IN THE COURT OF APPEALS OF IOWA

No. 0-828 / 00-695
Filed February 28, 2001

ERNEST DAVID MACK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
FEB 2 8 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Ernest Mack appeals from the summary denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

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

Considered by Sackett, C.J., and Zimmer, and Miller, JJ.

ZIMMER, J.

Applicant Ernest David Mack appeals from the summary denial of his application for postconviction relief. He contends he was denied his right to effective assistance of trial and postconviction counsel. We affirm.

Pursuant to a plea agreement, Mack appeared in court on December 17, 1996, and pled guilty to the charge of possession with intent to deliver crack cocaine. As part of the deal, a related charge of failure to possess a drug tax stamp was dismissed. The district court accepted the plea and sentenced Mack to a term of incarceration not to exceed twenty-five years. The court suspended the sentence and placed Mack on probation. Mack never filed a direct appeal.

In 1998, Mack violated the terms of his probation. As a result, his probation was revoked and he was incarcerated to serve his formerly suspended sentence.

On February 16, 1999, Mack filed an application for postconviction relief and an attorney was appointed to represent him. Mack's application alleged he was denied effective assistance of trial counsel in a number of respects. Specifically, he asserted his guilty plea was entered under duress, his plea was not knowingly and intelligently entered, his plea lacked a factual basis, his counsel failed to fully advise him of his constitutional rights, and his counsel failed to properly advise him during the sentencing phase of his case. Mack also contended his trial counsel failed to investigate whether the police had probable cause to stop and arrest him for the offense to which he pled guilty.

On February 16, 2000, the trial court entered an order pursuant to Iowa Code section 822.6, which stated that upon review of Mack's application it did not

appear Mack was entitled to postconviction relief and no purpose would be served by any further proceedings. The court advised both Mack and counsel of the court's intention to dismiss Mack's application. Mack and his attorney were invited to respond to the proposed dismissal within fifteen days. The court's order informed Mack that after considering any reply, the court would "then either dismiss the order or grant leave to amend to file an amended application or direct that the proceedings otherwise continue." The court dismissed the application on March 15, 2000 after neither Mack nor his attorney responded.

Mack appeals. He contends he was denied effective assistance of both trial counsel and postconviction counsel.

I. Scope and Standard of Review. Ordinarily, we review a postconviction relief action for errors of law. *Collins v. State,* 588 N.W.2d 399, 401 (Iowa 1998). However, if a constitutional right is involved, such as the right to effective assistance of counsel, we review de novo. *See id.*

Iowa Code section 822.6 provides for a procedure in postconviction proceedings analogous to summary judgment. Summary disposition of a postconviction relief action is not proper if a material issue of fact exists. *See* Iowa Code section 822.6 (1997); *Earnest v. State,* 508 N.W.2d 630, 632 (Iowa 1993). A material issue of fact exists if reasonable minds could draw different inferences and reach different conclusions from the facts. *State v. Dryer,* 342 N.W.2d 881, 883 (Iowa Ct. App. 1983). However, summary disposition is permissible in situations where a petitioner's allegations are directly contradicted by the record, unless the petitioner has raised a legitimate question concerning the credibility of that record. *Id.*

II. Preservation of Error. The State contends Mack did not preserve his claim for postconviction relief based on ineffectiveness of trial counsel because he filed neither a motion in arrest of judgment after his guilty plea nor a direct appeal following sentencing. Any claims not raised on direct appeal may not be litigated in postconviction unless there was sufficient cause for not raising them earlier and actual prejudice resulted from the alleged error. *State v. Osborn,* 573 N.W.2d 917, 921 (Iowa 1998). *See also* Iowa Code §822.8 (1999). None of the issues Mack attempts to raise in his postconviction action were asserted in a direct appeal. Accordingly, Mack cannot properly raise these issues now unless he demonstrates "sufficient cause" for not raising them earlier.

We conclude Mack has not demonstrated sufficient cause. Most of Mack's claims are contradicted by the plain language of the trial court's sentencing order filed December 17, 1996. In addition, Mack did not respond to the postconviction court's invitation to provide a reply to the court's notification of its intention to dismiss his application. As a result, the record reveals no basis for concluding that Mack had sufficient cause for not raising his claims of ineffectiveness of trial counsel on direct appeal. We conclude Mack has not preserved his claim of ineffective assistance of trial counsel.

III. Allegations of Ineffective Assistance of Postconviction Counsel. Mack claims his postconviction counsel was ineffective. To prevail on this claim, he must show that his postconviction attorney's performance fell outside a normal range of competency and that the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Dunbar v. State,* 515 N.W.2d

12, 15 (Iowa 1994). "Representation is presumed competent and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective." *Id.*

On appeal, Mack claims that an investigation by PCR counsel would have revealed constitutional problems with Mack's guilty plea and his sentencing. He claims that if PCR counsel had properly investigated his case, his application would not have been dismissed. Mack's claims are too general to allow us to address these allegations or preserve them for another postconviction proceeding. Mack does not propose what deficiencies an investigation would have revealed or how anything discovered would have changed the result in this case. Mack's argument is further weakened by his own failure to respond to the trial court's invitation to reply to the court's proposed dismissal of his application. Finally, the record before us on appeal reveals nothing that would support the claims made in Mack's application for postconviction relief.

We affirm the district court's dismissal of Mack's application for postconviction relief.

AFFIRMED.