IN THE COURT OF APPEALS OF IOWA

No. 1-761 / 00-1092
Filed December 12, 2001

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CLERK SUPREME COURT

GARRISON B. MILLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Gary L. McMinimee, Judge.

Garrison Miller appeals from the dismissal of his application for postconviction relief. **AFFIRMED.**

John G. Martens of Terrill & Martens Law Offices, Ames, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, and Stephen Holmes, County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Appellant defendant Garrison Miller appeals the district court's denial of his application for postconviction relief. Defendant claims on appeal that he was rendered ineffective assistance of trial counsel in that his trial counsel 1) failed to investigate; 2) failed to understand the law of burglary; and 3) failed to withdraw. We affirm.

On May 14, 1997 defendant's ex-girlfriend, Julie Eller, reported that a safe containing rings and over $2000 cash, among other things, was stolen from her home. Apparently defendant had keys to Eller's home, and testimony showed that defendant, who had called and asked Eller's current live-in boyfriend to leave Eller's house in order to pick him up in Ames, but who instead had someone else transport him to Eller's house, had access that day to Eller's empty house. (Eller was working at the time.) Defendant's friend William Vary accompanied him to the house. Defendant claimed he went to the house only to recover a jacket.

After Eller arrived home and reported the safe was missing, police arrested Vary and found the stolen rings in his mouth. Vary claimed defendant had stolen the safe, reporting he had seen defendant enter Eller's home and carry out a box-shaped item resembling a safe, and that defendant put this item in his vehicle. Vary made these statements implicating defendant after Vary was offered immunity from prosecution by the State.

On June 2, 1997 defendant pled guilty by *Alford* plea to second-degree theft pursuant to a plea agreement with the State reducing his second-degree theft and third-degree burglary charges to just the second-degree theft charge. On June 30, 1997 the district court sentenced defendant to an indeterminate five-

year term of incarceration, suspended the sentence, and placed defendant on probation at a residential facility. Defendant did not file a motion in arrest of judgment or appeal the sentence. His probation was later revoked, he was incarcerated, and he is currently serving his original sentence. It was upon this incarceration resulting from his probation revocation that defendant began claiming ineffective assistance of trial counsel.

The State contends that because Miller did not raise his claim of ineffective assistance of counsel on direct appeal and failed to articulate a sufficient reason for this failure, there is no merit to his claim. Defendant responds that he did not file a direct appeal because he lacked the knowledge and the record to pursue the claim on direct appeal. He advances that his attorney's records show that the attorney 1) did not investigate the case; 2) failed to correctly advise him on the elements of burglary; and 3) did not make available to him the option of obtaining new counsel.

Although the district court found that defendant's reasons for not raising his claims on direct appeal were unpersuasive, it addressed his substantive claim of ineffective assistance of counsel and found it had no evidentiary support.

We may review postconviction relief proceedings for errors at law or de novo. If the petitioner makes constitutional claims our consideration is in the nature of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). When no constitutional safeguards are at issue, our review is for errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). Any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim,

and actual prejudice resulted from the claim of error. *Osborn v. State,* 573 N.W.2d 917, 921 (Iowa 1998); *Jones v. State,* 479 N.W.2d 265, 271 (Iowa 1991). The rule requiring claims to be raised at trial or on appeal is not absolute. It is not applied if sufficient reason can be shown for not raising the claim at trial or on appeal. *Jones,* 479 N.W.2d at 271. Yet, the circumstances which will permit an ineffective assistance of trial counsel claim to be raised for the first time in a postconviction relief petition are circumscribed. Ineffective assistance of appellate counsel may provide sufficient reason. *Jones,* 479 N.W.2d at 271. Furthermore, factual or legal matters, which were excusably unknown at the time of the trial and appeal, may be properly asserted on postconviction relief. *See Stanford v. Iowa State Reformatory,* 279 N.W.2d 28, 33-34 (Iowa 1979); *Edwards v. State,* 249 N.W.2d 851, 852 (Iowa 1977).

The State, citing *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999), contends defendant has no justification for failing to raise his ineffective assistance claim on direct appeal. Without deciding if *Berryhill* controls, we will address defendant's claims.

To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate both ineffective assistance and prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Oetken,* 613 N.W.2d 679, 683 (Iowa 2000). Both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland,* 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995).

To establish the first prong, defendant must demonstrate his attorney performed below the standard demanded of a reasonably competent attorney. *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2064-5, 80 L. Ed. 2d at 693-4; *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000). We measure the attorney's performance against "prevailing professional norms." *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *State v. Risdal,* 404 N.W.2d 130, 132 (Iowa 1987). We begin with the presumption that the attorney performed competently. *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. at 694-95; *Oetken,* 613 N.W.2d at 683. We avoid second-guessing and hindsight. *Strickland,* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *Caldwell v. State,* 494 N.W.2d 213, 215 (Iowa 1992). We scrutinize each claim in light of the totality of the circumstances. *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *Artzer,* 609 N.W.2d 526, 531 (Iowa 2000).

In reviewing whether a plea bargain such as defendant's would have been within the scope of competent representation we look to whether there was a factual basis for the charge beyond the defendant's own statements. *See State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996); *State v. Hansen,* 344 N.W.2d 725, 728 (Iowa Ct. App. 1983). As the district court stated, there was such a basis. The minutes of testimony showed the property stolen was worth in excess of $1000 and the defendant was in the home from which it was taken shortly before the property was discovered missing. Minutes also showed that defendant called Eller's live-in boyfriend away from the residence just before going there and that Vary observed Miller remove a boxlike object from the home and put it in his car.

We find a claim of ineffective assistance cannot rest upon a claim that the plea had no factual basis.

Further, we find the plea was within the scope of competent representation because it was based upon an adequate investigation. Defendant told the district court when his plea was taken that he had told his attorney everything he knew about the offense and his involvement in it. The district court found defendant and his attorney were aware of all the necessary information when the plea was taken, including the fact that Vary was given immunity in exchange for his testimony. We find no basis for a claim of ineffective assistance based on a failure in this case to investigate.

We further deny defendant's claim that his plea was based upon his counsel's erroneous understanding of the law or that his counsel refused to withdraw. Defendant claims he had keys to the house and could not have been found guilty of burglary, and that as a result he never should have pled guilty because the State would have been unable to prove its case of burglary against him. Having access to the house does not exempt defendant from a charge of burglary if he exceeds his general right of entry. *See, e.g., State v. Peck,* 539 N.W.2d 170, 173 (Iowa 1995) (husband's entry onto premises he has part-ownership in can qualify as burglary if he violates the restraining order prohibiting his entry onto that premises). Further, as the district court found, even when in possession of keys to the house, defendant could have been found guilty of burglary if he had obtained those keys (or attained entry) by trickery, deception or fraud. 12A C.J.S. *Burglary* § 18 at 194-5 (1980). Because of these possibilities,

the trial court did not err in finding the defendant failed to demonstrate ineffective assistance on this point.

The court further noted that defendant had acknowledged at the time of his plea that he had been fully satisfied with his counsel. It therefore did not err in dismissing defendant's claim that he was prejudiced as a result of what he claimed was his counsel's refusal to withdraw.

The court was also justified in dismissing defendant's claim that his attorney should have sought a bond review hearing. We note that defendant produced no evidence that the hearing would have been a success and find that, based on the State's agreement to dismiss the burglary charge and recommend probation, defendant's attorney's advice to accept the plea was in defendant's interest and within the normal range of competency.

We agree with the district court's findings and determine that defendant did not show either that he had ineffective representation or that he suffered prejudice from his attorney's actions.

AFFIRMED.