IN THE COURT OF APPEALS OF IOWA

No. 1-805 / 10-1517
Filed November 23, 2011

MARKETH STEELE,
Petitioner-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Postconviction applicant appeals from an order denying postconviction relief. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Michael J. Walton, County Attorney, and Rob Cusak, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vogel, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Marketh Steele was convicted of robbery in the first degree under Iowa Code section 711.2 (2003). His appeal from that conviction was dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 6.104 (now rule 6.1005). Steele filed an application for postconviction relief pursuant to Iowa Code chapter 822 (2007). Following an evidentiary hearing, the application was denied by the district court. Steele appeals.

On appeal, Steele states the issue presented as the following:

> DID COUNSEL ERR IN NOT PRESERVING AND/OR PURSUING DIRECT APPEAL ISSUE OF SPEEDY TRIAL VIOLATION—TO STEELE'S PREJUDICE?

Noticeably absent from Steele's brief is any claim the postconviction trial court erred in ruling on his application. We nevertheless choose to view his substantive claim, apparently a claim of ineffective assistance of counsel, as such a claim of error.

Postconviction proceedings are law actions ordinarily reviewed for the correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). Claims of ineffective assistance of counsel, however, are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

On appeal from the denial of postconviction relief, Steele asserts that trial counsel in the underlying criminal proceeding was ineffective for failing to raise and litigate an alleged denial of his right to speedy trial. In his brief, Steele states:

> Ineffective assistance of counsel can include a failure to properly litigate the Defendant's speedy trial rights. . . . [T]he "key"

> question is whether counsel breached the essential duty in failing to seek dismissal based on the rule violation.[1]

Steele also asserts that appellate counsel in the underlying criminal proceeding was ineffective in not raising the speedy-trial-related issue on direct appeal. He states that appellate counsel "who sought to withdraw should have raised [certain issues concerning the alleged denial of right to speedy trial] for the challenge to have properly been resolved in the direct appeal."

In its brief the State asserts:

> THE SINGLE CLAIM URGED BY STEELE IN THIS APPEAL IS BOTH WAIVED AND MERITLESS.

The State goes on to state, however: "As discussed below, error is not preserved on the speedy trial issue now being presented . . . ." Based on the arguments and analysis presented by the State, we believe the issue raised by the State is more correctly characterized as one of error preservation rather than one of waiver. We thus address the issue as one of error preservation.

The State argues, in relevant part:

> The lone issue now urged in Steele's appellate brief . . . is an ineffectiveness claim for purported failure to make a speedy trial challenge.
>
> Steele's claim fails both substantively and procedurally, since a speedy trial claim *was* in fact urged by both defense and direct appeal counsel. Those facts aside, no speedy trial issue was ever pled, litigated, urged, or ruled on in the postconviction proceedings below . . . .
>
> If Steele desired to preserve such a claim for presentation in this appeal, then it was incumbent upon him to preserve error by seeking a ruling on this issue from the postconviction district court by a motion to enlarge.

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[1] Although not necessary to our decision, we note that trial counsel in the underlying criminal proceeding in fact moved to dismiss the charge on speedy trial grounds and pursued the matter through an evidentiary hearing and resulting district court ruling.

"It 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 III*, 641 N.W.2d 532, 537 (Iowa 2002). "We may not consider an issue that is raised for the first time on appeal, 'even if it is of constitutional dimension.'" *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (quoting *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985)).[2]

We have carefully reviewed Steele's written application for postconviction relief, his brief in support of it, and the transcript of the postconviction hearing. We find no speedy-trial-related issue of ineffective assistance presented to the postconviction trial court.

We have also carefully reviewed the postconviction trial court's ruling on Steele's application. We find no speedy-trial-related issue of ineffective assistance addressed or passed upon by that court. "Issues must ordinarily be presented to *and passed upon* by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (emphasis added).

"When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier*, 641 N.W.2d at 537 (citing *Benavides*, 539 N.W.2d at 356)). No such motion, or ruling thereon, appears in the record.

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[2] We do not recognize a "plain error" rule that allows appellate review of constitutional challenges not preserved in the district court in a proper and timely manner. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997).

In summary, the issue that Steele now attempts to present on appeal was not presented to or passed upon by the postconviction trial court, and no motion requesting a ruling on such an issue was filed in the trial court. The issue has not been preserved for our review. Thus there is nothing for our review. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (stating that where the district did not rule on an issue and the appellant made no request for a ruling by that court, on appeal there was nothing for the court to review). We therefore affirm the judgment of the postconviction trial court.

AFFIRMED.