

**IN THE COURT OF APPEALS OF IOWA**

No. 6-131 / 05-0796  
Filed May 10, 2006

**WILLIAM ALLEN CARLSON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Webster County, William C. Ostlund, Judge.

William Carlson appeals the district court's summary dismissal of his application for postconviction relief. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Kevin A. Fors, Harcourt, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Timothy N. Schott, County Attorney, for appellee-State.

Considered by Huitink, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VAITHESWARAN, J.**

William Carlson appeals the district court's summary dismissal of his application for postconviction relief. We affirm in part, reverse in part, and remand.

Carlson pled guilty to two separate counts of possession of methamphetamine with intent to deliver, one a class B felony and one a class C felony. Iowa Code §§ 124.401(1)(b)(7), (c)(6) (1999). He also pled guilty to possession of marijuana without a drug tax stamp. Iowa Code §§ 453B.1(3)(b), .3, .12. He appealed following imposition of sentence, but his appeal was dismissed as frivolous, after appellate counsel filed an unresisted Rule 104 motion. See Iowa R. App. P. 6.104(1) (permitting appointed counsel to file a motion to withdraw if convinced, after conscientious investigation, that the appeal is frivolous).

Carlson filed a pro se application for postconviction relief and later, through counsel, an amended and substituted application. Counsel raised several challenges to Carlson's judgment and sentence. The State prosecutor moved for summary judgment, arguing that Carlson waived his claims by failing to raise them on direct appeal or, in the alternative, waived all but one of his claims by virtue of his guilty plea. Carlson responded that he should receive the benefit of a recently enacted statutory provision that allows defendants to bypass direct appeal and raise ineffective-assistance-of-counsel claims for the first time in a postconviction relief action. See Iowa Code § 814.7 (2005).

The district court agreed with the State that Carlson was obligated to raise his claims on direct appeal. The court reasoned that section 814.7 did not apply

retroactively to postconviction relief applications such as Carlson's, filed before its effective date. The court granted summary judgment in favor of the State on all of Carlson's claims.

On appeal, Carlson's sole contention is that the "newly enacted statute, not requiring the ineffective assistance claim to be raised prior to Post Conviction Relief, is applicable to this case." We do not reach this issue because we are convinced Carlson did not have to avail himself of the procedural protection afforded by Iowa Code section 814.7.

Iowa Code section 814.7(1) became effective on July 1, 2004. See 80 Iowa Acts ch. 1017, § 2. In pertinent part, it provides that an ineffective assistance of counsel claim "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes."

Before the enactment of section 814.7, a postconviction relief applicant generally had to raise a claim on direct appeal in order to litigate that claim in a postconviction relief action. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). There was a notable exception to this rule: an applicant could wait until a postconviction relief proceeding to litigate the claim, if the applicant showed "sufficient reason" for not previously raising the claim, and showed actual prejudice. *Id.* An allegation that appellate counsel provided ineffective assistance could amount to "sufficient reason." *Id.*

Postconviction relief counsel in this case specifically alleged that appellate counsel was ineffective in failing to raise several of trial counsel's omissions. This amounted to "sufficient reason" for failing to raise the argument on direct

appeal. See *Bugley v. State*, 596 N.W.2d 893, 897 (Iowa 1999) (holding an unresisted appellate motion to withdraw bars subsequent claims for postconviction relief unless sufficient reasons are provided for not raising the grounds on direct appeal). As Carlson satisfied the procedural hurdle that section 814.7 was designed to ameliorate, he did not need to avail himself of that provision.

Our opinion might end here, with a reversal and remand for consideration of Carlson's claims on the merits. However, the State contends we should affirm the dismissal of all but one of the postconviction relief claims on the alternate theory raised by the prosecutor. As noted, the prosecutor also asserted that Carlson's guilty plea waived all objections to his convictions other than objections intrinsic to the pleas. See *Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000). We agree with the State that we may affirm on this alternate ground, if it applies. See *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002) (noting court has "upheld a district court ruling on a ground other than the one upon which the district court relied *provided* the ground was urged in the court.") (emphasis in original). We turn to this ground.

Carlson's amended and substituted postconviction relief application alleged: (1) the search of his home "was not done by search warrant;" (2) law enforcement officers trespassed onto his property; (3) a search warrant obtained in 1998 was illegal; (4) a search warrant obtained in 1999 was not supported by probable cause; (5) two search warrants were not supported by oath or affirmation; (6) the prosecutor committed misconduct; (7) there was insufficient evidence to support one of the charges; (8) evidence was illegally obtained;

(9) he was incompetent and unable to assist trial counsel; (10) trial counsel was ineffective in (a) failing to perform an “independent investigation,” (b) failing to obtain evidence for him to review, (c) failing to take a deposition, (d) failing to file pretrial motions to suppress, (e) failing to seek district court review of objections made during depositions, and (f) failing to “argue mitigating circumstances and state them specifically in the record;” (11) appellate counsel was ineffective in failing to investigate several issues; (12) the plea colloquy was confusing and unsupported by a factual basis; and (13) there was evidence of material facts not previously presented and heard, specifically, the ineffective assistance of trial and appellate counsel.

We conclude only one of the claims asserted in these paragraphs survived the guilty plea. As the State concedes, Carlson should be allowed to proceed with his claim that trial and appellate counsel were ineffective in failing to argue mitigating circumstances for a reduction of the mandatory minimum sentence on the methamphetamine counts. This implicates the interrelated arguments summarized in paragraphs 10(f), 11, and 13, above. To the extent Carlson extends this claim to the marijuana count, we reject it, as there was no mandatory minimum sentence associated with that count.

The claim summarized in the twelfth paragraph deserves special mention. That claim summarily asserts the absence of a factual basis. This is a ground that generally survives a guilty plea. *State v. LaRue*, 619 N.W.2d 395, 398 (Iowa 2000). However, Carlson was obligated to file a motion in arrest of judgment to raise this ground on appeal, or was obligated to assert in his postconviction relief application that trial counsel was ineffective in failing to do so and appellate

counsel was ineffective in failing to raise trial counsel's ineffectiveness.<sup>1</sup> *State v. Straw*, 709 N.W.2d 128, 132-33 (Iowa 2006). Carlson did neither. Therefore, we deem this claim waived.

The remaining claims were also waived. See, e.g., *LaRue*, 619 N.W.2d at 397 (listing challenges that are not waived); *Speed*, 616 N.W.2d at 159 (noting claims arising from the denial of motions to suppress, or from counsel's failure to investigate or file motions to suppress do not survive the entry of the guilty plea); *State v. Kobrock*, 213 N.W.2d 481, 483 (Iowa 1973) (holding guilty plea resulted in waiver of all questions relating to admissibility or sufficiency of evidence).

We affirm the dismissal of all Carlson's postconviction relief claims except the paragraphs relating to the mandatory minimum sentences. We remand for further proceedings on those paragraphs.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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<sup>1</sup> For purposes of this statement, we assume without deciding that Carlson could not have availed himself of Iowa Code section 814.7. But, even if this section did apply to Carlson, it would not have cured the amended and substituted postconviction relief petition.