FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KAILON C. GOETTSCHE,	)	
Applicant-Appellant,	)	Filed August 30, 1983
vs.	)	3-109 2-69083
STATE OF IOWA,	)	
Respondent-Appellee.	)	

Appeal from Pottawattamie District Court, Keith E. Burgett, Judge.

Defendant appeals the denial of his application seeking postconviction relief following his conviction of delivery of cocaine in violation of Iowa Code § 204.401(1)(a). AFFIRMED.

Richard G. Davidson of Davidson & Bailey, P.C., Clarinda, for applicant-appellant.

Thomas G. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

PER CURIAM

Defendant appeals the denial of his application seeking postconviction relief following his conviction of delivery of cocaine in violation of Iowa Code § 204.401(1)(a). We affirm.

In May 1980, Kailon Goettsche was convicted of delivery of a controlled substance in violation of Iowa Code section 204.401(1)(a). At trial Goettsche apparently stipulated to the drug transaction; the only issue was whether there was delivery for profit. In describing the drug transaction, Goettsche told the trial court that two men, who later turned out to be undercover narcotics agents, asked him to get cocaine for them; that Goettsche told them he could but he had no money; that the men then gave him $300; that Goettsche purchased cocaine from an unnamed source; and that Goettsche subsequently gave the cocaine to the men.

On direct appeal Goettsche was represented by an attorney other than his trial attorney. The only issue on direct appeal was the sufficiency of evidence of Goettsche's intent to profit from the cocaine transaction. Goettsche's conviction was affirmed by the court of appeals in November 1981.

In March 1982, Goettsche filed an application for postconviction relief, asserting that: (1) he merely aided and abetted the receiver of the controlled substance and so could not be guilty of delivery; (2) he was entrapped into committing the offense; and (3) his trial counsel was ineffective for failing to raise the receiver/deliverer issue.

On June 30, 1982, the postconviction court denied relief on grounds that Goettsche failed to assert his claims at trial or on direct appeal. The court made no findings regarding Goettsche's claim of ineffective assistance.

Our scope of review for postconviction proceedings is as an action at law, except when there are issues raised as to a constitutional violation. Then we must independently evaluate the totality of the relevant circumstances shown by the record under which rulings on those constitutional rights were made. Evidence relevant to the issue is received de novo. Bledsoe v. State, 257 N.W.2d 32, 33 (Iowa 1977).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. Iowa Code § 663A.2. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981); Horn v. Haugh, 209 N.W.2d 119, 120 (Iowa 1973); § 663A.8.

Defendant claims he has new evidence. Evidence newly discovered after trial is a permissible basis for postconviction relief as provided in § 663A.2(4). One of the three elements set out in State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976), which must be established before a new trial will be granted is that the evidence in question could not have been discovered before judgment in the exercise of due diligence. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 32-33 (Iowa 1979). Defendant contends that the fifth amendment of the United States Constitution protected defendant from making the facts available at the original trial and therefore defendant's willingness to tell these facts to the court now makes the disclosure "new evidence" sufficient for postconviction relief. Defendant relies on Zacek v. Brewer which stated that the court would resolve any doubt in favor of appellant and treat the allegation as one of asserting a new legal basis for granting relief. 241 N.W.2d 41, 46 (Iowa 1976). In Zacek, defendant's attorney found out after the trial that there were constitutionally

violative flaws in the search warrant procedures followed by the police which, if defendant's counsel had known of the flaws before trial, would have led to considereable change in counsel's trial and pleading strategy. Id. In the instant case, unlike in Zacek, defendant has not shown sufficient reason why the ground on which he now relies was not previously asserted.

All of the information defendant now wants to disclose was available to defendant at the time of trial when the decision was made to exercise his fifth amendment right to remain silent. Defendant should not be allowed to remain silent and then, upon conviction, claim he has new evidence to impart. He would essentially be getting two opportunities to have his case heard. The Iowa Code bars relitigation of previously adjudicated issues. State v. Wetzel, 192 N.W.2d 762, 764 (Iowa 1971). In a postconviction proceeding, when a defendant raises a factual or legal contention which he knew of and which he deliberately and inexcusably failed to raise in the proceeding leading to conviction, or, having raised the question in trial court, failed to pursue the matter on appeal, we will deny relief. Horn v. Haugh, 209 N.W.2d 119, 120-21 (Iowa 1973). There is an exception to this rule, however, and that is that inadequacy of counsel might be sufficient reason why an issue was not asserted or was inadequately raised originally. Cf. State v. Masters, 196 N.W.2d 548, 550 (Iowa 1972).

Defendant claims he received ineffective assistance of counsel in that certain arguments were not raised at trial and defendant was not allowed to testify on his own behalf. Ineffective assistance of counsel would be a violation of a basic constitutional safeguard. Consequently we make our own evaluation of the claim under the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39, 46 (Iowa 1977).

The ineffective assistance of trial counsel claim was raised for the first time in the postconviction proceeding. Where defendant failed to raise the issue

of ineffective assistance of counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). Defendant's appellate counsel was different from his trial counsel, so there is no reason why the issue could not have been raised on direct appeal. Defendant suggests that appellate counsel was also ineffective. Ineffective assistance of appellate counsel is sufficient reason for failing to raise an issue on direct appeal. Id.; Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). The right to effective assistance of counsel also applies to counsel on appeal and effectiveness is judged by the same standards. Hinkle at 31; cf. Anders v. California, 386 U.S. 738, 744-45, 87 S. Ct. 1396, 18 L. Ed. 2d 493, 498-99 (1967).

In reviewing an attorney's performance, the defendant has the burden of proof to establish by a preponderance of the evidence a claim of ineffective asssistance of counsel. We presume counsel was competent. When the claim is premised on the failure of counsel to take some action, the defendant must show that counsel failed to perform an essential duty and that prejudice resulted. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The question is whether the attorney's challenged performance was within the range of normal competency. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). In Kellogg, the defendant's counsel did not call two witnesses. The court did not view this action as unwise where it would not be helpful and where other testimony the witnesses could give might be devastating. Similarly, in this case, counsel's decision not to put defendant on the stand cannot be viewed as improvident when it might open other damaging avenues to cross-examination.

Defendant maintains his counsel should have allowed him to testify as to his acts in aiding and abetting the receiver, thereby vindicating himself of the

delivery charge. He relies on State v. Lott, which states that "delivery" means transfer from one person to another of a controlled substance. Thus, neither the recipient or customer of a drug sale nor a person who merely aids and abets a drug purchaser is a deliverer. 255 N.W.2d 105, 107 (Iowa 1977). However, rarely could it be ruled as matter of law that a go-between was acting solely as procuring agent. United States v. Barcella, 432 F.2d 570, 572 (1st Cir. 1970). Defendant in this case was not merely a customer or procuring agent, he was involved in the actual sale: the narcotics agents never met defendant's supplier; all transactions were handled through defendant; and we upheld the original trial court's finding of sufficient evidence to hold that the defendant intended to profit from the sale. Defendant offers no indication in his affidavit of what his new testimony would reveal that would contradict a finding of delivery. On the facts in the record, defendant was more involved in the sale in this case than was the defendant in State v. Lott, and the court in Lott found substantial evidence from which the jury could find defendant was involved in delivery. See 255 N.W.2d at 108. We find the same here and do not see any evidence of ineffective assistance of counsel for failing to raise a losing argument.

Defendant contends he would not have been able to purchase any cocaine if the narcotics agents had not advanced the money to him, thus he was entrapped into committing an illegal act. The test for entrapment is not a "but for" test. The test is whether the police conduct was sufficiently persuasive to induce the normally law abiding person to commit the offense. Conduct which merely affords one an opportunity to commit an offense does not constitute entrapment. State v. Leonard, 243 N.W.2d 75, 80 (Iowa 1976); State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974). In this case, the suggestion that the narcotics agents front money to defendant for the cocaine purchase was made by defendant. The agents merely

gave the defendant the opportunity to make a narcotics transaction for himself and for the agents. No entrapment was involved. Counsel was not ineffective for failing to raise the issue.

Effective assistance of counsel does not mean successful assistance. Miscalculated trial tactics do not necessarily amount to ineffective counsel. Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). We do not believe the record showed defense counsel did not consider the defenses of aiding and abetting or entrapment. Nothing in the record indicates defendant was represented by anything but competent counsel whose performance was within the range of normal competency. Defendant's contention to the contrary is without merit.

AFFIRMED.