

IN THE COURT OF APPEALS OF IOWA

No. 2-294 / 11-0993
Filed June 13, 2012

CURTIS CASTOR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Paul L. Macek,
Judge.

Curtis Castor appeals the postconviction court's dismissal of his
postconviction action. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Michael J. Walton, County Attorney, and Rob Cusack, Assistant County
Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Curtis Castor appeals following the denial of his application for postconviction relief. We affirm the judgment of the postconviction court and preserve his ineffective-assistance-of-postconviction relief counsel claim for further proceedings.

I. Background Facts and Proceedings.

We filed our opinion in this case on May 9, 2012, but subsequently granted Castor's petition for rehearing. Our May 9 opinion was vacated and our opinion filed May 23, 2012, replaced it. We subsequently granted Castor's second petition for rehearing. Our May 23 decision is therefore vacated, and this decision replaces it.

In December 2007, Curtis Castor was charged with sexual abuse in the third degree. He entered into a plea agreement with the State and pled guilty as charged under Iowa Code section 709.4(2)(c)(4) (2007), a non-forcible felony. Castor was sentenced to prison not to exceed ten years, and the sentence was suspended. He was placed on probation for a period of three years. As conditions of probation, Castor was required to complete an in-patient treatment program and then complete the program at the Residential Correctional Facility (RCF).

In November 2008, Castor's probation officer filed a report of numerous probation violations by Castor, and the State subsequently sought to have Castor's probation revoked. Following a hearing, the district court found Castor "willfully violated the terms of his probation as set forth in the report of violation."

The court revoked Castor's probation and ordered him to serve a prison term not exceeding ten years, "[p]ursuant to the judgment previously entered."

Neither the probation revocation nor the sexual abuse sentence was directly appealed by Castor. In May 2010, Castor filed an application for postconviction relief (PCR). He asserted, through his PCR counsel, that his trial counsel provided him ineffective assistance in four respects, all related to his guilty plea. The PCR court determined his claims were without merit and dismissed his application.

Castor appeals. He now, for the first time, contends his PCR counsel was ineffective in failing to challenge the district court's "abuse of discretion" in revoking his probation and imposing his original sentence.

II. Scope and Standards of Review.

We normally review PCR proceedings for errors at law. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010). But when there is an alleged denial of constitutional rights such as ineffective assistance of counsel, we conduct a de novo review. *Id.*

III. Discussion.

To prevail on his newly asserted claim, Castor must prove by a preponderance of the evidence that PCR counsel failed to perform an essential duty and prejudice resulted. *Id.* at 158. "Under the first prong of this test, counsel's performance is measured against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (internal quotation marks omitted). In order to establish prejudice, Castor

must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011) (citation omitted).

Here, the State asserts that PCR counsel’s failure to challenge the probation revocation and imposition of the prison sentence may have been a trial strategy. We do not know, as the issue was not asserted in the PCR application, was not defended by PCR counsel, and was not decided by the PCR court. An adequate record is important because “[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel.” *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981).

Although Castor concedes “[a] fair reading of the record demonstrates [he] committed rule violations and, therefore, violated the conditions of his probation,” he nevertheless asserts that “[h]ad PCR counsel raised and litigated this issue [in the PCR proceedings before the PCR court], the PCR court would have found that the district court abused its discretion in revoking Castor’s probation and he would have been released to probation supervision.” We are not mind readers; we are an intermediate appellate court. Iowa Code § 602.5101. This court reviews issues raised and decided by a prior court; indeed, “[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court *before* we will decide them on appeal.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (emphasis added). On appeal from the PCR court’s ruling, we are not charged with deciding whether the probation revocation court abused its discretion in sentencing Castor to prison; that issue is for the PCR court to decide. See *State v. Allen*, 402 N.W.2d 438, 443 (Iowa

1987). Our role is limited to correction of legal error in the PCR court's ruling. *Id.*; see also *Barker v. State*, 479 N.W.2d 275, 278 (Iowa 1991).

Moreover, we note Iowa Code section 822.9 provides that “[a]n appeal from a final judgment entered under chapter [822, which sets forth PCR procedures,] may be taken, perfected, and prosecuted . . . by the applicant . . . in the manner . . . provided in the rules of appellate procedure for appeals from final judgments in criminal cases.” “All final orders and judgments of the district court involving the merits or materially affecting the final decision may be appealed” Iowa R. App. P. 6.103(1) (similarly set forth in former Iowa Rule of Appellate Procedure 6.1 (2007) (“All final judgments and decisions of the district court . . . involving the merits or materially affecting the final decision, may be appealed”)). The merits of the PCR court's ruling are not at issue here as they were abandoned in favor of the newly asserted claim of ineffective assistance of PCR counsel.

Nonetheless, we are bound by our supreme court's pronouncements. See *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) (“We are not at liberty to overturn Iowa Supreme Court precedent.”); *State v. Hughes*, 457 N.W.2d 25, 28 (Iowa Ct. App. 1990) (citing *State v. Eichler*, 83 N.W.2d 576, 578 (1957) (“If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”)). Our supreme court has stated that if PCR counsel is ineffective, the applicant may raise an ineffective-assistance-of-counsel claim in an appeal from the PCR court's denial of the PCR application. *Dunbar v. State*, 515 N.W.2d 12, 16 (Iowa 1994). While our PCR-issue-preservation procedures have evolved over the years, *Dunbar* remains the law, and we are obliged to

apply its precepts here. See *id.* (“If his court-appointed counsel was ineffective, Dunbar could raise this claim on his appeal from the denial of his application.”).

Although ineffective-assistance-of-counsel claims are allowed as an exception to the general rule of error preservation, see *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982), here we can only divine what conclusion the PCR court would have reached had the issue been presented to it—and we decline to engage in such an exercise. We are permitted to preserve Castor’s newly asserted claim for another PCR proceeding if the record is not adequate to evaluate the claim. See *State v. Smith*, 573 N.W.2d 14, 22 (Iowa 1997) (preserving raised PCR counsel ineffectiveness claim for further proceedings when raised on initial PCR appeal and citing *Dunbar*, 515 N.W.2d at 16). We find the record is not adequate here. Accordingly, we affirm the judgment of the PCR court and preserve Castor’s claim for further PCR proceedings.

AFFIRMED.