IN THE COURT OF APPEALS OF IOWA

No. 9-547 / 98-90
Filed November 23, 1999

GARY L. CARBERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Carberry appeals the denial of his application for postconviction relief. **AFFIRMED.**

Patrick E. Ingram of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Richard Crowl, County Attorney, and Troyce Wheeler, Assistant County Attorney, for appellee.

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

HUITINK, P.J.

I. Background Facts and Proceedings.

In June 1993 Gary Carberry was convicted of attempted murder and murder in the first degree in Pottawattamie County. The court sentenced Carberry to terms of imprisonment for life and for twenty-five years, to be served consecutively. The Iowa Supreme Court affirmed his convictions. *State v. Carberry*, 501 N.W.2d 473 (Iowa 1993).

In this case Carberry seeks postconviction relief claiming he was denied effective assistance of counsel because counsel failed to request that closing arguments be recorded. As a result, Carberry argues there is no record supporting his claim that the county attorney made misstatements of the law concerning the applicable burden of proof. At trial Carberry testified counsel refused his request to secure a record of closing arguments. Counsel denied this assertion and testified he could not recall the claimed misstatement by the county attorney. The county attorney testified that he did not make the misstatement of the law claimed.

The district court concluded Carberry failed to prove counsel breached an essential duty and denied the relief Carberry requested. On appeal Carberry renews the arguments made below.

II. Standard of Review.

Our review of postconviction relief proceedings is ordinarily for errors at law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, where a postconviction

petitioner asserts violations of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. *Id.* This is the equivalent of de novo review. *Id.*

III. Ineffective Assistance of Counsel.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

Carberry contends that counsel's failure to have closing arguments recorded was a breach of counsel's duty to preserve the record. If counsel's inaction results in an insufficient record for appellate review, counsel has provided ineffective assistance of counsel. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). However, defense counsel is not required to have closing arguments recorded. *Id.* The district court

correctly found "Reporting of closing arguments was not required, and thus cannot be the essential duty breached." Moreover, the court, as the finder of fact, was free to credit testimony from counsel and the county attorney that the alleged statements were not made. Because Carberry has failed to prove counsel breached an essential duty, we affirm.

AFFIRMED.