

NOV 30 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BLAIR EDWARD JONES,)

Petitioner-Appellant,)

Filed November 30, 1983

vs.)

STATE OF IOWA,)

3-266
2-68986

Respondent-Appellee.)

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Petitioner appeals from denial of his application for postconviction relief from his conviction for robbery in the first degree. AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

Petitioner appeals from denial of his application for postconviction relief from his conviction for robbery in the first degree. He asserts that defense counsel's failure to call three persons as witnesses for defense constitutes an omission that denied him effective assistance of counsel. We affirm.

Postconviction relief actions under Iowa Code chapter 663A are law actions triable to the court and ordinarily are reviewed on error. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981); Thomas v. State, 316 N.W.2d 182, 183 (Iowa Ct. App. 1981). However where, as here, there is an alleged violation of a constitutional safeguard, this court will make an independent evaluation of the totality of circumstances under which the postconviction ruling was made. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Thomas v. State, 316 N.W.2d at 1983. The burden of proof in a postconviction action is on the petitioner to establish the facts asserted by a preponderance of the evidence. Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977).

Petitioner was convicted in 1978 of first degree robbery in violation of Iowa Code Supplement section 71L.2 (1977). That conviction was affirmed by us on appeal in State v. Jones, No. 62841 (Iowa Ct. App., March 31, 1980). Petitioner did not present the issue of ineffective assistance of counsel on direct appeal. A postconviction petitioner who asserts a ground for relief that has never been raised before bears burden to show sufficient reason why that ground was not previously asserted. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1981).

Jones has since secured different counsel, but his previous trial counsel was the same counsel that had ultimate responsibility for the appeal, and that argued the appeal before us. It is not feasible that his attorney would enter an ineffective assistance claim against himself on direct appeal. We find that is sufficient reason why it was not raised. Accordingly, the issue of ineffective assistance was properly before the postconviction court. See generally Iowa Code § 663A.8 (1983).

Even though there is a presumption that counsel is competent which must be overcome by the petitioner, the ultimate test is whether, under the entire record and totality of circumstances, counsel's performance was within the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Where specific errors of counsel are relied on to show ineffectiveness, two conditions must be satisfied before a party will have been found to be denied a fair trial due to inadequacy of counsel. It must be shown that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. Id.

Jones alleges that he had asked trial counsel to call as witnesses two persons who would have testified that they overheard petitioner's unconvicted accomplice say that Jones had not been involved in the robbery. A third witness allegedly would have testified that petitioner's accomplice had previously approached him to assist in a robbery. The statements were allegedly made while the witnesses and the petitioner's unconvicted accomplice were being held in Black Hawk County jail. Only one of the three alleged witnesses testified at the postconviction hearing. He testified that in the conversation he overheard, petitioner's accomplice did not directly deny that petitioner was involved, but, rather he admitted committing the robbery and stated it was better for petitioner to go to prison than him.

Trial counsel testified at the postconviction hearing that he had never heard of two of the witnesses before. He admitted obtaining a statement from the third witness but had no independent recollection as to why he had not called him. The record shows that he did call numerous other witnesses on behalf of the defendant. Trial counsel testified that he kept extensive notes in his files and that, although he routinely keeps any notes written by a criminal defendant to him during trial, he could find no notes from petitioner concerning any of the three witnesses. Petitioner, on the other hand, testified that he wrote a note asking trial counsel to call two of the witnesses.

We do not believe the petitioner sustained his burden to show that trial counsel was even aware of the existence of two of the witnesses. Further, we agree with trial court that the decision not to call the third witness which counsel had interviewed was a reasonable tactical decision. This witness, Rodell Harris, had been a friend of petitioner for twenty years. His testimony concerned whether petitioner had, in fact, coerced his accomplice into committing the robbery. Trial counsel instead testified that the circumstantial nature of the evidence against petitioner was what he had considered important. When counsel makes a reasonable tactical decision, this court will not engage in second-guessing. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982). Ordinarily, except for such basic decisions as whether to plead guilty, waive a jury, or testify in his own behalf, the accused is bound by the strategic decisions made by counsel. Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982). We find Jones failed to demonstrate that his attorney failed to perform an essential duty within the meaning of an ineffective assistance of counsel claim.

AFFIRMED.