FILED
MAY 24 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-158 / 89-971

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CLAYTON MANNING,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Jackson County, C. H. Pelton, Judge.

Appellant appeals from the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1989). **AFFIRMED.**

David D. Butler, Des Moines, for the appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Kjas T. Long, County Attorney, for the appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

HABHAB, J. 141

Appellant Clayton Manning appeals from the district court's dismissal of his application for postconviction relief under Chapter 663A, Iowa Code (1989). We affirm.

In 1981 Clayton Manning was convicted of first-degree murder and sentenced to life in prison. Upon direct appeal, the Iowa Supreme Court affirmed the conviction in August 1982. See State v. Manning, 323 N.W.2d 217, 218 (Iowa 1982). In 1985, the district court denied Manning's first application for postconviction relief.

Manning, acting pro se, later filed a second application for postconviction relief. In his second proceeding he raised a single issue, which he had not raised in his first postconviction proceeding. This issue was a challenge to the 1981 sentencing court's requirement that he make restitution for $1,101.00 in court costs incurred during his 1981 murder trial. Manning argued that prior to the 1982 enactment of Iowa Code section 910.2, the district court had no authority to impose restitution for court costs in a criminal case.

The district court denied Manning's second application for postconviction relief. The district court held that Manning's earlier postconviction proceeding precluded him from bringing the second proceeding under Iowa Code section 663A.8. The district court also rejected Manning's restitution argument on its merits.

Ordinarily, our review of postconviction proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, because appellant asserts constitutional due process violations, we review under the totality of the circumstances. This is the equivalent of de novo review. Id.

As we noted in Nims v. State, 401 N.W.2d 231 (Iowa App. 1986):

> In a collateral attack upon a state court conviction an applicant for post-conviction relief must show not only "cause" for failure to challenge the alleged error in the trial court or on direct appeal, but also must show actual and substantial prejudice resulting from alleged errors of which he now complains.

Id. at 233 (emphasis original). Appellant's stated reason for not raising this issue previously is that his prior attorney refused to do so. We will assume for the purposes of this appeal that appellant has shown sufficient cause for his failure to raise the issue on direct appeal and his first postconviction proceeding. As such, we will address the merits of appellant's application for postconviction relief.

In order to prevail upon a claim of ineffective assistance of counsel, appellant must show by a preponderance of the evidence that (1) counsel's performance was deficient in that counsel failed to perform an essential duty and (2) that prejudice resulted to the extent that "but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 688, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984); see Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985).

We discern no failure on the part of either appellant's counsel in not raising the issue of assessed court costs in the previous proceedings. The law in effect in 1981 allowed court costs to be charged to a defendant. See Iowa Code § 606.15(27) (1981). We conclude appellant's counsel quite appropriately refused to assert the issue on appeal or in the prior postconviction proceeding.

AFFIRMED.