trial a defense of diminished capacity. Instead, trial counsel focused on an argument of self-defense. Defendant now urges competent counsel would clearly have fashioned a defense based on diminished capacity and intoxication in view of the surrounding circumstances. Finally, defendant asserts trial counsel was ineffective in providing advise with regard to a proposed plea bargain. The State responds by asserting defendant's arguments of ineffective counsel cannot be relitigated now because they were finally adjudicated or waived on direct appeal, pursuant to Iowa Code chapter 663A.

Ordinarily, a postconviction relief proceeding pursuant to Iowa Code chapter 663A is at law and our review is not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards, the reviewing court makes its own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Hinkle, 290 N.W.2d at 30. Because a postconviction claim of ineffective assistance of counsel asserts a violation of constitutional safeguards, our review is de novo. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987).

III.

A. We first review applicant's assertion trial counsel was ineffective in preparing and presenting the defense of diminished capacity or intoxication. We begin by noting that certain legal principles guide our review.

Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d at 632. We presume counsel was competent and a postconviction petitioner has the burden of establishing by a preponderance of the evidence that trial counsel was ineffective. Id. To establish an ineffectiveness claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performing [sic] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Cuevas, 415 N.W.2d at 632 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Hinkle, 290 N.W.2d at 34. The litmus test for determining whether specified errors of counsel have resulted in required prejudice, is a defendant must show there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). In addition, it is well settled that a person is barred from relitigating in a postconviction proceeding any ground which is finally adjudicated on direct appeal. Iowa Code § 663A.8 (1987);

Armento v. Baughman, 290 N.W.2d 11, 12 (Iowa 1980). Unless a person can show sufficient reason for not asserting the claim in his direct appeal. Id. at 13.

Viewing the facts in the light of the foregoing principles, we affirm the decision of the district court. The defendant urges that competent counsel would have put forth a defense based on diminished capacity and intoxication in view of the surrounding circumstances. These circumstances include a blood alcohol level of .219% measured three and one-half hours after the shooting, his daughter's impending surgery, his ongoing treatment by a psychiatrist, and his wife having left him the previous day. In deciding defendant's direct appeal, the supreme court stated:

[O]nce defendant's trial counsel made a sound decision to emphasize self-defense than than diminished capacity as a defense, he reasonably stayed that course in his subsequent final trial preparations and presentation of the case to the jury. Once he reasonably decided to emphasize self-defense he reasonably attempted thereafter to present the evidence in a light which would emphasize the defendant's accurate recall of what happened in the bar and de-emphasize the effect of alcohol and drugs on his system. Defendant has not shown that his attorney was ineffective in failing to flush out more completely the defense of diminished responsibility when he reasonably thought the presentation of more evidence on that issue would have weakened considerably his justification defense.

State v. Wilkins, 346 N.W.2d 16, 19 (Iowa 1984). In addition, the supreme court stated that appellate counsel asserted on appeal "trial counsel should have prepared more

thoroughly and presented to the jury more effectively the theory the defendant was so intoxicated and drugged that he could not have formed the requisite" intent. Id. at 18. It is also clear from the earlier decision that the supreme court considered trial counsel's failure to admit evidence of defendant's high blood alcohol level or that he was taking medication. Defendant acknowledges the jury was instructed on the defense of diminished capacity but still asserts defense counsel inadequately investigated diminished capacity or an intoxication defense and failed to present the defense at trial. We do not believe the issue raised on this postconviction application is any different than the one decided by the supreme court during defendant's direct appeal. We thus deem the supreme court's decision on this issue to be a final adjudication and we decline to address the issue here.

B. For defendant's second claim that his defense counsel provided ineffective assistance, he claims he was persuaded to reject a plea bargain because of his attorney's assurance that in view of his intoxication a jury would never find him guilty of first-degree murder. He thus argues his attorney inadequately advised him of the ramifications of rejecting such a plea bargain. This claim is being raised for the first time in this postconviction proceeding. Unless defendant has a sufficient reason for failing to raise this claim on his direct appeal, we will

not consider it here. Washington v. Scurr, 304 N.W.2d 231 (Iowa 1981). We have stated when a postconviction applicant claims ineffective assistance of criminal trial counsel, the applicant assumes the burden of establishing by a preponderance of evidence two particulars. First, the applicant must show that sufficient reason exists for not having raised the issue on direct appeal. Secondly, by examination of the circumstances, the applicant must demonstrate counsel's inadequacy of representation. Hinkle, 290 N.W.2d at 30-31. The purpose behind this policy is a defendant should not be permitted to submit multiple grievances in a piecemeal fashion, thereby rendering meaningless the concept of a single comprehensive appeal. Carstens v. Rans, 210 N.W.2d 663 (Iowa 1973).

We find the applicant does not provide a sufficient reason for failing to make this claim on direct appeal. Defendant asserts he lacked a full opportunity for evidentiary discovery. We understand applicant was represented by different counsel on appeal, however we believe adequate time existed for him to discover the necessary information to fully argue this issue on direct appeal. Even if we chose to address this issue here, we would affirm the decision of the trial court. The trial court determined the evidence on this issue is quite sparse. The only evidence put forth at the postconviction hearing was testimony of both trial counsel and defendant.

Not surprisingly, the two stories contradicted one another. Although we review constitutional issues de novo, we still give weight to the trial court's findings on credibility of witnesses. Taylor v. State, 352 N.W.2d 683 (Iowa 1984). Because the trial court had the opportunity to review the demeanor of the witnesses in this matter, and at the same time, viewing the sufficiency of the evidence in the record, we do not find reason to disturb the decision of the trial court.

AFFIRMED.