

IN THE SUPREME COURT OF IOWA

No. 16-1650

DAVID M. POWERS

Applicant-Appellant,

vs.

STATE OF IOWA

Resister-Appellee

APPEAL FROM THE BLACK HAWK COUNTY DISTRICT COURT

THE HONORABLE GEORGE L. STIGLER

APPELLANT'S REPLY BRIEF

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/s/ Kent A. Simmons

KENT A. SIMMONS

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ROUTING STATEMENT

The State refuses to acknowledge the broad public importance in allowing postconviction applicants fair access to evidence relevant to their convictions. Mr. Powers's opening brief fully details the trial court's capricious denial of the disclosure of police investigative reports that were material to a valid claim and nonconfidential under the Open Records Act. The capricious nature of the ruling is shown in the simple fact Judge Stigler never stated any reason for denying the discovery. Even worse, he then summarily decided the issue on the merits to which the reports were germane on the basis of the contents of the reports. Applicant repeatedly requested the judge disclose the reports to him to allow him to provide fair litigation of the evidence in them. The amicus brief filed by the Innocence Network and the Innocence Project of Iowa demonstrates the vital importance of a fair PCR system. The Court should retain this case for ultimate determination upon this fundamental defect in due process. Iowa R. App. P. 6.1101 (2)(d). Wrongful convictions are real, and the system must provide the means for correction.

Statement of the Facts

The State chooses to leave out key PCR testimony from Investigator Chopard. Regardless of the semantics that may have been involved in the conversations Chopard had with K.P. and her father, Phil Powers, in 2011, Officer Chopard did admit these two key facts in his 2016 PCR testimony:

- 1) He did not believe K.P.'s allegation of being raped by gang members; and
- 2) During the meeting with K.P. and Phil, K.P. made it known that she knew Chopard did not believe her. In fact, she said, "Nobody believes me."

(Hrg. Tr. 7/25/17, pp. 13-16, L. 11-3)

Without mentioning these two key facts, the State simply parrots Judge Stigler to say Phil's recollection the police "believed it was a false report" was "intentionally false" testimony on Phil's part. (St. Br. 14-15)

If Phil sits in the conversation to hear K.P. say she knows the police do not believe her, Chopard does not correct her and gives her all the reasons he

does not believe her, and then Phil testifies the police “believed it was a false report,” is there any rational basis for the conclusion that Phil “intentionally testified falsely”? In fact, Phil did not say he was directly quoting Chopard. He testified that police told him “they interviewed everybody involved...” Phil added, “they felt it was a false report, and that’s how I remember it was presented to me.” (Hrg. Tr. 7/25/17, pp. 19-20, L. 24-5) The State takes the charade even one step farther to adopt the trial judge’s conclusion that there was “absolutely no reason to believe that K.P. made a false accusation.” (St. Br. 15) Investigator Chopard’s testimony that he conducted an investigation with several witnesses, and concluded he did not believe the accusation, is “absolutely no reason to believe that K.P. made a false accusation”? This Court should assume the State has thoroughly reviewed all of the facts. If this is the strongest statement of the facts the State can muster, the Court can be certain there is a fundamentally defective factual analysis at the core of Judge Stigler’s rulings.

Summary of the Argument

The State takes a piecemeal approach to attacking Mr. Powers's claims. The technique is an attempt to chip away at separate points where possible. Where a valid argument is not possible, the State simply ignores undeniable facts. First, the State fixates on a matter of semantics in the same way Judge Stigler did. Whether Investigator Chopard actually *said* he did not believe K.P.'s gang rape accusation, or simply made it clear to K.P. that he did not believe her, is immaterial. He testified on PCR that when he met with Phil Powers and K.P. at the end of his investigation, his conclusion was that he did not believe her. The judge's "conclusion" and the State's argument that Phil intentionally testified falsely is devoid of any rational basis. **The police believed it was a false report.** The manner in which they conveyed that belief to K.P. and Phil has nothing to do with Mr. Powers's right to discovery.

Secondly, the State chips and picks all around the fundamental fact that Judge Stigler went ahead and ruled on the Motion for Ruling on Admissibility of Evidence without allowing Mr. Powers the opportunity to

litigate the motion. The truly dangerous part of that process in terms of due process is that the police reports that were the basis for the ruling were available to K.P., the City and the State, but they were denied to Mr. Powers with no explanation as to why evidence of false accusations of sexual abuse would not be provided in discovery. It was a classic *ex parte* proceeding where two of the three attorneys opposing Mr. Powers did not even represent a party to the action, and the judge participated as an advocate. Judge Stigler's ruling is a prime example of backwards logic. The Applicant is denied the opportunity to prove the allegations were false because the allegations were not false. Summary conclusions cannot extinguish the right to discovery, especially when the summary conclusion defies the indisputable evidence in the record. **The police believed it was a false report.**

Equally alarming is the fact that the State has abandoned its constitutional duty to see that justice is done. The State not only fails to acknowledge this fundamental denial of due process. The State defends the defective process.

I.

**THE TRIAL COURT ABUSED DISCRETION IN QUASHING A
SUBPOENA FOR POLICE REPORTS FROM A CLOSED
INVESTIGATION THAT WOULD PROVIDE EVIDENCE AS TO
WHETHER APPLICANT'S GRANDDAUGHTER MADE FALSE
ACCUSATIONS OF SEXUAL ABUSE AGAINST OTHER PERSONS.**

PRESERVATION OF ERROR: Sub-argument "1", below, attempts to validate the course Judge Stigler took with his ultimate ruling. Additionally, counsel for the State did make the argument in the motion hearing that the subpoena should be quashed because there was no evidence the accusation against gang members was false. Error is therefore preserved on that point. On sub-argument "2", however, the State raises a point not addressed by Judge Stigler and not raised in the district court. The legal argument that Applicant is not pursuing "newly discovered evidence" has not been preserved. This argument was not raised in resistances filed by K.P. or the State, and it was not raised in oral arguments on the motions. (Hrg. Tr. 8/31/16, 23-25, L. 15-11)

In *DeVoss v. State*, 648 N.W. 2d 56, 60-63 (Iowa 2002), this Court abrogated previous case law that had allowed relaxation of rules of error preservation. The Court cited several cases where error preservation was relaxed in reviewing summary judgment rulings. The Court noted it had also relaxed error preservation rules in order to reverse district court decisions. With *DeVoss*, the Court stated it was abandoning the relaxation practice and creating a hard and fast rule for error preservation as a matter of fundamental fairness.

The Merits

The first approach the State takes is simply to continue to act as if Investigator Chopard never testified his investigation led him to believe K.P.'s accusation was false. The first sub-argument the State formulated to argue the subpoenaed police reports are irrelevant was this:

- 1. K.P.'s report was not false, so the police reports were not relevant.*** (St. Br. 17)

The argument the State makes then goes even farther than the blatant disregard for Investigator Chopard's investigative conclusion. After pretending Chopard never stated his belief K.P.'s accusation was false, the State then goes on to argue Mr. Powers cannot make a threshold showing the complaint was false. This is truly remarkable. There could not be a more clear threshold than a police officer testifying he completed a thorough investigation on the accusation and decided from that evidence that he did not believe the accusation. By then refusing to acknowledge Chopard's testimony, the State is able to launch into circular logic:

"Therefore, Powers was entitled to the police reports only if they tended to prove that K.P.'s gang rape report was false." (St. 18) In other words, Mr. Powers cannot have the reports because he cannot tell the Court what the reports say. What is the point of discovery? Is it not the pursuit of documents *to see what they say?*

In any case, the State is discussing the wrong threshold. The argument is made in reference to the *Alberts* case. The State quotes that

decision to say “it is imperative that a claim of sexual conduct (or misconduct) by the complaining witness be shown to be false before it is admissible at trial.” *Alberts*, 722 NW 2d at 409. (St. Br. 18) The question before the Court is not on admissibility at trial. The question is whether the subject of the discovery request “appears reasonably calculated to lead to the discovery of admissible evidence.” That means evidence that will be admissible at the instant PCR trial. Ia. R. Civ. P. 1.503(1). The State then actually concedes the evidence is discoverable as a legal matter by saying: “Therefore, Powers was entitled to the police reports only if they tended to prove that K.P.’s gang rape report was false.” (St. Br. 18) The State concedes the legal point, but denies the reality of Investigator Chopard’s testimony. If the investigation documented in the reports led Chopard to believe the accusation was false, why would the reports not “tend to prove” the accusation was false? Of course, Chopard’s opinion that the complaint was false is not evidence that would be admissible at trial. The point is that Chopard’s opinion shows Mr. Powers is entitled to see the evidence that led Chopard to that conclusion. The trial court and the State cannot be allowed to change the facts in order to escape the directive of the law.

After denying the factual reality of Investigator Chopard's testimony, the State then turns to a procedural argument that also misses the point. As stated above, this objection was waived by failure to preserve in the trial court:

2. K.P's subsequent report of sexual abuse does not qualify as newly discovered evidence. (St. Br. 21)

This argument again avoids the nature of the PCR claim. The allegation is that the false gang rape accusation was not raised prior to sentencing in the criminal case as a result of ineffective assistance of counsel and/or concealment of exculpatory evidence. (App. 18-20)

The State incorrectly characterizes the evidence of false gang rape accusations as something that occurred after Mr. Powers was sentenced and convicted. The procedural context of the events is important. The claim is not in the realm of newly discovered evidence of occurrences taking place after conviction. The context is in events taking place between the verdict and sentencing, within the time when Mr. Powers could have litigated a Motion for New Trial. Importantly, the evidence is not directly

aimed at the impact the false accusation would have had with the jury in the criminal trial. The question is directed to the impact it would have had with the judge in the criminal case on proceedings addressing a Motion for New Trial. This distinction is critical because the evidence certainly would have had a great impact upon the judge's consideration of K.P.'s credibility. Under Rule 2.24(1)(b)(6), Ia. R. Cr.P. , the judge considers the weight of the evidence offered in the criminal trial. That process allows the judge to weigh the credibility of the complaining witness in deciding whether a miscarriage of justice may have occurred. *State v. Ellis*, 578 N.W. 2d 655, 658-659 (Iowa 1998) In conjunction with Rule 24(2)(b)(8), that weighing could take into account evidence discovered in the interim between verdict and sentencing. Additionally, the trial judge would have been empowered to grant a new trial on the basis that was not "fair and impartial" as the result of any cause. Rule 24(2)(b)(9)

II.

THE JUDGE ABUSED DISCRETION IN OVERRULING APPLICANT'S MOTION FOR RULING ON ADMISSIBILITY OF EVIDENCE BECAUSE HE DENIED APPLICANT THE OPPORTUNITY TO CONDUCT DISCOVERY TO DEVELOP THE EVIDENCE, FAILED TO AFFORD APPLICANT A FUNDAMENTALLY FAIR OPPORTUNITY TO BE HEARD, FAILED TO PROCEED IN AN UNBIASED MANNER, AND HE REACHED HIS CONCLUSIONS ON UNREASONABLE AND UNTENABLE GROUNDS.

PRESERVATION OF ERROR: The State posits that Mr. Powers made only a due process claim about the denial of discovery, and did not preserve the issue of due process violation in the motion hearing process. Seventeen days before the second hearing, Applicant filed his Supplement to Motion for Filing Documents. He pointed out that with all participants having the police reports except for Applicant, the hearing would have the effect of an *ex parte* proceeding, as the the judge, the City and the State would all be proceeding in concerted action against Mr. Powers. Mr.

Powers would be unable to effectively cross-examine the witness the judge was summoning to court. Applicant asserted the hearing would violate his state and federal constitutional rights to fundamental fairness and the statutory right to effective assistance of counsel. Applicant also reiterated that he would be unable to preserve error without knowing what was in the reports. (Supp. Mot. 8/14/16; App. 69-70)

When Applicant's counsel was given the opportunity to cross-examine Detective Chopard at the subsequent hearing, counsel requested copies of the reports to review for cross-examination. The judge then acknowledged that he was aware of Applicant's motion requesting the reports and he was taking the opportunity to overrule that motion. He said, "You will not be given access to those." (Hrg. Tr., 8/31/16, p. 9, L. 18-24). After all parties examined Chopard, Applicant's counsel pointed out the Motion for Ruling on Admissibility did not need to be ruled upon at that time and that it should not be ruled upon until Applicant was provided with the reports and allowed to do any additional discovery that might flow from the reports. (Hrg. Tr. 8/31/16, pp. 26-29, L. 25-2) Judge Stigler then ruled on

the motion and acknowledged that he was ruling on the basis of evidence he had examined and would not allow Applicant to examine:

We're not going to victimize this child
Yet again by having her questioned
As to events that occurred to her [sic]
in that gang house. All of these reports
will be preserved for record purposes, and
the court, in the event of an appeal, will
have those records available to it
to make its own determination as to whether
there is a credible claim of falsity to K.P.'s
second report of having been abused.
**You have nothing other than Phil Powers'
statement,** and Phil Powers' statement
lacks credibility for all the reasons I have
previously stated in the record. (Hrg. Tr.
8/31/17, p. 32, L. 14-24)

The judge made it clear he was not going to allow Applicant to discover, develop or present any additional evidence. The trial court had summoned the witness and adduced evidence for his ruling against Mr. Powers without giving Applicant the means by which to effectively cross-examine that witness or pursue additional discovery. Applicant's counsel asked the judge if there would be a written ruling and was told there would be. After

an additional request in writing for a ruling, the judge still did not file one. (Hrg, Tr. 8/31/17, pp. 34-35, L. 19-1) (Motion for Ruling, App. 71-72)

STANDARD OF REVIEW: Upon a showing of a violation of fundamental fairness in procedural due process, the Applicant is not required to show actual prejudice to gain reversal. *Botsko v. Davenport Civil Rights Comm.* 774 N.W. 2d 841, 853 (Iowa 2009)

The Merits

The State continues its exercises in incredulity with its arguments maintaining Mr. Powers has been treated fairly in the district court. Again, the first sub-argument relies on conclusions of fact that simply cannot be reasonably inferred from the testimony in the record. The second sub-argument reverts to another piecemeal chipping and picking at separate points. The State does not address the totality of the judge's advocacy against Mr. Powers in a way that lends itself to this Court's *de novo* review. In offering a justification for each of the following five actions

Judge Stigler took against Mr. Powers, the State only emphasizes the totality of the adversarial role the judge took against the Applicant:

- 1) The district court denied access to the police reports “without stating any reason for the denial”;
- 2) The district court allowed the city attorney and K.P.’s guardian ad litem “to participate in challenging the relevance of the evidence”;
- 3) The district court “cross-examined” witnesses;
- 4) The district court “initiated its own investigation”; and
- 5) The judge’s rulings “were not supported by substantial evidence... and the judge was not “neutral and unbiased.”

(State’s Br. 37-40)

All of these points must be considered in the totality of evidence that converges in a *de novo* review to expose a trial judge on an adversarial mission. A piecemeal approach is myopic.

Keeping all of the foregoing five points in mind in the aggregate, the Court must examine the State's version of the procedural facts. First, the State posits this sub-argument:

A. The district court reasonably excluded irrelevant evidence.
(St. Br. 32)

The State describes Applicant's Motion for Ruling on the Admissibility of Evidence as a "self-inflicted wound." The implication is that Mr. Powers made some kind of tactical error in attempting to clarify for the district court the substantive issue raised in the First Amendment to the PCR Application. (App. 18-20) From a tactical standpoint, should Mr. Powers have assumed that the judge would not allow him to see the evidence upon which the judge would decide the motion? The State then amazingly chides Mr. Powers for failing to show the probative value in the reports he was not allowed to see:

"The proponent of the evidence bears the burden of demonstrating its admissibility." (Cite) Powers requested the preliminary ruling, but he failed to

demonstrate the relevance
of K.P.'s gang rape report.
(St. Br. 32-33)

Is the State unintentionally exposing Judge Stigler's unspoken reason for denying disclosure of the reports to Mr. Powers? : "If I don't give him the reports, he cannot demonstrate the relevance of the reports?" And again, the point is not whether the reports themselves are relevant, but whether the Applicant's need for the reports is "reasonably calculated to lead to the discovery of admissible evidence." The State follows the district court's lead in jumbling standards for admissibility of evidence at trial with the standard for evidence that is discoverable. Applicant did not "falsely accuse" the judge of concluding he was in a better position than Investigator Chopard to evaluate Chopard's reports. It was a simple truth. Mr. Chopard conducted the investigation. Judge Stigler did not. (St. Br. 34) The judge's factual conclusion from reading the reports cannot possibly be a reasonable inference.

The final dead end in this sub-argument is the State's willingness to argue that there is some probative value in Judge Stigler's cross-examination of Phil Powers, ordering him to give a physical

description of a police officer he had met over five years before the July 2016 motion hearing. (St. Br. 35-36) Chopard's testimony fully corroborated Phil's testimony. How could any inaccuracy in Phil's physical description of Chopard have any rational connection to Phil's credibility as to his conversation with Chopard? Rationality, logic and reason cannot be suspended to reach a conclusion the trial court prefers. This "analysis" is simply another instance in the abuse of discretion.

The State titles its second sub-argument on the due process argument in this way:

B. Powers had a fundamentally fair opportunity to present his PCR challenge.

Mr. Powers agrees he "must comply with established rules of procedure and evidence". (St. Br. 36). The PCR is a civil judicial action, however, and the protections of procedural due process apply to the actions the trial court took against Mr. Powers. Applicant cites due process

standards from civil proceedings in administrative and detention proceedings, below.

Due process requires that fundamental fairness must govern a civil proceeding in its judicial process. *In re Morrow*, 616 N.W. 2d 544, 549 (Iowa 2000). A trial process “that is fundamentally unfair violates the guarantees of due process in the United States and Iowa Constitutions.” *More v. State*, 880 N.W. 2d 487, 499 (Iowa 2016). In the context of administrative proceedings, this Court has recognized the serious due process threat when one person in a proceeding “performs both *prosecutorial and adjudicative* roles.” (emphasis supplied) Quoting a treatise authored by an authority on administrative law, the Court went on to observe:

It is difficult for anyone who has worked long and hard to prove a proposition . . . to make the kind of dramatic change in psychological perspective necessary to assess that proposition fairly. *Botsko v. Davenport Civil Rights Comm.* 774 N.W. 2d 841, 849 (Iowa 2009)

In concluding that a commission's director was performing in two roles in the administrative hearing the Court explained: "The combination of advocacy and adjudicative functions had the appearance of fundamental unfairness in the administrative process. Further, because of the risk of injecting bias into the adjudicatory process, Botsko is not required to show actual prejudice," 774 N.W. 2d at 853.

The State denies that Judge Stigler was operating as an advocate by pointing to Rule 5.614, Ia. R. Evid. The rule provides that a judge may call and interrogate witnesses. The State also cited *State v. Cuevas*, 288 N.W. 2d 525 (Iowa 1980) in support of the practice. The frailty of the argument lies in the fact the State simply mentioned the rule in passing. A close look at the rule and *Cuevas* shows Judge Stigler was way out of bounds in the instant case. First, the *Cuevas* case was cited in the Official Comment to Rule 614 as a caution to the trial judge. The Comment acknowledged the trial court's inherent power allowed the judge to call and interrogate witnesses, but that power must be carefully limited:

However, judges are not encouraged to interrogate witnesses and when cause to do so exists, restraint must be used.

Indeed, the text of the rule itself imposes great restraint. In subsection (a), the rule says, “For good cause **in exceptional cases**, the court may... call witnesses.” In subsection (b), the rule allows the judge’s interrogation of witnesses “[w]hen necessary in the interests of justice....” In the *Cuevas* case, this Court approved the trial judge’s clarification of an expert’s extensive and confusing testimony that had attempted to estimate the time of death in a murder case. The witness was called by the State, not by the judge:

In other words, trial court did not undertake the introduction of evidence; it asked about nothing not already before the jury. We note also, that the trial court’s questions were impartially framed, with a view to straighten the record out. 288 N.W. 2d at 533

In the instant case, Judge Stigler called his own witness in his own effort to impeach the testimony of Phil Powers. The judge was not simply “clarifying” the testimony Phil had given. He went to the trouble of setting a whole new hearing date to bring in his own witness to attack Phil’s testimony. The judge took it upon himself to do the work the State was not

doing. He was doing the State's bidding. The caution the Official Comment brings to the rule is taken from a stern warning from the *Cuevas* decision:

Although we have recognized the power of the judge to question witnesses, we have cautioned against assuming the role of advocate. (Citations)
We do not encourage judges to enter the fray with their own interrogation of witnesses. And when cause to do so exists, restraint must be used. By engaging in the examination of witnesses the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice, or advocacy are some of those. 288 NW 2d at 532-533

The same rule as it appears in the Federal Rules of Evidence noted another safeguard that continues to allow the trial judge to call witnesses.

The Advisory Committee's Note for 614 (a) states:

Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured.

Of course, the denial of the reports denied Mr. Powers the opportunity to effectively cross-examine the judge's witness. In regard to subsection (b) of 614, the federal Advisory Committee added this:

The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

CONCLUSION

After the opening brief and all facts demonstrated herein, the record is now illustrated to show Judge Stigler proceeded against Mr. Powers in the following ways:

1. The judge dismissed Mr. Powers PCR *in toto*, even though it was pointed out to him that one of the claims was not raised in the State's Motion to Dismiss and the claim had not been adjudicated on direct appeal. An additional claim had been authorized by amendment and it was not a subject of the Motion to Dismiss either.

2. After the first appeal was taken, this Court ordered Limited Remand for a ruling on a motion to reinstate the aforementioned claims. Judge Stigler reinstated the claims and ordered them to be set for a hearing on the merits. For no stated reason, he also assigned the case to himself.

3. He set K.P.'s Motion to Quash for a hearing even though the reason for the original Motion to Quash was moot because Applicant had agreed to a continuance of the hearing on the merits that conflicted with the witness's vacation.

4. The judge refused to allow Applicant to have police reports that were subpoenaed even though the reports pertained to a closed investigation and were required to be turned over by the Open Records Act.

5. The judge aggressively cross-examined Applicant's witness who established there were grounds for discovery of the police reports in an attempt to impeach that witness.

6. The judge allowed attorneys for the child and for the City to object to the relevance of evidence on the merits, and Applicant's substantive claim, when those parties had no standing to object to relevance.

7. The judge set a new hearing and summoned to court his own witness in an attempt to impeach Mr. Powers's witness.

8. The judge again refused to allow counsel for Applicant to have the police reports when counsel stated the reports were necessary to allow him to effectively cross-examine the judge's witness. Counsel had explained the reports could be filed under seal while still being available to counsel. Counsel requested the reports in a motion before that second hearing, and in the hearing, just as he was given the opportunity to cross-examine the Judge's witness.

9. The judge never stated a reason as to why the Applicant could not have the reports in order to develop his evidence showing the complainant's false accusation of the rape by gang members, and he then

summarily ruled there was no false complaint without allowing counsel to have the evidence.

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