

IN THE SUPREME COURT OF IOWA

NO. 17-0007

Muscatine County No. PCCV019353

CATHRYN ANN LINN,)
Applicant-Appellant,)
)
vs.)
)
STATE OF IOWA,)
Respondent-Appellee.)

APPEAL FROM THE DISTRICT COURT IN AND FOR
MUSCATINE COUNTY THE HONORABLE NANCY S. TABOR

APPLICANT-APPELLANT'S FINAL BREIF

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CERTIFICATE OF SERVICE AND FILING

The undersigned certifies that on September 4, 2017, a true copy of the foregoing instrument was served on the Attorney General via EDMS, and on September 5, 2017, one copy will be mailed to Applicant-Appellant addressed to Cathryn Ann Linn, #1099763, 420 Mill St., Mitchellville, Iowa 50169.

I further certify that on September 4, 2017, I will file this document by EDMS with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, IA 50319.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. PCR COURT ERRED IN GRANTING SUMMARY JUDGMENT

Iowa R. Civ. P. 1.981(3).

Walker v. Gribble, 689 N.W.2d 104, 108 (Iowa 2004

Kelly v. Iowa Mut. Ins. Co., 620 N.W.2d 637, 641 (Iowa 2000

SHI R2 Solutions, Inc. v. Pella Corp., 864 N.W.2d 553 (Iowa Ct. App. 2015).

- A. The first assignment of error is the court's finding there was no information available to trial counsel on BWS.

Killing One's Abuser, Emory Law Journal (2010) Vol 59, p. 769, 776.

State v. Arreola-Dominguez, Iowa Court of Appeals, No. 3-798 / 12-2037, Dec. 18, 2013.

- B. The second assignment of error was granting summary judgment for want of an expert while simultaneously denying Linn's request for court funds to retain an expert

Killing One's Abuser, Emory Law Journal (2010) Vol 59, p. 769, 777.

State v. Frei, 831 N.W.2d 70 at 74 (Iowa 2013)(

State v. Price, 2008 WL 5234351, No. 8-604/07-1659, filed Dec. 17, 2008 (Iowa Ct. App.))

State v. Axiotis, 569 N.W.2d 813, 815 (Iowa 1997).

Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 531 (Iowa 1999).

State v. Rodriguez, 636 N.W.2d 234, 246 (Iowa 2001)

State v. Griffin, 56r N.W.2d 370 (Iowa 1997)

State v. McGhee, 220 N.W.2d 908 (Iowa 1974)

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State v. Shanahan, 712 N.W.2d 121, 143 (Iowa 2006)

- C. The third assignment of error was the court finding summary judgment warranted because BWS was inconsistent with her defense.

State v. Broughton, 425 N.W.2d 48, 51 (Iowa 1988)

**II. POSTCONVICTION COUNSEL WAS INEFFECTIVE
FOR FAILING TO COMPLY WITH I.R.C.P. 1.981 IN
RESISTING THE STATE’S MOTION FOR SUMMARY
JUDGMENT.**

6th Amendment of the U.S. Constitution,

Article I, Section 10 of the Iowa Constitution.

Iowa Rule of Civil Procedure 1.981

State v. Lopez, 872 N.W.2d 159, 169 (Iowa 2015).

- A. PCR counsel breached a duty to set forth evidence required under I.R.C.P 1.981(5) to refute the State’s motion for summary judgment.

Iowa Rule of Civil Procedure 1.981(5)

- B. If expert testimony on BWS was required, PCR counsel breached a duty to set forth evidence required under I.R.C.P 1.981(5) to refute the State’s motion for summary judgment.

Killing One’s Abuser, Emory Law Journal (2010) Vol 59, p. 769, 777.

I.R.C.P. 1.981(5)

ROUTING STATEMENT

This case involves application of existing legal principles and is appropriate for transfer to the Court of Appeals. Iowa R. App. P. 1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case. Applicant-Appellant, Cathryn Ann Linn, appeals the district court's grant of State's motion for summary judgment dismissing her petition for postconviction relief.

Course of Proceedings. A jury returned a verdict of guilty for First Degree Murder against Applicant-Appellant, Cathryn Ann Linn, in 2007. Direct appeal followed. The appeal raised several issues: motion to suppress; sufficiency of the evidence and ineffective assistance of trial counsel. The conviction was affirmed on appeal in 2009. The postconviction relief (hereinafter PCR) petition was filed in 2009. The PCR petition alleged, *inter alia*, ineffective assistance of trial counsel for failing to raise Battered Women's Syndrome (hereinafter BWS) in support of the Linn's justification defense. The State did not file an Answer. A number of attorneys were appointed and substituted. In 2015, one such attorney filed a request for costs to retain an expert on BWS. That attorney later withdrew. The State served discovery requests on the subject of BWS. The State then filed a motion for summary judgment. Summary judgment was granted on December 9, 2016. This appeal was filed January 3, 2017.

STATEMENT OF FACTS

Cathryn Ann Linn was charged with the murder of Barry Blanchard in 2009. (Appendix p. 826) She was appointed counsel and filed the affirmative defense of justification. (App. 826.)

During trial Linn testified about traumas she had experienced during her life related to men in her life. She also testified about the physical and psychological abuse she suffered through Blanchard. Linn's older sister had been murdered by an abusive partner (App. 641:1-15). Linn's abuser told her he had killed people before in the service and had murdered a civilian (App. 697:14-17). Linn's abuser told her how he brutally beat his former partner to within an inch of her life (App. 697:17-19). Linn's abuser warned her she better not piss him off (App. 697:19-20). Linn's abuser promised he would cut her from her pussy to her throat and fuck her in the throat while she is bleeding (App. 697:1-9, 21-24). Linn unsuccessfully tried to end the relationship with her abuser (App. 650:3-4). Linn's abuser controlled her by taking her money, food stamps, medication, etc. (App. 668:15-17). Linn needed to hide from her abuser her money, food stamps and medication (App. 669:2-14). Linn's relationship with her abuser started out fine (App. 644:21-24). Linn's late husband had committed

suicide (App. 679:25; 681:22-682:5). Linn's abuser had a reputation for being tough and intimidating (App. 685:17-19). Linn's abuser physically and emotionally abused her (App. 690:20-691:8). Linn was unemployed (App. 693: 16). Linn's abuser pressured her to buy drugs (App. 694:10-16). Linn's abuser had told her at least 15 times he would cut her and still fuck her dead or alive (App. 700:22-701:9). Linn believed her abuser would carry out his threat to kill her (App. 701:10-13). Linn medicated for mental health and was an alcoholic. (App. 643:1-2, 669:2-14)

A jury returned a verdict of guilty for First Degree Murder in 2007. (App. 826) Direct appeal followed. The appeal raised several issues: motion to suppress; sufficiency of the evidence and ineffective assistance of trial counsel. The conviction was affirmed on appeal in 2009. (App. 807, 812) The postconviction relief (hereinafter PCR) petition was filed in 2009. (App. 10) The PCR petition alleged, *inter alia*, ineffective assistance of trial counsel for failing to raise Battered Women's Syndrome (hereinafter BWS) in support of the Linn's justification defense. (App. 11) The State did not file an Answer. A number of attorneys were appointed and substituted. In 2015, one such attorney filed a request for costs to retain an expert on BWS.

(App. 826) That attorney later withdrew. Attorney Jeffrey M. Lippman was appointed. Subsequently, the State served discovery requests on the subject of BWS. (App. 28-35) Specifically, the State sought evidence and witnesses on BWS. (App. 32-33) Linn's general responses were "Investigation is ongoing at this time. Applicant will supplement this answer." (App. 32-33) With these responses, the State filed a motion for summary judgment on September 19, 2016. (App. 23) Linn's counsel filed a resistance that did not contain a statement of disputed facts as required by Iowa R.Civ. P. 1.981(3), nor did it contain affirmative evidence as required by Rule 1.981(5). (App. 814) Summary judgment was granted on December 9, 2016. (App. 1) This appeal was filed January 3, 2017. (App. 6)

STANDARD OF REVIEW AND PRESERVATION OF ERROR

Summary judgment is reviewed for errors at law. Iowa R. App. P. 6.907. Review is de novo on a claim of ineffective assistance of counsel. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

Summary judgment was granted on December 9, 2016. The court granted summary judgment citing the following grounds: (1) no facts support Battered Women's Syndrome (hereinafter BWS); (2) no expert testimony on BWS; and (3) BWS would be inconsistent with her defense. (App. 3) Linn timely filed this appeal and seeks review of all three grounds.

Linn further appeals claiming her court-appointed PCR counsel was ineffective. This claim was preserved by seeking de novo review on this appeal.

I. PCR COURT ERRED IN GRANTING SUMMARY JUDGMENT

PCR Trial court granted the State's motion for summary judgment. The Court stated "Linn's claim that trial counsel was ineffective for failing to raise Battered Women's Syndrome fails. She provides no information as to what facts were available to her trial counsel to support such a claim. She provides no expert witness testimony by affidavit to explain how a jury might have been told that the syndrome was relevant. And more importantly, the State of Iowa correctly notes that such syndrome evidence would have been inconsistent with her trial testimony about the nature of the shooting. Linn cannot demonstrate that her trial counsel's performance was deficient and there is no evidence of resulting prejudice." (App. 3-4).

The question on review is whether the district court erred in granting summary judgment.

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law.” Iowa R. Civ. P. 1.981(3). A question of fact exists “if reasonable minds can differ on how the issue should be resolved.” *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). We view the record in the “light most favorable to the party opposing the motion for summary judgment.” *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 641 (Iowa 2000). These summary judgment standards dictate the outcome of the appeal. *SHI R2 Solutions, Inc. v. Pella Corp.*, 864 N.W.2d 553 (Iowa Ct. App. 2015).

As a preliminary matter, it is important to note that the State never denied by way of an Answer the allegations in either the original petition or as amended. In her original petition, Linn claimed she suffered from BWS and PTSD. (App. 11). In her amended petition, Linn added that her attorney failed to pursue this defense to her prejudice. (App. 14-15)

A. The first assignment of error is the court’s finding there was no information available to trial counsel on BWS.

Contrary to the court’s conclusion, there is substantial record evidence clearly demonstrating counsel’s awareness of facts sufficient to support a BWS defense. During his opening remarks at trial,

Linn's court-appointed counsel told the jury the defense was one of justification (App. 565: 24-25) and that the evidence would show "things in [Linn's] life that related to her relationship with [her abuser] and the events of February 6 and February 7." (App. 566:24-567:2). During direct examination of Linn at trial, her court-appointed attorney elicited the following evidence:

1. Linn's older sister had been murdered by an abusive partner (App. 641:1-15);
2. Linn's abuser told her he had killed people before in the service and had murdered a civilian (App. 697:14-17);
3. Linn's abuser told her how he brutally beat his former partner to within an inch of her life (App. 697:17-19);
4. Linn's abuser warned her she better not piss him off (App. 697:19-20);
5. Linn's abuser promised he would cut her from her pussy to her throat and fuck her in the throat while she is bleeding (App. 697:1-9, 21-24);
6. Linn unsuccessfully tried to end the relationship with her abuser (App. 650:3-4);

7. Linn's abuser controlled her by taking her money, food stamps, medication, etc. (App. 668:15-17):
8. Linn needed to hide from her abuser her money, food stamps and medication (App. 669:2-14);
9. Linn's relationship with her abuser started out fine (App. 644:21-24);
10. Linn's late husband had committed suicide (App. 679:25; 681:22-682:5);
11. Linn's abuser had a reputation for being tough and intimidating (App. 685-19):
12. Linn's abuser physically and emotionally abused her (App. 690:20-691:8);
13. Linn was unemployed (App. 693: 16);
14. Linn's abuser pressured her to buy drugs (App. 694:10-16):
15. Linn's abuser had told her at least 15 times he would cut her and still fuck her dead or alive (App. 700:22-701:9);
16. Linn believed her abuser would carry out his threat to kill her (App. 701:10-13).
17. Linn medicated for mental health and was an alcoholic. (App. 643:1-2, 669:2-14)

Iowa courts have recognized evidence of BWS as proof in support of a justification defense. There is consensus that psychologically, BWS may apply when a woman has been abused at least twice and exhibits a cluster of symptoms such as low self-esteem, self-blame, anxiety, depression, and despair. *Killing One's Abuser*, Emory Law Journal (2010) Vol 59, p. 769, 776. The syndrome explains that a battered woman stays in an abusive relationship as a result of these feelings of helplessness and fear. Since a woman suffering from BWS feels she cannot leave the relationship, she may come to believe that using deadly force is her only option for escape. *Id.* Clinically, BWS is categorized under PTSD. *State v. Arreola-Dominguez*, Iowa Court of Appeals, No. 3-798 / 12-2037, Dec. 18, 2013.

On this record, and Iowa's acceptance of BWS in support of a justification defense, summary judgment was erroneous.

B. The second assignment of error was granting summary judgment for want of an expert while simultaneously denying Linn's request for court funds to retain an expert

It is widely accepted that BWS testimony may support the objective reasonableness requirement of justification by showing that

a reasonable person in her circumstances would have acted in the same way. *Killing One's Abuser*, Emory Law Journal (2010) Vol 59, p. 769, 777. This is true under Iowa law as well. In *State v. Frei*, the Iowa Supreme Court said expert testimony on BWS “can aid in cautioning jurors that the behavior of battered women should not be lightly dismissed as inherently unreasonable”. *Frei*, 831 N.W.2d 70 at 74 (Iowa 2013)(holding that justification requires both subjective and objective reasonable test). In *Frei*, the defendant was charged with murder. She sought but was denied an entirely subjective test instruction on justification based on BWS. On appeal, the Supreme Court ruled that Iowa’s statutory justification defense based on BWS still requires both a subjective and objective test. *Id.* The rationale in *Frei*, tells us that expert testimony on BWS is relevant to the objective and subjective test for a justification defense. *Frei*, at 74 (relying favorably on *State v. Price*, 2008 WL 5234351, No. 8-604/07-1659, filed Dec. 17, 2008 (Iowa Ct. App.))

For this reason, denial of expert testimony on this defense is reversible error under Iowa law. *Price*, 2008 WL 5234351, No. 8-604/07-1659, filed Dec. 17, 2008 (Iowa Ct. App.) In *Price*, the defendant was charged with murder. She raised a justification

defense. The trial court excluded her expert testimony on BWS. It resulted in a hung jury. At the second trial the court again excluded the expert's testimony. The issue on appeal from conviction was whether the trial court abused its discretion in excluding the testimony. Abuse of discretion is that exercise of judgment "clearly untenable" or "clearly unreasonable" (*State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997)). The Court of Appeals in *Price* found the exclusion was both an abuse of discretion and prejudicial, citing *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999).

The Court of Appeals in *Price* reversed the conviction, saying the expert testimony on BWS allows the jury to view both the defendant and victim behavior in the context of the nature of the relationship. It reasoned that expert testimony on BWS "would have given the jury information that it needed to understand the significance and meaning of the victim's conduct and to understand the defendant's reaction to that conduct (parroting *State v. Rodriguez*, 636 N.W.2d 234, 246 (Iowa 2001) ... and that "its function is to aid the jury in determining whether a defendant's fear and claim of self-defense are reasonable".

In the present case, the postconviction court also denied Linn expert testimony on BWS. It granted summary judgment for want of an expert, while simultaneously denying Linn's request for an expert. In terms of a fair trial, there is no meaningful distinction between being denied an expert to defend against a motion for summary judgment, and being denied the use of expert testimony at trial. In the present case, on October 8, 2015, Linn's first court-appointed PCR counsel formerly requested funds to retain Laurie Schipper as an expert on BWS. The request even cited other Iowa cases in which Ms. Schipper had testified as an expert on BWS. *See, State v. Griffin*, 564 N.W.2d 370 (Iowa 1997) No hearing on the motion was permitted. And though that motion was never formally resisted by the State, it was eventually denied on December 9, 2016, as part of the ruling granting the State's motion for summary judgment.

The denial of the expert in this postconviction case is as prejudicial as denying the testimony in *Price*. First, *State v. McGhee*, 220 N.W.2d 908 (Iowa 1974) states that to ensure due process, a hearing shall be permitted on an indigent's request for funds to retain an expert. *State v. McGhee*, 220 N.W.2d at 913. *See also* I.R.Cr.P.

2.20(4). Here no hearing was permitted. Second, *McGhee* says deference is given to an attorney's request for such funds. *Id.*

Second, an attorney may be ineffective for not raising BWS as part of a justification defense. *State v. Shanahan*, 712 N.W.2d 121, 143 (Iowa 2006). Thus, Linn has the burden to prove she was prejudiced. To prove prejudice Linn had the burden to prove what an expert would have said on her behalf. To survive summary judgment, Linn needed to at least put forth, as the trial court put it, "expert testimony by affidavit to explain how a jury might have been told that the syndrome was relevant". Linn was indigent at trial, and remained indigent. The denial of her request for an expert effectively assured the demise of her claim on summary judgment. *State v. McGhee*, 220 N.W.2d 908 (Iowa 1974).

C. The third assignment of error was the court finding summary judgment warranted because BWS was inconsistent with her defense.

First, Iowa law permits defendants to advance inconsistent defenses. *State v. Broughton*, 425 N.W.2d 48, 51 (Iowa 1988)(joining the majority of jurisdictions affirming a defendant's right to benefit

from any defense shown by the evidence, even if inconsistent with the defendant's own testimony).

Second, Linn had already advanced justification as a defense from opening statements to closing argument. The BWS evidence would have been consistent with and bolstered that line of defense. BWS is not inconsistent with justification, but is part and parcel to it. *See, Price and Frei.*

Under the summary judgment standard, the evidence is viewed in the light most favorable to Linn, and she enjoys all reasonable inferences from the evidence. To conclude as a matter of law that BWS was inconsistent with her justification defense is clear and prejudicial error.

II. POSTCONVICTION COUNSEL WAS INEFFECTIVE FOR FAILING TO COMPLY WITH I.R.C.P. 1.981 IN RESISTING THE STATE’S MOTION FOR SUMMARY JUDGMENT.

Linn claims PCR counsel was ineffective in the following respects:

- a. Failing to set forth affidavits or transcripts to refute the State’s alleged facts;
- b. Failing to secure and expert on BWS.

Applicant-Appellant, Cathryn Ann Linn, was entitled to effective assistance of court-appointed counsel under the 6th Amendment of the U.S. Constitution, and Article I, Section 10 of the Iowa Constitution. Linn appeals the dismissal of her petition for postconviction relief (hereinafter PCR) on the ground that her PCR counsel was ineffective for failing to comply with Iowa Rule of Civil Procedure 1.981 in resisting the State’s motion for summary judgment. To prevail on a claim of ineffective assistance of counsel, Laughlin must show (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. *State v. Lopez*, 872 N.W.2d 159, 169 (Iowa 2015).

A. PCR counsel breached a duty to set forth evidence required under I.R.C.P 1.981(5) to refute the State's motion for summary judgment.

Iowa Rule of Civil Procedure 1.981(5) provides that when a party supports a motion for summary judgment with affidavits or other transcripts, the non-moving party must respond in kind to effectively resist the motion. Specifically, the rule states in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

IRCP 1.981(5)

In the instant case, the State's motion was supported as provided by the rule, but Linn's counsel did not respond with affidavits or otherwise to set forth specific facts showing there is a genuine issue for trial. This failure was fatal in light of counsel's failure to identify evidence on BWS through discovery responses.

B. If expert testimony on BWS was required, PCR counsel breached a duty to set forth evidence required under I.R.C.P 1.981(5) to refute the State's motion for summary judgment.

The conventional wisdom is that without expert testimony on BWS to explain a battered woman's perceptions, a jury likely will not

understand how the defendant's reaction could be considered reasonable. *Killing One's Abuser*, Emory Law Journal (2010) Vol 59, p. 769, 777. To the extent Iowa law, as established under cases such as *Frei* and *Price*, requires that an expert is needed for testimony on BWS, then Linn's PCR counsel was ineffective. PCR counsel failed to secure such expert. PCR counsel failed to even obtain an affidavit from an expert making a rudimentary nexus between the record evidence as set forth herein and how a jury could use that relative to a justification defense. Though a request was filed by prior counsel to permit funding to secure an expert, subsequent PCR counsel refiled a similar motion but failed to insist on a hearing. Instead, the request was allowed to languish until finally denied as part of the ruling granting summary judgment. PCR counsel further failed to file a motion to continue the summary judgment matter until securing an expert. Instead, PCR counsel allowed the motion for summary judgment to go to the court without an expert.

Failing to follow the basic requirements of I.R.C.P. 1.981(5) or seek more time to comply, should be viewed as ineffective as missing a jurisdictional deadline. When it comes to summary judgment, as here, the consequence is the same.

CONCLUSION

The court should have approved the request for funds to retain an expert. Summary judgment was improper on the record that exists. In the alternative, PCR counsel was ineffective in prosecuting this petition and defending against the State's motion for summary judgment. Either way, the dismissal should be reversed.

RELIEF REQUESTED

Linn demands the dismissal on summary judgment be vacated and that the request for funds for an expert be granted, and that the matter be remanded for trial on the petition for postconviction relief.

REQUEST FOR ORAL ARGUMENT

Linn request to be heard on oral argument.

COST CERTIFICATE

I certify that the cost of printing the Appellant's Brief/Appendix was \$73.00.

/s/ Darrell G. Meyer, AT0005273

**Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type-Style Requirements**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

[**X**] this brief contains 4,386 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Darrell G. Meyer September 4, 2017
Signature/ Date