

IN THE COURT OF APPEALS OF IOWA

No. 0-928 / 09-0825
Filed February 9, 2011

DONALD G. VENTEICHER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Carroll County, Frederick E. Breen (plea and sentencing) and Joel E. Swanson (postconviction motion for summary judgment), Judges.

Donald G. Venteicher appeals the summary dismissal of his postconviction action. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Shawn Smith, Ames, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, John Werden, County Attorney, and James Van Dyke, Assistant County Attorney, for appellee State.

Considered by Mansfield, P.J., Danilson, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

DANILSON, J.

Donald G. Venteicher appeals from the summary dismissal of his application for postconviction relief. He contends there is a genuine issue of material fact as to whether his guilty plea to domestic abuse assault, third offense, as a habitual offender was knowing and voluntary; and whether he received effective assistance of counsel. Although Venteicher cannot challenge the voluntariness of his guilty plea without first establishing that his trial counsel was ineffective, we find there are genuine issues of material fact entitling Venteicher to an evidentiary hearing. We therefore reverse the postconviction court's summary dismissal of the ineffective assistance of counsel claims relating to the knowing and voluntary nature of his plea, and remand for an evidentiary hearing.

Discussion.

On August 2, 2007, Venteicher was charged by trial information with third offense domestic abuse assault as a habitual offender and criminal mischief in the fourth degree. On August 24, 2007, Venteicher entered a guilty plea to third offense domestic abuse assault as a habitual offender. The guilty plea was made pursuant to a plea agreement that included dismissal of the remaining charge for criminal mischief in the fourth degree. Venteicher requested immediate sentencing. The district court accepted Venteicher's guilty plea and sentenced him to serve a term not to exceed fifteen years as a habitual offender, with a three-year mandatory minimum.

On January 5, 2009, Venteicher filed a pro se application for postconviction relief challenging the voluntariness of his guilty plea and

contending he received ineffective assistance of counsel.¹ On January 8, 2009, the State filed a motion for summary dismissal pursuant to Iowa Code section 822.6 (2009). Venteicher filed a pro se resistance and requested an evidentiary hearing. On January 14, 2009, the State filed a second motion for summary dismissal with supporting exhibits from the trial court record. On April 3, 2009, Venteicher, through counsel, filed a second resistance focusing on allegations of ineffective assistance of counsel.

A hearing was held on May 4, 2009. At that time, Venteicher filed an affidavit setting forth facts within his personal knowledge which supported his claims for relief. On May 7, 2009, the court entered an order granting the relief sought by the State, the dismissal of Venteicher's application.² Venteicher now appeals.

We review the dismissal of an application for postconviction relief to correct errors of law. Iowa R. App. P. 6.907; *De Voss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). The rules for summary judgment apply to a motion for summary disposition of a postconviction relief application under Iowa Code section 822.6. *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002). Summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The moving party has the burden of showing the nonexistence of a material fact, and the court is to consider all

¹ Venteicher's direct appeal challenged the imposition of a fine on his habitual offender enhancement as an illegal sentence. The State conceded, and on July 28, 2008, the supreme court entered an order granting the State's motion to vacate sentence and remand for resentencing. On October 10, 2008, the district court vacated the fine portion of the sentence.

² Although the order does not separately refer to the State's two motions for summary judgment, the ruling appears to address the merits of both motions.

materials available to it in the light most favorable to the party opposing summary judgment. *Id.* A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. *Id.*

Venteicher contends his plea was not knowing and voluntary because “[d]uring the guilty plea hearing there was confusion regarding whether [he] was pleading to [a habitual offender] enhancement or not,” and because he “was misadvised of the habitual offender impact on his plea for domestic abuse.” In his affidavit, Venteicher also explained that he tried to question his attorney during the proceeding about the habitual offender issue, but “all she said was keep quite [sic] and calm down, over and over.” Venteicher’s affidavit also reflects that he fully intended to proceed to trial if he was facing a fifteen-year sentence, but due to the urging of his attorney, and his attorney’s representation that he would only receive a five-year sentence with a one-year minimum, he chose to plead guilty. He further states that his counsel failed to file a motion in arrest of judgment, which prevented his ability to appeal. He asserts these claims create a disputed fact issue, entitling him to an evidentiary hearing.

Because Venteicher expressly waived the filing of a motion in arrest of judgment, he cannot now challenge the voluntariness of his guilty plea, except on the basis that his counsel’s deficient performance rendered his guilty plea unintelligent or involuntary. See Iowa R. Crim. P. 2.24(3)(a); *Manning*, 654 N.W.2d at 561 (“We have held that a defendant who pleads guilty waives all claims of ineffective assistance of counsel except those that bear on the knowing

and voluntary nature of the plea.”); see also *State v. Antenucci*, 608 N.W.2d 19, 19 (Iowa 2000).³

We agree the facts alleged in Venteicher’s affidavit provide a genuine issue of material fact concerning these issues. As a result, Venteicher was entitled to an evidentiary hearing to determine the viability of his ineffective assistance of counsel claim relating to the voluntariness of his plea, even where its success may seem improbable. *Manning*, 654 N.W.2d at 562.

As our supreme court has stated:

When counsel’s performance is put in issue, as it is here, an evidentiary hearing on the merits of the complaint will ordinarily be required. Such a hearing affords the parties an opportunity to adversarially develop all of the relevant circumstances attending counsel’s performance, including those circumstances and considerations which may be pertinent but are not a part of the criminal trial record.

Watson v. State, 294 N.W.2d 555, 556 (Iowa 1980). We apply this policy in this case.

Conclusion.

The postconviction court erred in dismissing Venteicher’s claims in his application that his plea was not voluntarily and intelligently entered because he received ineffective assistance of counsel. We remand for an evidentiary hearing on those remaining issues. See *State v. Oberhart*, 789 N.W.2d 161, 163 (Iowa

³ Venteicher also contends his counsel was ineffective by misadvising in regard to waiving time before sentencing and waiving a presentence investigative report; trial counsel’s confusion during the habitual offender portion of the sentencing hearing, and by failing to properly prepare, counsel, and appeal. Inasmuch as these issues do not relate to whether Venteicher’s plea was voluntarily and intelligently given, we agree the district court correctly dismissed the claims. See *Manning*, 654 N.W.2d at 561.

2010) (preserving issue for postconviction relief); *accord State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.