IN THE COURT OF APPEALS OF IOWA

No. 1-164 / 90-271

FILED
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CLERK SUPREME COURT

284

CHARLES EDWARD STEVENS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Stevens appeals the denial of his application for postconviction relief (challenging his 1979 conviction for first-degree kidnapping). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Sarah J. Coats, Assistant Attorney General; John Sarcone, County Attorney; and D. William Thomas, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Charles Stevens was convicted of first-degree kidnapping in 1979. The Iowa Supreme Court affirmed his conviction upon direct appeal in 1980. State v. Stevens, 289 N.W.2d 592 (Iowa 1980).

In 1982 Stevens applied for postconviction relief challenging the 1979 conviction. One allegation raised in Stevens' 1982 application was that trial counsel rendered ineffective assistance because counsel failed to adequately prepare an alibi defense. The district court implicitly found that good cause existed to raise this contention for the first time (appellate counsel had also been trial counsel), reached the merits of the application, and denied postconviction relief. On appeal, Stevens was represented by the State Appellate Defender's Office. Stevens' appeal from the denial of postconviction relief was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 104.

Stevens later filed the current application for postconviction relief. The district court once again denied postconviction relief, and Stevens has appealed.

Stevens again contends he received ineffective assistance of counsel in his 1979 criminal trial. He alleges trial counsel should have presented all composite drawings and photos which had been made of the perpetrator so the jury could have compared the composites. He also argues trial counsel should have introduced a 1978 newspaper article about a then-unidentified "circuit

rapist" operating in eastern Iowa. He alleges the composite picture of the "circuit rapist" was similar to the composite picture produced by the victim of the crime for which Stevens was charged. Stevens apparently argues that this newspaper article would have permitted the jury to find that the mysterious circuit rapist, rather than Stevens, had committed the crime for which Stevens was charged.

In addition, Stevens contends he is also entitled to postconviction relief on the additional ground of newly-discovered evidence. The alleged new evidence consists of a 1983 newspaper article which identified the "circuit rapist" referred to in the 1978 newspaper article noted above.

I. **Newly-Discovered Evidence.** Iowa Code section 663A.2(4) provides that an individual who has been convicted of a public offense may seek postconviction relief if there is evidence of material facts, not previously presented, which would require vacating the conviction. An applicant alleging newly-discovered evidence as a ground for postconviction relief must show: (1) the evidence was not discovered until after judgment; (2) the evidence could not have been discovered earlier through the exercise of due diligence; (3) the evidence is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial

is granted. Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982).

Stevens has met his burden in establishing the first two elements. The identification of the "circuit rapist" did not occur until 1983, well after Stevens' first postconviction proceeding was decided (November 1982).

However, we conclude Stevens has failed to establish the third and fourth elements. We cannot conclude the evidence discovered is material to Stevens' case. Nor can we conclude that the identification and confessions of the "circuit rapist" would probably change the result if a new trial was granted. The 1983 newspaper article notes that the individual named therein admitted to committing several sexual assaults in Davenport, Muscatine, Cedar Rapids, Iowa City, Coralville, Burlington, and Clinton, Iowa. We are unable to fathom how these confessions relate to Stevens' conviction for kidnapping which stemmed from an incident in Des Moines, Iowa. Merely because the sexual assault victims of the "circuit rapist" and the victim of Stevens' kidnapping described their assailants similarly is not evidence which entitles Stevens to a new trial. Stevens has failed to produce any connection between this "circuit rapist" and the crime for which Stevens was convicted.

Additionally, the victim of the kidnapping identified Stevens as her assailant. She also described his car and that it contained a Pepsi can and yellow clothes basket. Stevens was arrested in a car containing those items. The

victim's identification of Stevens as her assailant is not adversely affected by this "newly-discovered evidence."

The trial court did not err in denying Stevens postconviction relief on this ground.

II. Ineffective Assistance of Counsel. Stevens complains his attorney in the 1979 criminal trial rendered ineffective assistance by failing to present all possible evidence relating to Stevens' defense that he had been mistakenly identified as the perpetrator of the crime.

Stevens did not raise this precise contention in his first postconviction proceeding but he did challenge trial counsel's effectiveness in preparing and presenting Stevens' alibi defense. Stevens contends he should now be allowed to raise these new specific complaints (concerning the composite pictures and the 1978 newspaper article) because prior postconviction counsel rendered ineffective assistance.

Proceedings under Iowa Code section 663A are civil actions at law and ordinarily reviewed on error. However, when a postconviction petitioner asserts violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the circumstances in a de novo review. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984).

Iowa Code section 663A.8 generally bars applicants in postconviction actions from assigning grounds for relief which were not asserted in a prior proceeding. Section

663A.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. 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.

(Emphasis added.)

In Polly, our supreme court enunciated the rule that an applicant must not only show sufficient reason for failure to challenge the alleged error in an earlier proceeding, but must also show actual prejudice resulting from these errors. 355 N.W.2d at 856. Ineffective assistance of counsel may satisfy the "sufficient reason" element of the test articulated in Polly. Lamphere v. State, 348 N.W.2d 212, 215 (Iowa 1984).

> To establish a claim of ineffective assistance of trial counsel, we have indicated the applicant must show: 1) that counsel's performance was so deficient as not to be functioning as "counsel" guaranteed by the sixth amendment; and 2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. A claim of ineffective assistance of appellate counsel must satisfy an analogous standard. Representation by counsel is presumed to be competent, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective.

Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989) (citations omitted) (emphasis in original).

Stevens has not established sufficient reason for failing to raise these additional claims of trial counsel's ineffectiveness at his first postconviction proceeding. First, Stevens was represented by attorney Larry Handley during his first postconviction proceeding. However, the State Appellate Defender's Office represented Stevens on appeal. On appeal, Stevens did not allege Handley was ineffective. Having failed to allege counsel's ineffectiveness on appeal, Stevens waived the issue.

Even if we were inclined to find Stevens could first raise this issue in a second application for postconviction relief, Stevens has failed to show that his first postconviction counsel's performance was deficient. Handley testified at the second postconviction trial. He testified trial counsel's effectiveness was an issue of the original postconviction relief application, including the composite picture issue. In the original postconviction proceeding, Stevens alleged that trial counsel failed to conduct adequate investigation and preparation for trial, "including the failure to properly challenge the identification by the victim of the vehicle involved and the individual involved." From our de novo review of Handley's representation, we find he investigated Stevens' allegations of ineffective assistance of trial counsel and competently prosecuted that issue at trial. Original postconviction counsel's performance was not deficient.

Furthermore, Stevens has failed to show that he has suffered actual prejudice. Appealing his original application for postconviction relief, the Appellate Defender's office sought to withdraw. Appointed counsel may move to withdraw if "convinced after conscientious investigation of the entire record . . . that the appeal is frivolous . . . ." Iowa R. App. P. 104(a). "The motion must be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The Appellate Defender's motion and brief alleged, "In reviewing the record as a whole, appellate counsel is unable to make a reasonable argument that trial counsel's performance was below the range of normal competency." Stevens was properly notified of the request to withdrawal and he exercised his right to request that the appeal proceed nonetheless. See Iowa R. App. P. 104(d).

A three-member panel of the supreme court ruled, "After examining the record, we agree with counsel that there is no ground for reversal of the trial court's denial of postconviction relief." Appellate counsel was allowed to withdraw and Stevens' appeal was dismissed. See id. Necessarily implicit in the panel's decision is a finding that Stevens' trial counsel was not ineffective in preparing and presenting Stevens' alibi defense -- including that trial counsel adequately challenged the victim's identification of Stevens as the perpetrator.

Stevens is barred from relitigating the issue of trial counsel's effectiveness.

Moreover, in view of the victim's positive identification of Stevens as her assailant and her detailed description of the car in which he was arrested, whether the composite pictures were reflective of Stevens' appearance and whether the composite pictures were similar to those of the "circuit rapist" seems to be of minimal benefit to Stevens. We find Stevens has suffered no prejudice.

Stevens' second application for postconviction relief was properly denied.

AFFIRMED.