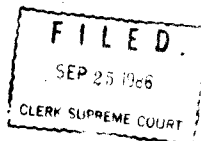


IN THE COURT OF APPEALS OF IOWA



EDWARD WAYNE DON,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed September 25, 1986

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6-220
85-895

Appeal from the Iowa District Court for Mahaska County (No. 28184-69-294)

- Dan F. Morrison, Judge.

The petitioner appeals the district court's denial of his application for postconviction relief contending he is entitled to such relief on the grounds that he was denied effective assistance of trial and postconviction counsel and that the trial court denied him his sixth amendment right to confront witnesses against him. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden and Douglas F. Staskal, Assistant Attorneys General, for respondent-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

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The petitioner, Edward Wayne Don, was convicted in 1980 of first-degree murder following a jury trial. His conviction was affirmed on direct appeal by the Iowa Supreme Court. State v. Don, 318 N.W.2d 801 (Iowa 1982). On November 24, 1982, Don filed an application for postconviction relief alleging that he was denied effective assistance of counsel prior to and during his trial. On February 12, 1985, a hearing was held on the application. On May 7, 1985, the postconviction court entered its ruling denying relief. Don filed a timely notice of appeal.

Don argues first of all that his constitutional right to confront witnesses was violated by the admission into evidence at trial of deposition testimony which was taken out of his presence and without his knowledge. We note that, as Don concedes, this issue was not preserved for review on direct appeal.

A postconviction proceeding is not an opportunity for litigating issues that were not properly preserved for our review on direct appeal. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). We will not ordinarily allow a defendant to claim in postconviction proceedings that the trial court erred on issues that were not properly preserved for our review on direct appeal. Id. As our statute governing postconviction procedure states, "[t]his remedy is not a substitute for . . . direct review of the sentence or conviction." Iowa Code § 663A.2(7) (1985). In order for a postconviction applicant to circumvent these principles, the applicant must show sufficient reason for failure to challenge the alleged errors in trial court as well as actual prejudice resulting from the errors. Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984); Iowa Code section 663A.8 (1985). It is not sufficient that the applicant demonstrate that the errors created a possibility of prejudice; rather, the applicant must show that the errors worked

to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. Id. at 855.

Don argues that ineffective assistance of his counsel establishes sufficient reason for his failure to challenge the alleged constitutional error in the trial court. This particular claim of ineffective assistance, like the underlying sixth amendment claim, was not presented on direct review. In State v. White, 337 N.W.2d 517 (Iowa 1983), our supreme court dealt with the degree of specificity required of ineffective assistance claims on direct appeal in order to preserve the claim for postconviction proceedings. After pointing out that "a defendant's ineffective assistance claim on appeal is hardly an inconsequential step in the proceedings," the court went on to say that, on direct appeal

[t]his court should be provided with enough information to make an initial assessment of defendant's contentions. Whether the specific issue can be disposed of on appeal or must be reserved for resolution in postconviction proceedings is a determination that should be made by the appellate court, not by defense counsel. We cannot base our holding on the bald assertion in a brief that counsel provided ineffective assistance in some undisclosed fashion. . . . We have never held . . . that a defendant on direct appeal should not disclose the grounds, or describe the situations, that support his claim of ineffective assistance.

Id. at 519-20.

In the present case, we think that Don has failed to preserve his claim that his trial counsel was ineffective when he failed to inform Don of the deposition, allowed the use of the deposition at trial, and failed to preserve the issue of the deposition's admission for direct review. Although Don argued on direct review that his trial counsel was ineffective in several respects, the present claim was not among them. As a result, this ineffective assistance claim has not been preserved for our review and Don's claim of sufficient reason for not challenging the alleged constitutional error in the trial court fails. In addition,

Don has not made an adequate showing of actual prejudice resulting from the claimed error. Quite to the contrary, the record discloses that the deposition testimony Don now seeks to quash was relied upon extensively by Don during all phases of his defense effort. In light of this fact, we fail to see how Don was prejudiced by the evidence he now, given hindsight, seeks to challenge.

Don next contends that his trial counsel was ineffective in failing to give adequate advice regarding an offer of a plea of guilty to the lesser offense of second-degree murder. As with his previous ineffective assistance claim, Don failed to apprise the court on direct appeal of this ground. Notwithstanding this omission, we have studied Don's contention on this point and find it to be without merit. Don testified at his postconviction hearing that his attorney informed him during discussions on the proposed plea agreement that if Don was convicted of first-degree murder he would receive a life sentence. Don argues here, however, that the consequences of such a sentence in terms of actual years of imprisonment were never adequately explained to him and that had they been explained to him he would have accepted the plea agreement. We think that Don's awareness of the maximum sentence for the first-degree murder conviction was adequate to make his rejection of the plea agreement an informed one. Cf. Hill v. Lockhart, 731 F.2d 568, 570 (8th Cir. 1984) (the details of parole eligibility are considered collateral rather than direct consequences of a plea, of which a defendant need not be informed before pleading guilty); Grant v. State, 320 N.W.2d 619, 621 (Iowa 1982) (federal constitution does not require that a defendant with a prior forceable felony conviction be informed of the period of parole ineligibility prescribed by section 906.5, The Code, before his or her guilty plea be accepted). The record discloses that in light of his knowledge of the maximum possible sentence Don rejected the State's offer and thereby took a calculated risk that he would not be convicted

of first degree murder. This decision can in no way be attributed to ineffective assistance of counsel.

Finally, Don argues that his trial counsel was ineffective in failing to properly object to the introduction into evidence of a pair of boots allegedly worn by him at the time of the murder. Related to this claim is Don's allegation that his postconviction counsel was ineffective in failing to properly pursue this issue at the postconviction hearing. Once again Don failed to state this ineffective assistance of trial counsel claim on direct appeal. We note, however, that Don did appeal the trial court's ruling which allowed the boots into evidence. On its review, the supreme court held that the objection made by Don's trial counsel was inadequate to preserve error on the chain of custody ground urged on appeal. Don, 318 N.W.2d at 805. It is this inadequate objection that forms the basis for Don's present ineffective assistance claim. Therefore, it is arguable that Don failed to present this specific ineffective assistance claim on direct appeal due to the possibility that, prior to the supreme court's opinion, he was not aware of the nature of his counsel's alleged ineffectiveness in this respect. We assume, without deciding, that this constitutes "sufficient reason" for not raising this issue on direct appeal. See Iowa Code section 663A.8 (1985).

Even given this assumption, however, we think that Don may not raise this claim in postconviction proceedings as he has not shown that "actual prejudice" resulted from the admission of the boots into evidence. As we have noted above, this is a co-requisite with a showing of "sufficient reason" to our hearing issues on postconviction which were not raised on direct appeal. Polly, 355 N.W.2d at 856. Although Don argues that the boots' admission was "clearly . . . critical to the State's case," and "extremely damaging to the defendant," he fails to demonstrate any support to these conclusions. Consequently, we think this issue was not properly preserved for the postconviction proceedings.

As a result of our holding that this issue was not preserved for postconviction proceedings, Don's contention that his postconviction counsel was ineffective in failing to properly pursue it is rendered meritless.

AFFIRMED.