

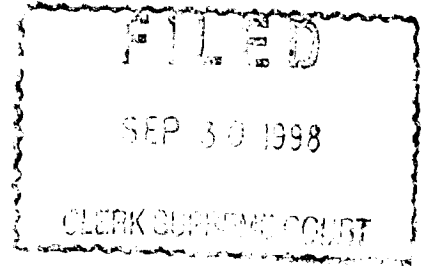
IN THE COURT OF APPEALS OF IOWA

No. 8-470 / 97-1378
Filed September 30, 1998

MARK AARON DELANEY,
Appellant,

vs.

STATE OF IOWA,
Appellee.



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Mark Delaney appeals from a district court ruling denying his application for postconviction relief, following his convictions on several counts of theft by deception. **AFFIRMED.**

Susan R. Stockdale of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Ronald Sotak, and Steve St. Clair, Assistant Attorneys General, and John P. Sarcone, County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

Mark Delaney was convicted of four counts of first-degree theft and four counts of second-degree theft following a jury trial in October 1992. The district court sentenced Delaney to eight consecutive terms of incarceration totaling sixty years. Delaney's convictions were affirmed on direct appeal and his claim of ineffective assistance of counsel was preserved for postconviction relief. The original sentence imposed was vacated and Delaney's case was remanded for resentencing. *See State v. Delaney*, 526 N.W.2d 170 (Iowa App. 1994).

In this postconviction proceeding, Delaney alleges his trial counsel was ineffective in two respects: Delaney cites counsel's failure to object to victim testimony specifically excluded by the trial court's ruling on a motion in limine. He also cites counsel failure to object to testimony at the original sentencing hearing about unprosecuted offenses offered by the State. In addition, Delaney claims he is entitled to postconviction relief because the State's violation of the motion in limine and offer of unprosecuted offenses at sentencing was prejudicial prosecutorial misconduct.

The State contests Delaney's ineffective assistance and prosecutorial misconduct claims. The State also claims Delaney has failed to preserve error on his claims by failing to raise them on direct appeal.

I. Scope of Review.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). 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. This is the equivalent of de novo review. *Id.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

II. Error Preservation.

An applicant for postconviction relief is generally barred from assigning grounds for postconviction relief which were not raised on direct appeal. Iowa Code § 822.8 (1997). Such grounds may nevertheless be considered if the applicant establishes sufficient reason for not raising grounds on direct appeal. *Polly v. State*, 355 N.W.2d 849, 855 (Iowa 1984). Additionally, postconviction relief is not intended as a forum to relitigate issues resolved on direct appeal. *Stewart v. Nix*, 31 F.3d 741, 743 (8th Cir. 1994).

Delaney's ineffective assistance of counsel claims raised on direct appeal were limited to counsel's failure to object to witnesses presented at sentencing and to

actions of persons in the courtroom during sentencing. *See Delaney*, 526 N.W.2d at 173. There is no indication he claimed trial counsel was ineffective for failing to object to testimony excluded by the trial court's ruling on his motion in limine. Moreover, Delaney does not argue sufficient reasons exist for not raising this issue on direct appeal. We accordingly decline to consider Delaney's ineffective assistance of counsel claim based on counsel's failure to object to such testimony.

As noted earlier, Delaney's original sentence was vacated. As a result, his claims based on counsel's performance at the original sentencing hearing were effectively remediated. The record also indicates Delaney has not appealed the sentence imposed on remand. There is therefore nothing left to consider on postconviction relief.

We have carefully considered all of Delaney's claims and find them to be without merit. The judgment of the district court is affirmed.

AFFIRMED.