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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DENNIS HODGES,	)	
Applicant-Appellant,	)	*Filed March 9, 1988*
vs	)	
STATE OF IOWA,	)	7-499 87-229
Resister-Appellee.	)	

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Appeal from the Iowa District Court for Black Hawk County (*No. 64978*), Dennis D Damsgaard, Judge

Dennis Hodges appeals from the district court's denial of his second application for postconviction relief **AFFIRMED.**

Craig C Ament of Olsen, Parsons & Ament, Cedar Falls, for applicant-appellant

Thomas J Miller, Attorney General; Bruce Kempkes, Assistant Attorney General, and *Scott Lemke*, Assistant County Attorney, for resister-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Dennis Hodges appeals from the district court's denial of his second application for postconviction relief. We affirm.

Dennis Hodges was accused of first-degree robbery in violation of Iowa Code section 711.2 (1977 supp.). Following a bench trial, the trial court found Hodges guilty as charged and sentenced him to a prison term of up to twenty-five years. The supreme court originally dismissed Hodges' direct appeal but later reinstated it. On September 23, 1981, the supreme court affirmed Hodges' conviction in an unpublished opinion.

On October 4, 1984, Hodges filed an application for postconviction relief, contending, inter alia, that his trial counsel was ineffective in failing to: (1) present a final argument; (2) file a motion to suppress the results of an allegedly illegal investigatory stop; and (3) call character witnesses on his behalf. The district court denied Hodges' application in an order filed on May 5, 1986. For some reason, Hodges' postconviction counsel failed to discover the district court's decision until September 8, 1986, after the time for filing a notice of appeal or motion for delayed appeal had expired. Counsel later testified that Hodges had always intended to appeal from any adverse decision in this proceeding.

On October 8, 1986, Hodges filed a second application for postconviction relief, reiterating his earlier claims and alleging that his postconviction counsel rendered ineffective assistance in failing to perfect his appeal. Following a hearing, the district court denied Hodges' application, ruling that his original postconviction counsel had not rendered ineffective assistance and, in any event, that Hodges had failed to show prejudice.

Postconviction relief actions pursuant to Iowa Code Chapter 663A are law actions and are ordinarily reviewed only on error. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). However, when there is an alleged violation of

a constitutional safeguard, we will make an independent evaluation of the totality of the circumstances under which the postconviction ruling was made. Polly v State, 355 N.W.2d 849, 854 (Iowa 1984); Thomas v. State, 316 N.W.2d 182, 183 (Iowa App. 1981).

Iowa Code section 663A.8 provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

In accordance with this section, any claim not properly raised at trial or on direct appeal may not be litigated in postconviction proceedings unless the applicant has provided a sufficient reason for not properly raising it previously. Washington v. Scurr, 304 N.W.2d 231, 234 (Iowa 1981). The applicant must establish by a preponderance of the evidence sufficient reason for not raising the issue on direct appeal. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The applicant must additionally show that he or she has suffered actual prejudice resulting from the alleged trial court errors. Polly, 355 N.W.2d at 855. "It is not sufficient that the applicant demonstrate the errors created a possibility of prejudice, he or she must shoulder the burden of showing they worked to his or her actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." Id. It is thus clearly the view under Iowa law that a postconviction proceeding is not an avenue for litigating issues that were not properly preserved for our review.

Hodges contends there was sufficient reason for his failure to raise the grounds on direct appeal because he received ineffective assistance of appellate counsel, and the issues now urged for consideration were based on facts outside

he record for that appeal. Since ineffective assistance of appellate counsel constitutes sufficient reason for failure to raise these issues on direct appeal, we proceed to consider them. Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981). The same standards apply to a claim that appellate counsel was ineffective as do with a claim of ineffectiveness of trial counsel. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). It must be shown that (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Petitioner bears the burden to establish these two elements by a preponderance of the evidence. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

We have reviewed Hodges' assignment of errors and reviewed the evidence in this case; we agree with the district court's finding that under the totality of the circumstances, he should be denied postconviction relief based on ineffective assistance of both trial and appellate counsel as their performance was well within the range of normal competency. Snethen, 308 N.W.2d at 14. Hodges has not carried his burden in proving that counsel at the trial and appellate levels failed to perform an essential duty nor that prejudice resulted to the extent he was denied a fair trial. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). Hodges has not proven that but for counsel's alleged professional errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984).

We affirm the conviction.

AFFIRMED.