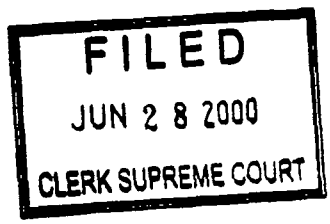
IN THE COURT OF APPEALS OF IOWA

No. 0-299 / 98-2232
Filed June 28, 2000



ORDELL THOMAS KJOS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

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

L. Jay Irwin III of L. Jay Irwin III P.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

The applicant, Ordell Thomas Kjos, appeals the denial of his application for postconviction relief. He contends the trial court erred in failing to find his trial counsel ineffective. We affirm.

I. Background Facts and Proceedings. In January of 1997, the State charged Kjos with sexually abusing a seven-year-old child after investigating a complaint made by the mother, Sheila Jackson. At trial, the victim testified Kjos touched her "private parts" under her underwear with his hand. In an interview with police officers, Kjos described two incidents where he had contact with his victim's genitalia over her underwear and one incident where he touched her genitalia under her underwear. Kjos's interview with police officers was tape-recorded. The interview was played at his jury trial. The defense called no witnesses. On June 23, 1997, a jury convicted Kjos of second-degree sexual abuse and he was sentenced to a term of imprisonment not to exceed twenty-five years. Kjos did not file a timely notice of appeal. In November 1997, the Iowa Supreme Court denied Kjos's application for a delayed appeal.

On June 28, 1998, Kjos filed an application for postconviction relief alleging his trial counsel was ineffective. A hearing was held in September 1998. At his hearing, Kjos testified he had wanted several witnesses called at his criminal trial: (1) a psychologist who would testify regarding dysfunctional families; (2) Thomas Frazier, a former cellmate, to testify Kjos had urged Frazier to tell the truth about charges against Frazier involving a child; (3) the victim's school principal who would testify Sheila Jackson's children were involved in counseling before Kjos became involved with her; (4) the victim's older sister who

would testify about her mother's past relationships; and (5) Sheila's cousin, a police officer, who would testify Sheila had told him she was raped by her father and then recanted the accusation. The district court found trial counsel was not ineffective and denied the application. Kjos appeals, reiterating that his trial counsel was ineffective.

II. Preservation of Error. The State argues that Kjos's appeal from the denial of postconviction relief presents formidable error preservation difficulties. We agree. Any claim not raised on direct appeal may not be litigated in postconviction unless there was sufficient cause for not raising it earlier and actual prejudice resulted from the alleged error. *Osborn v. State,* 573 N.W.2d 917, 921 (Iowa 1998); *see also* Iowa Code § 822.8 (1997). Kjos raises issues in his postconviction action that were not litigated on direct appeal. These issues cannot properly be raised now unless he demonstrates "sufficient cause" for not raising them earlier. Ineffective assistance of appellate counsel may provide sufficient cause. *See Osborn,* 573 N.W.2d at 921.

We find Kjos does not establish sufficient cause for his failure to raise the issue of ineffective assistance on direct appeal. Kjos did not file a timely appeal and his application for a delayed appeal was denied. His postconviction application does not allege ineffective assistance of appellate counsel or any other reason for failing to raise ineffective assistance of trial counsel on direct appeal. Kjos claims in his brief that he wanted to file an appeal before the deadline expired and indicated this desire to counsel. However, no record was made on this matter at the postconviction hearing and trial counsel was not questioned regarding his reasons for not filing an appeal.

At his postconviction hearing, Kjos admitted he did not file a timely appeal. However, he claims he thought his ability to appeal was contingent on admitting the crime to his counselor. He testified he did not initiate an appeal until the counselor informed him that an appeal would not be viewed as a denial of his criminal responsibility for sexual abuse. This claim does not constitute 'sufficient cause' under any authority we can find. The excuse offered by Kjos is not a credible one for failing to raise the claim of ineffective assistance on direct appeal. Kjos does not raise any other grounds which have been held to constitute sufficient cause in past cases.[1]

The postconviction court did not rely on the failure to preserve error in rejecting Kjos's application. However, we will affirm on appeal, as we do here, where any proper basis appears for the district court ruling, even though it is not the one relied on by the district court. *State v. LeGrand,* 540 N.W.2d 667, 669 (Iowa App. 1995). Accordingly, we affirm the district court's ruling on the basis that Kjos failed to preserve his claims.

AFFIRMED.

[1] *See, e.g., Stanford v. Iowa State Reformatory,* 279 N.W.2d 28, 33-34 (Iowa 1979) (holding factual or legal matters excusably unknown at time of trial or appeal may be raised first in postconviction action); *Jones v. State,* 545 N.W.2d 313, 314 (Iowa 1996) (stating ineffectiveness of postconviction counsel may permit new issues to be raised in postconviction application).