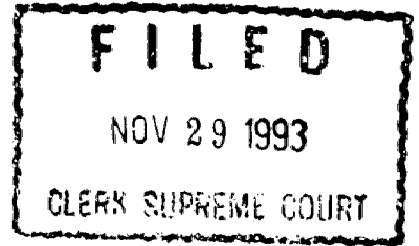


IN THE COURT OF APPEALS OF IOWA

No. 3-339 / 92-107



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ROBERT EMIL SWANSON,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Lee County,
Harlan Bainter, Judge.

The applicant appeals the district court's ruling denying his application for postconviction relief challenging his second convictions for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1985) after his original convictions had been reversed. **AFFIRMED.**

Phillip B. Mears of Mears Law Office, Iowa City, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr. and Robert J. Glaser, Assistant Attorneys General, and Michael P. Short, County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ. Donielson, J., takes no part.

SCHLEGEL, J.

The applicant, Robert Emil Swanson, appeals the district court's ruling denying his application for postconviction relief challenging his second convictions for assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1985) after his original convictions had been reversed. The applicant claims: (1) the sentences imposed should be vacated because the actual service of the sentences would be harsher than the service of the original sentences; (2) he should have been considered as having fully served the sentences; and (3) the convictions should be set aside on the basis that the subsequent prosecution violated the double jeopardy clause.

On June 4, 1986, the applicant, who was then serving a thirty-year sentence at the Iowa State Penitentiary and scheduled to be released on December 30, 1987, was charged by trial information with two counts of assault with intent to inflict serious injury stemming from the alleged assault of two prison guards. The defendant was found guilty of assault without intent to inflict serious injury but causing bodily injury. On November 4, 1986, the district court sentenced the defendant to consecutive one-year prison terms on each offense.

On March 23, 1983, the court of appeals reversed the applicant's conviction on his appeal on the basis that the offense of assault causing bodily injury was not a lesser-

included offense of assault with intent to inflict serious injury. The reversal was without remand, and procedendo issued on June 6, 1988. See State v. Swanson, 423 N.W.2d 560 (Iowa App. 1988).

On the applicant's discharge date of December 30, 1987, the applicant was arrested on a federal warrant and taken into federal detention. On September 6, 1988, the State filed a new trial information charging the applicant with two counts of assault causing bodily injury. The applicant moved to dismiss the trial information on speedy trial grounds, but the motion was denied. A jury subsequently found the applicant guilty on both counts. On November 18, 1988, the district court entered a judgment sentencing the applicant to consecutive terms of 270 days on the first count and one year on the second count. The sentence was ordered to be served consecutively with a federal conviction the applicant had received.

The applicant appealed the 1988 convictions only asserting that his right to a speedy trial was violated by the filing of the trial information more than ninety days after procedendo had been issued regarding his original appeal. On December 21, 1989, the court of appeals affirmed his conviction rejecting his speedy trial argument. See State v. Swanson, 452 N.W.2d 466 (Iowa App. 1989). Procedendo was issued in that appeal on March 12, 1988.

On May 8, 1991, the applicant filed an application for postconviction relief challenging his 1988 convictions. The applicant claimed the actual sentences he would be serving after his second convictions in 1988 were illegally harsher than his original sentences which had been overturned on the first appeal because of the way the good time and work bonus credits were now computed. The applicant also claimed he was not given credit for the time served on the assault charges and claimed the prosecution of the assault charges after his successful appeal violated the double jeopardy clause.

A hearing was held on the application. On December 23, 1991, the district court entered a ruling denying the application, determining the applicant waived the issues raised in the application by not raising them on direct appeal. The court also determined the applicant's claims had no merit. The applicant appeals. We affirm.

Our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, to the extent the defendant raises constitutional issues, the scope of review is a de novo evaluation based on the totality of the circumstances. Id.

Swanson raises several grounds for postconviction relief. First, he again asserts his speedy trial rights were violated. As the trial court properly noted, this issue has already been disposed of by this court and cannot be relitigated in this action. Swanson's speedy trial

rights were not violated. See State v. Swanson, 452 N.W.2d 466, 467-468 (Iowa App. 1989); Iowa Code section 663A.8 (1985). Secondly, Swanson claims the sentence he received following the second trial should be vacated because it was harsher than the first sentence. Next, Swanson argues he should be found to have fully served the sentence he received in November 1988. His final claim is that his convictions should be set aside because they violated the double jeopardy clause.

Although the trial court discussed each of these issues, it held that all of the issues had been waived since they had not been raised in direct appeal. The sole issue raised by Swanson on direct appeal was his claim that he had been denied a speedy trial. That argument was rejected by this court. Consequently, the trial court was correct in holding that the other issues had been waived. Postconviction relief actions are not the appropriate forum to raise new issues that have not been properly preserved. In Washington v. Scurr, 304 N.W.2d 231, 234-35 (Iowa 1981), the supreme court stated:

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. § 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.

Id.; see also Iowa Code section 663A.8 (1985).

Swanson has failed to demonstrate any reason why the issues he now urges were not raised on direct appeal. No

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explanation exists in the record or in his brief to account for failing to raise those issues on direct appeal. No claim is made that appellate counsel breached an essential duty or that prejudice resulted. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984); Taylor v. State 352 N.W.2d 683, 685 (Iowa 1984). In order for this court to consider the issues presented to us in this postconviction action, it is necessary that Swanson demonstrate by a preponderance of the evidence that: (1) sufficient reason exists for not having raised the issues on direct appeal; and (2) actual prejudice resulted from the claimed error. Polly v. State, 355 N.W.2d 849, 846 (Iowa 1984). The district court was correct in stating:

There is no evidence in the record to establish sufficient reason why the new grounds were not raised in his direct appeal proving why the new grounds he now asserts were not urged in his earlier direct appeal to the Iowa Court of Appeals. Accordingly the Court finds that none of the new grounds asserted in Mr. Swanson's application may be litigated in this action and that all such grounds are barred and should be dismissed.

We agree with the trial court. The issues raised in this postconviction action have been waived since they were not raised on direct appeal and since Swanson has failed to show by a preponderance of the evidence that any acceptable reason exists for the failure to raise them on direct appeal.

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While we decline to discuss the other issues raised by Swanson's appeal, we hold these other contentions are without merit.

AFFIRMED.