

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DOUGLAS MATTHEW MOORE,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

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No. 4:02-cv-40241

**RULING AND ORDER
DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS**

Petitioner, Douglas Matthew Moore (Moore), brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, seeking to overturn his state conviction for attempted murder in violation of Iowa Code section 707.11. Moore relies upon the following grounds to support his habeas petition: (1) ineffective assistance of trial counsel; (2) miscalculation of his sentence; and (3) improper jury selection. Respondent moves to dismiss on the grounds that Moore's claims are procedurally defaulted and subject to dismissal. For the reasons that follow, Moore's petition is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1998, Douglas Moore filed for divorce from Melissa Moore. Both individuals sought custody of their six-year-old son, Jonathan. Prior to the custody hearing, Douglas Moore spoke several times with his friend, Thomas Greer, of his plans to hire someone to kill his ex-wife so that he could gain custody. After being arrested on a theft charge, Greer informed the police of Moore's plans to have his ex-wife murdered

and set up a meeting between himself, Moore, and an undercover officer. The undercover officer posed as a hit man from Chicago named “Carlos”.

At the meeting with the undercover officer, Moore supplied Carlos with a handgun and a magazine containing six bullets. Moore told Carlos that the gun was in working condition and that he just wished his ex-wife would “disappear”. Carlos told Moore, “You understand that she’s going to disappear graveyard dead, right?” Moore stated that he understood. Moore then provided Carlos with his ex-wife’s name and address, as well as several identifying characteristics, directions to her house, and a description of her and her boyfriend’s cars.

Moore was arrested and charged with attempted murder in violation of Iowa Code section 707.11. On March 21, 2000, a jury found Moore guilty, and the court sentenced him to an indeterminate twenty-five-year term of imprisonment. Moore appealed his conviction to the Iowa Court of Appeals contending that he was denied his constitutional right to effective assistance of counsel because defense counsel failed to object to the admission of certain evidence and failed to call Greer as a witness on his behalf. The Iowa Court of Appeals affirmed Moore’s conviction. State v. Moore, No. 00-0801, 2001 WL 246393 (Iowa Ct. App. Mar. 14, 2001). The Iowa Supreme Court denied Moore’s application for further review, and procedendo was issued on June 15, 2001. Moore obtained court-appointed counsel to assist in drafting an application for postconviction relief pursuant to Iowa Code section 822, but he never filed his application with the state. Moore filed this habeas petition on May 31, 2002.

APPLICABLE LAW AND DISCUSSION

I. Exhaustion of Remedies

“A writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State” 28 U.S.C. § 2254(b)(1)(A). The rationale behind the exhaustion requirement is “grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights”. Coleman v. Thompson, 501 U.S. 722, 731 (1991). A habeas petitioner satisfies the exhaustion requirement by giving the state courts a “fair opportunity” to apply controlling legal principles to the facts that are relevant to his constitutional claim. Odem v. Hopkins, 192 F.3d 772, 774-75 (8th Cir. 1999). The habeas petitioner, therefore, must have fairly presented the “substance” of his federal habeas claim to the state courts. Picard v. Connor, 404 U.S. 270, 275 (1971). This requires presentation of “both the factual and legal premises” of the claims to the state courts in order to preserve them for federal habeas review. Flieger v. Delo, 16 F.3d 878, 885 (8th Cir. 1994).

Moore’s first ground for relief is his claim that he was denied effective assistance of counsel at trial in violation of the Sixth Amendment of the United States Constitution. Specifically, Moore claims that trial counsel was ineffective because counsel (1) refused to call witnesses on his behalf; (2) denied him the right to confront his accuser; (3) denied him the right to cross-examine witnesses; (4) denied him the right to pick the jury; and (5) was under a great deal of stress from a recent divorce.

Of the five claims of ineffective assistance of counsel asserted by Moore, only the failure to call witnesses was asserted on direct appeal of his state conviction. Moore's claims that he was denied the right to confront his accuser, the right to cross-examine witnesses, the right to pick the jury, and the claim that counsel acted under stress, therefore, have not been presented to or considered by a state court.¹

Although Moore argued on direct appeal his claim that trial counsel refused to call Greer on his behalf, the record reflects that he did not give the state courts a fair opportunity to consider his constitutional claims. In his brief to the Iowa Court of Appeals, Moore made the bare assertion that his defense counsel failed to subpoena and secure the testimony of Greer, whom he believed was a key witness. Appellant's Brief at 6, State v. Moore, 2001 WL 246393 (Iowa Ct. App.) (No. 00-0801). Moore even conceded in his brief that "the record on [his claim for ineffective assistance of counsel] needs to be developed at a postconviction relief hearing". Id. The Iowa Court of Appeals noted that in complaining about ineffective assistance of counsel, "it is not enough to simply claim counsel should have done a better job, for example, should have called a witness". Moore, 2001 WL 246393, at *13. Because Moore did not state what Greer's testimony would have been or how it would have supported his defense, the court held his claim was too general and refused to address

¹ Moore includes each of these claims under the heading of ineffective assistance of counsel in his habeas petition. These claims may conceivably constitute independent constitutional grounds for habeas relief. Either way, the claims were not raised in state court.

it or preserve it for a postconviction proceeding. Id. Moore, therefore, never fairly presented this claim on direct appeal.

Moore also claims that there has been an error in the computation in his sentence. According to Moore, he is entitled to credit for schooling, employment, and treatment, among other factors. When he arrived at his corrections facility, however, his counselor told him that he would have to serve eighty-five percent of his twenty-five-year sentence for attempted murder. Moore contends that he is being sentenced twice for the same offense. Moore, however, failed to raise this claim on direct appeal. Moore, 2001 WL 246393, at *1.

Finally, Moore alleges that the jury selection process violated his constitutional rights. Moore claims that his trial attorney, John Wright, knew everyone on the jury. Moore does not, however, elaborate in his brief how this caused him prejudice. Nevertheless, even assuming that his attorney's familiarity with members of the jury did rise to the level of a constitutional violation, he did not raise this ground on direct appeal. Id.

Although Moore did not present any of the grounds for his habeas petition on direct appeal, it does not necessarily follow that dismissal of his petition is warranted. See Thomas v. Wyrick, 622 F.2d 411, 413 (8th Cir. 1980). Rather, the Court must further inquire into whether there exists a state law forum in which the petitioner may be heard on the merits of his claim. See id. (noting that "[t]he question with respect to exhaustion is not merely whether [the petitioner] has in the past presented his federal claim to the state courts, but also whether there is, under [state law], any presently

available state procedure for the determination of the merits of that claim”). The exhaustion requirement is limited in its application “to those state remedies still open to the habeas applicant at the time he files his application in federal court”. Humphrey v. Cady, 405 U.S. 504, 516 (1972). Based on the procedural posture of Moore’s habeas petition, the Court concludes that no state forum exists in which his claims may be heard.

Section 822 et seq. of the Iowa Code allows a defendant to seek collateral relief from a conviction through a postconviction hearing. See Iowa Code § 822 et seq. Under Iowa law, to preserve an issue for postconviction review, the petitioner must raise the issue on direct appeal. See Iowa Code § 822.8; see also Wycoff v. State, 382 N.W.2d 462, 465 (Iowa 1986). Nonetheless, the petitioner may still obtain postconviction review if he can establish by a preponderance of the evidence “sufficient reason” or “cause” for not raising the issue on direct appeal, and also establish that actual prejudice resulted from the alleged error. Iowa Code § 822.8; see also McKee v. Nix, 995 F.2d 833, 835 (8th Cir. 1993); Osborn v. State, 573 N.W.2d 917, 921 (Iowa 1998). Thus, if Moore lacks a “sufficient reason” or “cause” for failing to raise his claims in state court, then his claims are exhausted. Otherwise, Moore’s claims remain unexhausted because postconviction review would still be available to him.

In his habeas petition, Moore asserts that he asked his appellate counsel to raise on direct appeal the claims contained in his habeas petition. His appellate counsel, however, advanced only a portion of his ineffective assistance of counsel argument on direct appeal. It is well-settled in the courts of Iowa that ineffectiveness of appellate

counsel may provide the requisite “sufficient reason” or “cause” necessary to permit a claim to be brought for the first time in a postconviction action. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). In order to challenge the effectiveness of his appellate counsel, Moore must show that (1) counsel failed in an essential duty, and (2) the deficient performance was so prejudicial as to deprive him a fair trial. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Bugely, 562 N.W.2d 173, 178 (Iowa 1997). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Jones v. State, 479 N.W.2d 265, 272 (Iowa 1991). Other than his own subjective belief, Moore provides no evidence to suggest that his appellate counsel failed in an essential duty, or that he was prejudiced as a result. The Court, therefore, is satisfied that Moore lacks a “sufficient reason” to overcome his failure to raise on direct appeal the issues contained in this habeas petition. Consequently, to the extent that Moore is left without an available state court remedy, he satisfies the exhaustion requirement for the purpose of this habeas petition.

II. Procedural Default

Although Moore’s claims are technically exhausted, they are still beyond review by this Court because they have been procedurally defaulted. See McKee v. State, 995 F.2d 833, 835 (8th Cir. 1993) (recognizing that under Iowa law, a claim is procedurally defaulted if the defendant fails to show “sufficient reason” for not raising an issue on direct appeal). Mere failure to raise an issue on direct appeal does not automatically constitute a procedural default under Iowa law. Rather, a petitioner must also lack

“sufficient reason” for doing so before violating the procedural requirements of section 822.8 of the Iowa Code. Iowa Code § 822.8. When a petition lacks sufficient reason for failing to raise his claims on direct appeal, section 822.8 suffices as an independent and adequate state procedural bar to raising those same claims in a subsequent habeas petition. Wyldes v. Hundley, 69 F.3d 247, 253 (8th Cir. 1995). Hence, for the very reason that Moore’s claims are exhausted – lack of sufficient reason for failing to raise the issues on direct appeal – his claims are procedurally defaulted.

Claims which have been procedurally defaulted are barred from federal habeas review unless the petitioner can show “cause for the default and actual prejudice as a result of the alleged violation of federal law”. Coleman, 501 U.S. at 750. In his brief, Moore attempts to establish cause by claiming ineffective assistance of his appellate counsel. The United States Supreme Court has recognized that in certain circumstances, counsel’s ineffectiveness in properly preserving a claim in state court may constitute sufficient cause to overcome a procedural default. Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Before a claim of ineffective assistance of counsel may be used to establish cause for a procedural default, however, it must be presented to the state courts as an independent claim. Edwards v. Carpenter, 529 U.S. 446, 452 (2000). The record indicates that Moore has not exhausted his claim of ineffective assistance of appellate counsel in state court. The ineffective assistance of appellate counsel claim, therefore, cannot serve as the requisite “cause” to overcome the procedural default of his other claims. Because Moore fails to show cause for the procedural default, the Court does not determine whether he has suffered actual prejudice.

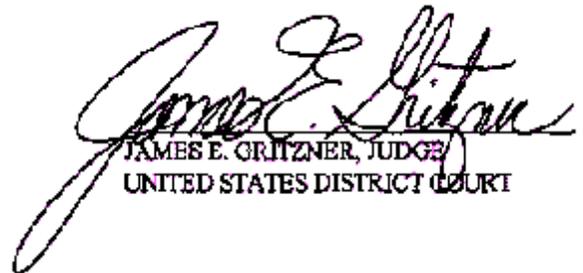
Wylde, 69 F.3d at 253-54.² Accordingly, Moore's petition for writ of habeas corpus shall be dismissed.

CONCLUSION

The Court **GRANTS** Respondent's motion to dismiss. Moore's petition for writ of habeas corpus brought under 28 U.S.C. § 2254 is **DISMISSED**.

IT IS SO ORDERED.

Dated this 2nd day of December, 2002.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT

² In Edwards v. Carpenter, the United States Supreme Court held that a federal court cannot consider an ineffective assistance of counsel claim as "cause" for the procedural default of another claim when the ineffective assistance claim has itself been procedurally defaulted. Edwards, 529 U.S. at 448. It appears from the record that Moore requested and was appointed counsel for the purpose of filing an application for postconviction relief in state court. As a result, the matter was assigned a case number. After consulting with counsel, Moore ultimately did not file an application. The matter was subsequently dismissed with prejudice. It is unclear from the record exactly what the state court dismissed because Moore had not yet filed a postconviction relief application. The Court, therefore, will not decide whether Moore defaulted on his ineffective assistance of appellate counsel claim.