

FILED

JAN 27 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STEPHEN THOMAS UTHE,)

Applicant-Appellant,)

vs.)

STATE OF IOWA,)

Resister-Appellee.)

Filed January 27, 1988

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7-463
86-1034

Appeal from the Iowa District Court for Polk County (No. PCR 175), Dick Strickler and Louis A. Lavorato, Judges.

Applicant appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for applicant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; and Cathie Thune, Assistant County Attorney, for resister-appellee.

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

DONIELSON, J.

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The applicant appeals from the district court's denial of his application for postconviction relief. We affirm.

On February 2, 1981, Stephen Thomas Uthe entered guilty pleas to one count of first-degree robbery and one count of false use of a financial instrument pursuant to a plea agreement. The district court then sentenced him to consecutive prison terms of up to twenty-five years on the robbery charge and up to ten years on the false use charge. This court dismissed Uthe's direct appeal as frivolous without prejudice to his right to bring a postconviction action.

Uthe filed a pro se application for postconviction relief on May 17, 1982, followed by an amended and substituted application on August 24, 1982. On October 21, 1982, Uthe moved to have his original defense attorneys deposed separately. The attorneys refused, claiming that they were real parties in interest. The district court overruled Uthe's motion to compel, and the supreme court denied his subsequent application for interlocutory appeal. His postconviction application was then voluntarily dismissed without prejudice on May 4, 1983.

On June 10, 1983, Uthe filed another application for postconviction relief, contending that his original defense attorneys had rendered ineffective assistance by failing to inform him, prior to his pleading guilty, that he would be subject to an aggregate minimum sentence of seventeen and one-half years under Iowa Code section 906.5 (1979). Uthe claimed that his attorneys instead informed him that he would be eligible for parole in two or three years. Uthe's first motion for summary judgment was denied, and his second motion was ordered to be heard at the postconviction hearing.

On January 7, 1986, Uthe filed an application to be present at the postconviction hearing. On January 28, the district court denied the application but

permitted him to file an affidavit of testimony. Uthe filed his affidavit on March 21, 1986, reasserting his objection to be excluded from the hearing. He then filed a supplemental affidavit which did not reiterate his objection.

At the postconviction hearing, Uthe requested that one of his former attorneys be removed from the courtroom prior to the other's testimony. Uthe maintained that such a step was necessary to assure that each attorney would rely upon independent recollection of the guilty plea proceeding. The district court overruled Uthe's request. Both attorneys testified that they had informed Uthe of the applicability and possible effect of section 906.5 on his sentences. On June 30, 1986, the district court denied Uthe's application for postconviction relief.

Postconviction relief actions pursuant to Iowa Code chapter 663A are law actions and are ordinarily reviewed only on error. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). However, when there is an alleged violation of a constitutional safeguard, we will make an independent evaluation of the totality of the circumstances under which the postconviction ruling was made. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984); Thomas v. State, 316 N.W.2d 182, 183 (Iowa App. 1981).

I. Uthe's first contention of error is that Iowa Rule of Evidence 615¹ violates the due process clause of the federal constitution by making sequestration of witnesses discretionary with the district court. The State responds, inter

¹Rule 615. Exclusion of Witnesses. At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause. (emphasis added)

alia, that Uthe's constitutional challenge to rule 615 should be deemed waived due to his failure to raise it below.

Constitutional questions not raised at the district court level cannot be raised for the first time on appeal. See State v. Hansen, 286 N.W.2d 163, 165-66 (Iowa 1979). While Uthe did file a motion for protective order to compel separate discovery to require his two former trial attorneys be deposed separately and at his postconviction hearing Uthe did request exclusion of one attorney from the courtroom while the other testified, at no time until this appeal was the issue posited in terms of constitutional magnitude. Thus, we do not address the constitutional dimensions of his claim, other than to stand by our prior case law that exclusion of witnesses rests within the sound discretion of the trial court because a party is not entitled to exclusion as a matter of right. State v. Sharkey, 311 N.W.2d 68, 70 (Iowa 1981).

In the alternative, Uthe argues that the district court's denial of the sequestration of his two original defense attorneys during depositions and at the postconviction hearing was an abuse of discretion. Uthe argues he was prejudiced because the central issue boiled down to whether he was misinformed by his two defense attorneys of the consequences of his plea. Uthe claims he was told he would have to serve two to three years before being eligible for parole; his two former attorneys testified they informed him of the provisions of section 906.5 which provided that Uthe must serve one-half of his time before being eligible for parole, no matter how many years of incarceration.

Abuse of discretion is a difficult standard to meet. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). A defendant does not meet it unless he demonstrates the ruling was clearly unreasonable or was based on wholly untenable grounds. State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982).

Uthe submits the district court's reason to deny sequestration of the two witnesses was because they were parties to the action, thus falling under an exception to rule 615. Uthe contends this theory is misguided. We find, after a review of the postconviction hearing transcript, that the district court stated:

You may be correct . . . that they are not listed parties in this case, but you have informed the Court orally and in writing that there are accusations against both these attorneys. That makes them pretty important witnesses, at least. They have some significance in this hearing. I am going to overrule your motion.

We find the district court properly exercised its discretion; Uthe has not demonstrated he was prejudiced by the denial of his request for sequestration of witnesses. Uthe's plea agreement included dismissal of the remaining three other counts of false use of a financial instrument and one count of robbery in the first degree, as well as dismissal of other charges in separate prosecutions; in addition, the State would not file several charges involving false use of a financial instrument then under investigation.

We cannot reverse the district court without a showing of actual prejudice. Sharkey, 311 N.W.2d at 70. There is no presumption of prejudice from a failure to sequester witnesses. Fletcher v. State, 68 Wis.2d 381, 388, 228 N.W.2d 708, 712 (1975). We find no error occurred.

II. Uthe's second contention is that the district court abused its discretion by refusing to permit him to attend the postconviction hearing. The State responds that this claim should be considered waived due to Uthe's failure to reassert that claim at the postconviction hearing and to present a sufficient record on appeal.

We do not find Uthe waived this claim. Uthe filed an application to be present at the postconviction hearing. Upon denial of that application, he filed an affidavit expressly reasserting his objection to not being able to attend.

We have previously held that whether to allow the applicant to personally appear is a matter within the discretion of the trial court. Mark v. State, 370 N.W.2d 609, 611 (Iowa App. 1985). The appellant must show that "his oral testimony, if personally present, would have been different or deviated from his affidavit." Id. The trial court's discretion arises because of the costs and security problems involved in procuring a prisoner's personal presence at a hearing. Sallis v. Rhoads, 325 N.W.2d 121, 124 (Iowa 1982).

We cannot find, based on the record before us, that Uthe's oral testimony would have been different from his affidavit testimony. Apparently, a hearing was held at the district court level on this issue; however, there is no record of what transpired. A judgment below is presumed correct in the absence of a sufficient record for review. See State v. Ryder, 315 N.W.2d 786, 788-89 (Iowa 1982).

Accordingly, we affirm the district court in all respects.

AFFIRMED.