IN THE SUPREME COURT OF IOWA

Supreme Ct. No. 19-2016

JOHN LEWIS ARTHUR ANDERSON,
Applicant-Appellant,
vs.
STATE OF IOWA,
Respondent-Appellee.

POLK CO. No. PCCE083218

BRIEF OF APPELLANT

ON APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY HONORABLE JUDGE JOSEPH W. SEIDLIN

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ROUTING STATEMENT

Appellant submits that this case presents substantial constitutional issues as to whether Defendant received effective assistance of counsel, the application of standards regarding rulings on Motion for Summary Judgments, and standards for delayed appeals in PCR cases, such that this case should thus be retained by the Supreme Court.

STATEMENT OF THE CASE

Nature of Case:

This is an appeal by Petitioner John Lewis Arthur Anderson of the District Court's May 16, 2019 ruling granting the State's Motion for Summary Judgment dismissing his petition for post conviction relief.

STATEMENT OF THE FACTS

On June 22, 2018, John Anderson initiated this post conviction relief action in Polk County Case No. PCCE083218, asserting as grounds of fact the presence of newly discovered evidence as well as claims that he received ineffective assistance of counsel in the 2010 convictions in Polk County felony case No. FECR233112. The State moved for summary judgment in the post-conviction relief matter, Mr. Anderson resisted, providing newly discovered evidence in the form of letters from a State's trial witness, asserting a factual issue as to whether the conviction was obtained through perjured testimony from a witness testifying falsely at trial.

Applicant, while having appointed counsel in this PCR matter, filed several pleadings pro-se. In this PCR matter, Mr. Anderson was initially court appointed Raya Dimitrova as counsel on June 28, 2018. Said counsel filed appearance on July 9, 2018. Applicant filed pro-se a Motion for Court-appointed investigator on October 5, 2018. (Appendix p. 53) On October 18, 2018, Applicant filed a pro-se motion noting a hearing scheduled on the State's Motion for Summary Judgment, indicating he did not have a copy of the filing, and asking for more time to respond. (Appendix p. 55) Applicant pro se stated in his October 16,

2018 filing that he had a right to discovery in this PCR matter and expressed his desire to conduct discovery as well as depositions in the matter. (Appendix p. 57) The Court continued hearing on the Motion for Summary Judgment and left Mr. Anderson's pro se motion for an investigator scheduled on November 2, 2018.

On that November 2, 2018, roughly four months after appointment and her appearance as counsel, Counsel Dimitrova moved to withdraw as attorney because she had a conflict, having previously represented Mr. Anderson in Polk County Case No. PCCE077660, another post-conviction relief proceeding stemming from the same underlying Case No. FECR233112. No explanation as to the 4 month delay in discovering the conflict from prior representation was provided, either at the reported hearing or in the Motion to Withdraw. The Court appointed new counsel Jonah Dyer on that date and ordered the motion for investigator scheduled at the same time as the hearing the motion for summary judgment on December 14, 2018. Mr. Dyer moved to withdraw on November 5, 2018 and Nicholas Einwalter was appointed on November 6, 2018. Pro se Applicant filed a resistance to the Motion on November 13, 2018, stating that newly discovered evidence existed. (Appendix p. 62) Continuance of the December 14, 2018 hearings on

Investigator and Summary Judgment was granted at Defense Counsel's request. A new date of January 25, 2019 was set. Counsel thereafter requested a continuance of that Court date indicating a need to perform additional investigation. The matter was continued to March 22, 2019. Pro se Applicant prepared and filed a brief in support of his pro se resistance to the Motion for Summary Judgment, complaining that he was denied his right to effective assistance of counsel through trial and PCR counsel's failure to perform the essential duty of investigation, that counsel "in the case at bar and during trial counsel failed to interview and depose key witnesses". (Addendum to Pro se Brief page 1). At that time, no status on the Motion for Investigator was provided to the Court, so no hearing was scheduled. Judge stated that if hearing was needed, the Parties were to inform the Court. Resistance to the Motion for Summary Judgment was filed by Applicant's counsel on March 21, 2019. Said motion raised the factual issue of actual innocence based upon the newly discovered evidence of a letter from Dejaaron Cassell to Rebecca Gladney, and a February 14, 2017 letter from Mr. Cassell, both stating remorse for what happened to "Johnny" and stating that Mr. Cassell's testimony contained lies about Johnny's involvement. (Appendix p. 69-70)

Hearing on the Motion for Summary Judgment was held the next day, March 22 2019. The Court entered its ruling May 16, 2019 granting the State's Motion for Summary Judgment. Defendant timely advised his counsel he wished to appeal, but no appeal was taken by Mr. Einwalter. (Appendix 103) Pro se Applicant filed A Motion for Belated Appeal on November 16, 2019. (Appendix p. 98) This Court has ordered parties to brief the issue of a delayed appeal in this post-conviction relief matter as part of the appellate issues. (Appendix p. 112)

STANDARD OF REVIEW

Postconviction actions are law actions and are reviewed ordinarily only on error. Hahn v. State, 306 N.W.2d 764 (Iowa 1981); Hinkle v. State, 290 N.W.2d 28 (Iowa 1980). The Appellate court is bound by trial court's findings of fact where there is "substantial evidentiary support." Michels v. Brewer, 211 N.W.2d 293 (Iowa 1973). However, an exception is made for constitutional issues, which are reviewed by the Court on "the totality of the circumstances." When such issues are present, the appellate court will "consider anew all the matters presented to, and which should have been considered by, the trial court and reach [their] own conclusion on whether the constitutional safeguard was violated." Kellogg v. State,

288 N.W.2d 561 (Iowa 1980); Snethen v. State, 308 N.W.2d 11 (Iowa 1981).

The Court may grant a motion for summary disposition of an application for post conviction relief when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa Code 822.6 (2017). The goal is to provide a method of disposition once the case has been fully developed by both sides, but before an actual trial." Hines v. State, 288 N.W.2d 344, 346 (Iowa 1980).

A motion for summary judgment is the functional equivalent of a Motion for Directed Verdict. In determining whether there is a fact issue to try, every legitimate inference that reasonably can be deduced from the evidence should be afforded the non-moving party. A fact question is generated if reasonable minds can differ on how an issue should be resolved. Knapp v. Simmons, 345 N.W.2d 118, 121 (Iowa, 1984). The burden of proof to show that there is no issue of material fact is on the moving party. Anita Valley Inc v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979). Under Iowa Rule of Civil Procedure 1.981,

Summary Judgment is only to be granted, based upon Affidavits and other documents filed with the Court, if there is no genuine issue as to any material fact and if the moving parties are entitled to Judgment as a matter of law. "When the State seeks to avoid a full trial of relevant facts through a motion for summary judgment, the state, as the moving party, has the burden of showing the absence of triable issues." Allison v. State, 914 N.W.2d 866, 892 (Iowa 2018)

ARGUMENT

CONSTITUTIONAL CONCERNS ARE PRESENT IN THIS MATTER SUCH THAT A DELAYED APPEAL SHOULD BE GRANTED

The appeal herein was not taken until pro se Applicant filed his motion for delayed appeal on November 21, 2019, six months after the May 16, 2020 PCR ruling. In his December 24, 2019 Statement to the Court, attorney Nicholas Einwalter for Mr. Anderson has confirmed that he was timely directed to file notice of appeal and did not do so, miscalculating the time to file, resulting in prejudice to Defendant if this delayed appeal is not granted. ((Appendix 103)

Applicant asserts that the standards applicable to delayed appeals in direct criminal appeals should be applied to this post-conviction relief proceeding.

Regarding authorizing delayed appeals, "the decision is for this court to make and depends on the circumstances of each case. Horstman v. State, 210 N.W.2d 427, 430 (Iowa 1973); Cleesen v. Brewer, 201 N.W.2d at 476. State v. Anderson, 308 N.W.2d 42, 46 (Iowa 1981).

> Applications for a delayed direct appeal have been granted where a defendant "has made a good faith effort to perfect his appeal and has directed his attorney to proceed therewith but due to a technical irregularity the appeal was either filed late or notice was improperly served." Anderson, 308 N.W.2d at 46

There is not a rule limiting the granting of delayed appeals to criminal cases. While delayed appeal has been in the past limited to those instances where a valid due process argument might be advanced should the right of appeal be denied Swanson v. State, 406 N.W.2d 792, 793(1987), "[t]he same federal constitutional considerations which have forced us to recognize delayed appeals in criminal cases are potentially applicable in some civil settings." Id. at n.1

Individuals subjected to loss of liberty have the right to counsel under the Iowa and U.S. Constitution. When those incarcerated and/or facing loss of liberty are not provided effective counsel, that right is not fulfilled. "Under certain circumstances failure to perfect an appeal is denial of effective counsel. Indeed, failure by appointed or retained counsel to commence the simple steps for appeal is a blatant denial of due process." Blanchard v. Brewer, 429 F.2d 89, 90 (8th Cir. 1970).

An attorney's failure to perfect an appeal can constitute ineffective assistance of counsel when a significant liberty interest is at stake. In parole revocation proceedings, a significant interest is at stake and as such, failure to perfect appeal constitutes

ineffective assistance of counsel. Heath v. State, 372 N.W.2d 265, 266 (Iowa 1985) In the present case, appointed counsel's failure to timely file an appeal is a denial of due process implicating significant liberty interests.

Furthermore, Applicant has claimed herein that he is innocent of the crimes for which he is convicted.

> The Iowa Constitution gives a floor to bring freestanding claims of actual innocence under our postconviction-relief statute, specifically sections 822.2(1)(*a*) and (*d*). A conviction of an innocent person violates the Iowa Constitution, specifically the due process clause and the prohibition against infliction of cruel and unusual punishment. Thus, section 822.2(1)(*a*) is one vehicle to bring an actual-innocence claim. Additionally, conviction of an innocent person infringes upon the "interest of justice" precisely because it violates the Iowa Constitution. Therefore, section 822.2(1)(*d*) is another vehicle to assert an actual-innocence claim.

Schmidt v. State, 909 N.W.2d 778, 798 (Iowa 2018)

"Actually innocent people should have an opportunity to prove their actual innocence…the incarceration of actually innocent people therefore implicates procedural due process." Schmidt v. State, 909 N.W.2d 778, 793–94 (Iowa 2018) "An innocent person has a constitutional liberty interest in remaining free from undeserved punishment. Holding a person who has committed no crime in prison strikes the very essence of the constitutional guarantee of substantive due process." Schmidt v. State, 909 N.W.2d 778, 793 (Iowa 2018)

The Iowa Constitution's guarantees of substantive and procedural due process and one's liberty interest in remaining free from undeserved punishment are significant liberty interests justifying application of the delayed appeal provisions to this post-conviction relief action. Applicant Anderson made a good faith effort to perfect his appeal by directing his attorney to proceed. Mr. Einwalter did not timely file the appeal. Mr. Anderson should not be caused to lose his right to appeal when the failure to timely appeal was caused by his attorney's failure to complete the duty to do so. The valid due process argument that applicant's right to effective post-conviction relief counsel is implicated. "Iowa Code section 822.5 has been held to amount to a statutory right to counsel in PCR proceedings….[t]hus, where the only counsel provided to an applicant has been ineffective, a violation of the statute occurs." Allison v. State, 914 N.W.2d 866, 871 (Iowa 2018). If delayed appeal is not authorized, the procedural, substantive due process rights, as well as liberty interests of Mr. Anderson are violated.

Mr. Anderson should be granted a delayed appeal in this matter.

A MATERIAL FACT ON THE ISSUE OF NEW EVIDENCE EXISTED IN THE FORM OF TESTIMONY FROM A RECANTING WITNESS SUCH THAT THE COURT ERRED IN GRANTING SUMMARY JUDGMENT

This matter did not proceed to trial on the merits. Application's petition was dismissed following the District Court's grant of summary judgment to the State. However, insufficient grounds existed to grant summary judgment. The State bore the burden to establish the nonexistence of a material fact. Allison v. State, 914 N.W.2d 866, 892 (Iowa 2018). It failed to fulfill that burden.

Applicant asserted as a ground for post conviction relief newly discovered evidence and that he was actually innocent of the crimes for which he was convicted. "Individuals convicted of public offenses by ways other than a plea of guilty, have long been allowed to attempt to prove their actual innocence under chapter 822." Demery v. State, No. 19-1465, 2020 WL 1887955, at *2 (Iowa Ct. App. Apr. 15, 2020).

This claim of actual innocence is, however, raised after the three year limitation period. Thus, applicant is required to demonstrate that he could not have raised the ground of fact within the applicable time period. Applicant relying on the ground-of-fact exception must also show the ground of fact is relevant to the challenged conviction. "A ground is "relevant" if it is the type of fact that has

the potential to qualify as material evidence for purposes of a substantive claim under section 822.2." Schmidt v. State, 909 N.W.2d 778, 798–99 (Iowa 2018)

Mr. Anderson provided sufficient evidence to avoid summary disposition that would establish the information could not have been raised within the three year limitations period. The letters were addressed to a third party and nothing in the PCR record establishes that the letters were received by Mr. Anderson. Additionally, the information therein, taken in the light most favorable to Mr. Anderson, would be material as it would demonstrate that he was not present at the time of the crimes, thereby not involved, and actually innocent of the crimes for which he is convicted.

Mr. Anderson thereafter presented sufficient information to avoid summary disposition regarding the newly discovered evidence. To prevail on a newly discovered evidence claim, claimant must show by a preponderance of the evidence (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the

trial. Moon v. State, 911 N.W.2d 137, 151 (Iowa 2018). The District Court found that "the information from Cassell was clearly available to Anderson prior to his trial which took place in April, 2010" (Appendix p 95). However, this finding is incorrect as is discussed hereafter. The District Court further held that the information would simply have been impeachment as to Cassell's trial testimony.

Applicant had requested discovery to investigate his claim of newly discovered evidence. The hearing on summary judgment should not have proceeded prior to that investigation being completed. However, no ruling on the motion for an investigator at State expense was ever requested by counsels for Appellant, such that the investigation at State expense was never authorized by the Court. Regardless, two letters written by a trial witness, Dejaaron Cassell, were provided in support of the resistance. (Appendix p. 69-70) One letter was addressed to Rebecca Gladney prior to the time of trial on the matter. The second letter is dated 7 years later, does not contain an envelope to denote to whom it was written, but does refer to "Johnny" as opposed to "you" suggesting the letter was written to a 3rd party and not Applicant. In both letters, Mr. Cassell indicates Mr. Anderson's non-

involvement in the crimes. These letters, from a purported eyewitness who testified against Mr. Anderson at trial, and provided to a third party that Mr. Anderson thereafter discovered, raise the significant risk that Defendant was convicted by perjured testimony of Dejaaron Cassell. At the very least, investigation was needed to determine whether Mr. Cassell would confirm drafting the letters, when they were drafted, to whom the letters were provided, and the substance of the assertions in the letters that Mr. Anderson was not involved in the crimes. Importantly, and contrary to the District Court's findings, the letters do not demonstrate that Mr. Anderson was aware of Mr. Cassell's intentions prior to trial. There is no indication that Mr. Anderson had the earlier letter prior to trial. To the contrary, the evidence shows that the letter was given to a 3rd party, Rebecca Gladney. No evidence shows that Ms. Gladney provided the letter to Mr. Anderson prior to trial. Mr. Anderson asserts that the evidence is newly discovered. The District Court held that "the information from Cassell was clearly available to Anderson prior to his trial which took place in April, 2010." (Appendix p. 95). However, the content of the letters, mailing address, and dates contained on the letters, support that they were not provided directly to

him at the time they were authored as opposed to showing they were "clearly available to Anderson prior to his trial". If the information is taken in the light most favorable to Anderson, it appears that it was not available to him and was instead provided to a 3rd party. Thus, a factual issue exists as to whether there was newly discovered evidence under Iowa Code Section 822.2(1)(d) sufficient to avoid the State's Motion for Summary Judgment. Additional investigation into the matter was warranted to determine Mr. Cassell's intention and the timing of the letters.

The Cassell evidence is not merely impeachment as a matter of law. Impeachment evidence would relate to challenges that testimony offered was untrue. This testimony would replace prior Cassell testimony claiming Anderson was present. It would thus not be impeachment but substantive evidence of the facts and circumstances surrounding the crimes. While "the postconviction court is not required to believe the recantation, and has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result" Adcock v. State, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994), taken in the light most favorable to Mr. Anderson, the matter should

have proceeded to full hearing for the Court to fully consider the evidence presented. The letters amount to support that Applicant was factually innocent of the charges against him. "actual innocence requires proof of factual innocence with respect to the challenged conviction." Dewberry v. State, 941 N.W.2d 1, 7 (Iowa 2019), reh'g denied (Jan. 16, 2020) The letters state that Mr. Anderson was not there at the time of the crime, that Cassell's testimony was just a story, and that he was forced to lie on "Johnny". Such testimony provided a material fact sufficient to avoid a motion for summary disposition. The information, taken in the light most favorable to Mr. Anderson, was an alibi and would establish his actual innocence of all convictions and any lesser included offenses. It was error to decide the matter in summary disposition. Based upon the Cassell letters, Applicant should have been afforded the opportunity to conduct discovery, perform depositions, and present a full record as to the nature of the new evidence of Mr. Cassell's perjured testimony for the post conviction court's consideration.

CONCLUSION

The District Court erred in granting the State's motion for summary judgment. The evidence taken in the light most favorable to Mr. Anderson showed that the witness recantation letters were not received by him prior to trial. The Court erred in finding otherwise. Those letters amounted to material facts in the form of testimony from a witness that the witness lied. The State failed in its burden to demonstrate the absence of a genuine issue of material fact. A full hearing on the claims of newly discovered evidence should have been heard to determine the factual issues of whether the new information was material and not merely impeachment.

Wherefore, Appellant requests that the Court vacate the District Court's order granting the State's motion for summary judgment and remand for further proceedings.

REQUEST FOR NONORAL SUBMISSION

Appellant hereby consents to nonoral submission of this matter upon submission of the case.

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COST CERTIFICATE

Comes now Counsel for Appellant and hereby state that the costs of printing this document were $ 0 .

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CERTIFICATE OF FILING

The undersigned hereby affirms that Appellant's Final Brief was e-filed with the Clerk of the Iowa Supreme Court on November 10, 2020 by filing with the appellate EDMS system.

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CERTIFICATE OF SERVICE

The undersigned hereby affirms that one copy of the Appellant's Final Brief was served by mailing said document by United States Mail on November 10, 2020 to the following:

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