IN THE COURT OF APPEALS OF IOWA

No. 0-870 / 09-1820
Filed January 20, 2011

DAVID WAYNE PENWELL, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Penwell appeals the court's dismissal of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephen J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, J. Tabor, J., takes no part.

EISENHAUER, J.

David Penwell appeals the district court's dismissal of his application for postconviction relief (PCR). We affirm.

I. Background Facts and Proceedings.

A. Criminal Case and Appeal.

On March 13, 2001, Penwell robbed a convenience store, ordered the clerk into his van, and forcibly attempted a sex act with the clerk. The clerk escaped from the van. When a police officer discovered Penwell hiding in a vehicle at a truck stop, Penwell fired two shots at the police officer. The officer shot Penwell, who was hospitalized.

Based on this series of events, the State charged Penwell with first-degree kidnapping, second-degree sexual abuse, and attempted murder. Before trial, Penwell utilized Dr. Logan, a forensic psychiatrist, to evaluate him for the defenses of insanity and diminished capacity. Dr. Logan was deposed on July 20, 2002, and gave preliminary testimony supporting Penwell's defenses.

Next, Dr. Logan was provided with additional information: (1) audio tape and CD of an interview of Penwell in his hospital room on March 14; (2) audio tape of a second Penwell interview on March 16; and (3) videotaped one-hour interview of the store clerk. The day before trial, on July 29, 2002, Dr. Logan's deposition was completed. Dr. Logan testified he had changed his opinion and was no longer of the opinion that Penwell suffered from diminished capacity or insanity:

> Q. And based upon your review of these additional materials since the June 20th deposition, have your opinions

> changed in any fashion? . . . A. They have changed in that I no longer hold the opinion that Mr. Penwell did not know the wrongfulness nature and consequences of his actions.
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> . . . .
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> Q. Okay. Has anything you received . . . changed [your opinion] to the extent that you no longer have an opinion that he was legally insane or that he was—or he suffered from mental illness to the extent that he was unable to form an intent that evening. A. That's correct.
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> Q. . . . [Y]ou are now of the opinion that although Mr. Penwell suffered from a diagnosable mental illness that he was not legally insane as Iowa defines it to be. A. Right.
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> Q. You're further of the opinion now that you have been provided this additional information that even though he did suffer from a diagnosable mental illness and his judgment was impaired, it did not negate his ability to form intent on the events . . . of March 13, 2001? A. That's also correct.

Penwell's counsel testified the change in Dr. Logan's position right before trial, "pretty much gutted our defense." Dr. Logan was not called as a witness during the trial. Rather, the defense strategy changed to using Penwell's treating psychiatrist at the jail and to using people that knew Penwell. Trial counsel explained:

> [W]hat we were trying to do at that point was . . . connect [Dr. Khokar's] jail psychiatry, which primarily took place after the incident, with people who recognized symptoms beforehand, to at least put in front of a jury that . . . even though the prosecution's going to argue this stuff happened post-incident, there are some people who recognized something who can come in here and testify that Mr. Penwell was having psychiatric problems before.

During the jury trial, Dr. Khokar, the jail psychiatrist who treated Penwell, testified Penwell suffered from a diagnosable mental illness (bipolar illness with psychotic features). Dr. Khokar did not testify Penwell suffered from diminished capacity or insanity on March 13, 2001.

Dr. Taylor, the State's psychiatrist, also examined Penwell and testified Penwell "was fully capable of differentiating between right and wrong" and "he was capable of forming a specific intent." Dr. Taylor found no basis for an opinion Penwell suffered from diminished capacity or insanity. Dr. Taylor discussed the results of Penwell's alcohol and methamphetamine tests, stating:

> The alcohol that he might have consumed might allow Mr. Penwell to carry out acts that he would not otherwise do, and the methamphetamine might give him the energy to do it. But as far as interfering with his mental processes, there's no way that could be a factor.
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> Q. Now is there any evidence that you have found of any psychotic behavior on the evening of March 13, 2001? A. Not a shred.

The trial court refused to submit jury instructions on the defenses of insanity and diminished capacity, ruling:

> [I]f there had been evidence—lay evidence or expert evidence that on the night of March 13 any mental illness that the defendant had had affected him to the extent that he could not distinguish between right and wrong or the nature and quality of his acts or form specific intent, there would be something to consider there. And there is no such testimony in the record, and the jury would have to speculate on the extent to which any mental illness, if it existed at all, affected [Penwell] at the time and place of the acts charged.

The jury convicted Penwell of kidnapping, sexual abuse, and assault with intent to commit serious injury. Penwell appealed arguing the district court: (1) abused its discretion in denying his request to strike a prospective juror; (2) erred in refusing his request to give jury instructions on insanity and diminished responsibility; and (3) erred in failing to identify second-degree sexual abuse as a lesser included offense of first-degree kidnapping in the jury instructions.

On July 14, 2004, this court affirmed Penwell's conviction. We held "the trial court did not abuse its discretion in refusing to strike the juror." Regarding Penwell's proposed insanity/diminished responsibility jury instructions, we ruled: There is "no support for Penwell's position in the expert testimony." We next considered "whether other parts of the record engendered jury questions on the claimed defenses," and held:

> After a careful review of the record, we conclude the record does not contain substantial evidence from which a jury could determine Penwell was insane or exhibited a diminished responsibility under Iowa law. The trial court was therefore correct in refusing to instruct the jury on these issues.

Regarding the failure to instruct second-degree sexual abuse is a lesser included offense of first-degree kidnapping, we determined:

> As the State properly concedes, second-degree sexual abuse is a lesser included offense of first-degree kidnapping. However, we conclude the jury instructions created no reversible error because Penwell was not prejudiced by the court's separate instructions on the two offenses. After the jury returned guilty verdicts on both counts, the sentencing court merged the offenses and sentenced Penwell only on the kidnapping conviction.

(Citations omitted.)

B. Postconviction Relief.

On March 22, 2005, Penwell filed a pro se application for PCR, summarily alleging: (1) court abused its discretion; (2) denial of his constitutional right to a fair trial; (3) due process; and (4) ineffectiveness of counsel. On September 26, 2005, the State moved to dismiss, arguing Penwell is barred from relitigating any ground finally adjudicated on direct appeal.

In November 2005, Penwell filed an application for appointment of counsel. On December 1, 2005, the court appointed attorney Peters to represent Penwell. On June 20, 2006, Peters filed an amended application for PCR, asserting: (1) trial counsel was ineffective "by failing to adequately present available evidence to support a claim of temporary insanity or diminished responsibility"; (2) the court inappropriately handled issues concerning a prospective juror; (3) trial counsel was ineffective by failing to adequately present evidence/law "to support lesser included crime instructions to the jury"; and (4) the court erred in failing to instruct the jury on diminished capacity, temporary insanity, and lesser included offenses.

On October 4, 2006, after a hearing, the court partially granted the State's motion to dismiss. The court dismissed "those parts of [Penwell's PCR] application that were previously raised" in his direct appeal. The court set for hearing "the remaining issue of whether [Penwell] was adequately represented at trial."

On November 26, 2007, Penwell filed a letter and documents and requested these items be put in the record for evidence in the upcoming hearing.

On April 21, 2008, Penwell filed several letters he had written to Peters and moved to proceed pro se. On May 2, 2008, Peters filed a response stating he "has no problem with Mr. Penwell proceeding Pro Se and with Counsel." Hearing on Penwell's motion to proceed pro se was set for June 12, 2008. On May 30, 2008, Peters informed the court he had received correspondence from Penwell requesting Peters remain his attorney.

Upon motions from both parties, the PCR hearing was continued several times. On May 29, 2009, Peters filed a "motion for authority to employ an expert witness at state expense." The motion states "testimony by an expert reviewing only the record available at the time of trial is the only method for establishing whether or not" trial counsel was ineffective in failing to present evidence "regarding the mental capacity of [Penwell] at the time the alleged crime occurred." After hearing, on August 28, 2009, the court denied the motion, ruling:

> [Penwell] bears the burden to demonstrate a reasonable need for the appointment of an expert. An indigent criminal defendant is not entitled to appointment of expert services at state expense unless there is a finding that the services are necessary in the interest of justice. When the accused is merely embarking on a "random fishing expedition" in search of a defense, courts are discouraged from allowing state funds for experts.
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> This Court cannot conclude that the hiring of an expert as requested . . . is necessary in the interests of justice in pursuing this postconviction relief action.

On November 9, 2009, the court conducted a hearing on Penwell's PCR application. Penwell participated by conference call. At the start of the hearing, Peters informed the court all the issues in the June 20 amended application had been disposed of except the first issue: whether trial defense counsel was ineffective in not doing a better job in finding an expert to testify Penwell was either insane or suffered from diminished capacity on March 13, 2001. After Peters presented his exhibits, the State argued:

> Your honor, the problem that [Penwell] has now, too, is that Dr. Taylor at the time did examine [Penwell] at the time of trial for the state. Dr. Taylor testified that [Penwell] didn't suffer from any diminished responsibility at the time of the offense. Then you had Dr. Logan who was in the wings and capable of being called by the state. He wasn't called by anyone obviously because the doctor at

> that time was of the opinion [Penwell] didn't suffer from any diminished responsibility at the time of the offense, didn't meet the requirements of insanity. So there was nothing [Penwell] could present at the time and Dr. Khokar was just asked as to his mental condition at the present time, which was bipolar illness with psychotic features. . . .
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> [I]f they got an expert at this point in time—all they would be doing is going back and reviewing Dr. Logan's notes and just offering an opinion, which really isn't evidence because they wouldn't have the opportunity to see [Penwell]. This is [five] years later? So it would be of no importance, no relevance. It's just to have somebody review his notes to see if Dr. Logan might have been wrong. *But you're still left with what Dr. Logan said at the time and Dr. Taylor said at the time and Dr. Khokar said at the time. Counsel wasn't ineffective. Counsel just didn't have anything to work with.* And the problem is if you presented Dr. Logan's notes, then you're going to present Dr. Logan who is going to say he doesn't suffer from any of those things.
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> So counsel wasn't ineffective for not presenting anything on the behalf of Dr. Logan because they would have been stuck with their own expert who had interviewed [Penwell] saying he didn't suffer from any insanity or diminished responsibility at the time of the offense.

(Emphasis added).

On November 20, 2009, the court dismissed Penwell's PCR application, noting none of the three psychiatrists, Drs. Logan, Taylor, Khokar, found a basis for an opinion Penwell suffered from diminished capacity or insanity. This appeal followed.

II. Standard of Review.

We "review postconviction relief proceedings on error." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, we review de novo constitutionally-based ineffective assistance of counsel claims. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). The PCR court's denial of Penwell's application for the

appointment of an expert witness is reviewed for an abuse of discretion. *State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998).

III. PCR Issues and Ineffective PCR Counsel.

Penwell first argues the court erred in failing to address all his pro se issues. Penwell claims numerous issues other than the one issue addressed and resolved by the PCR court were raised in his letters filed with the court and should have been resolved by the PCR court.

We disagree. At the start of the postconviction hearing, attorney Peters assured the court the only issue before the court was trial counsel's failure to "adequately present evidence to support a claim of temporary insanity or diminished capacity." Penwell participated in the hearing by telephone and during the hearing had a private conversation with attorney Peters. At no point did Penwell or attorney Peters contradict their issue-narrowing statement. Therefore, Penwell affirmatively waived any other issues and cannot allege error in the court's failure to address other issues. *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). We find no error.

Alternatively, Penwell argues his PCR counsel was ineffective in failing to request the court address the pro se issues identified in his letters: methamphetamine caused his behavior; failure to present evidence of medications he was taking at the time; failure to call doctors with knowledge of his psychiatric history, failure to call exculpatory witnesses; at trial [Penwell] was so heavily medicated that he could barely talk/focus; his ex-wife could testify to his mental disability; the police have custody of a letter he wrote showing he was

suicidal after his arrest; the trial court and prosecutor improperly commented on his failure to testify; and trial counsel failed to separate and argue the burden of proof regarding the different defenses.

In order to prevail on this claim Penwell must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

We can resolve Penwell's ineffective-assistance-of-counsel claim because we conclude, as a matter of law, Penwell cannot prove "prejudice resulted." To meet the prejudice prong, Penwell is required to show but for PCR counsel's error, there is a reasonable probability that the results of the PCR proceeding would have been different. *See State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006). "The most important factor under the test for prejudice is the strength of the State's case." *Id*.

Penwell asserts he has been prejudiced because his claims "*may have been* instrumental to obtaining a new trial based upon his claims of insanity and diminished responsibility" and Penwell "*wanted* rulings for later purposes of habeas corpus relief." (Emphasis added). Penwell has advanced no substantive prejudice argument, but has merely presented conclusions without analysis. *See* Iowa R. App. P. 6.903(2). Penwell has not met his burden of establishing by a preponderance of the evidence "there is a reasonable probability that, but for counsel's" errors, the result of the PCR proceeding would have been different. *Ledezma*, 626 N.W.2d at 145. Therefore, Penwell has failed to meet his burden

of proving prejudice. We conclude any alleged failure by PCR counsel did not cause prejudice to Penwell sufficient to establish ineffective assistance of PCR counsel.

IV. PCR Psychiatric Expert.

Penwell argues his request for an expert in the postconviction proceedings to contradict the testimony of the medical personnel appearing at trial was improperly denied by the district court. Penwell stresses the fact that the record illustrates his mental problems in great detail.

Penwell "is not entitled to appointment of expert services at state expense unless there is a finding that the services are necessary in the interest of justice." *Leutfaimany*, 585 N.W.2d at 208. After reviewing all the evidence, Penwell's own trial expert, Dr. Logan, was unable to conclude he suffered from insanity or diminished capacity on March 13, 2001. We agree with and adopt the State's argument quoted above and the district court's ruling on the motion detailed above. Accordingly, Penwell failed to demonstrate a reasonable need for expert evaluation and the court's denial was within its discretion.

V. Penwell's Pro Se Appellate Brief.

Penwell filed a supplemental pro se appellate brief. Penwell first claims error in the court's failing to submit jury instructions on diminished responsibility. This claim is without merit because this issue was resolved in Penwell's direct appeal. "Issues that have been raised, litigated, and adjudicated on direct appeal cannot be relitigated in a postconviction proceeding." *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986).

Penwell next claims fair trial-due process violations: (1) the State took a letter Penwell wrote before he left the house that evening and, had the letter been admitted into evidence, Penwell "would have been able to have my defenses on one or both"; and (2) the trial court improperly commented on Penwell's refusal to testify. These pro se arguments were neither presented to nor ruled upon by the court in the PCR proceedings. We will not consider these issues for the first time on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Further, we also decline to address these issues because Penwell's pro se brief does not meet the requirements of Iowa Rule of Appellate Procedure 6.903(2)(*g*). "We do not utilize a deferential standard when persons choose to represent themselves." *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). Therefore, Penwell has failed to adequately present his pro se issues on appeal and the issues are waived. *See* Iowa R. App. P. 6.903(2)(*g*)(3).

For the foregoing reasons, we affirm the judgment of the district court dismissing Penwell's application for postconviction relief.

AFFIRMED.