

IN THE COURT OF APPEALS OF IOWA

No. 1-292 / 10-0103
Filed July 13, 2011

KEVIN LYNN BROWN,
Plaintiff,

vs.

**IOWA DISTRICT COURT
FOR APPANOOSE COUNTY,**
Defendant.

Appeal from the Iowa District Court for Appanoose County, Annette J. Scieszinski, Judge.

Brown appeals the district court's order finding him in contempt for violating his probation. **WRIT ANNULLED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha Trout, Assistant Attorney General, and Richard F. Scott, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J. takes no part.

SACKETT, C.J.

Kevin Lynn Brown appeals the district court's order finding him in contempt for violating his probation. Brown contends his trial counsel rendered ineffective assistance by 1) failing to require the court to follow the procedures for finding of contempt under chapter 665 (2009); 2) reaching a settlement with the State despite the fact the court file failed to contain a plan of payment for his probation; 3) failing to object to the imposition of the law enforcement surcharge; and 4) agreeing to an extension of his probation beyond the legal limit. Because this matter is a writ of certiorari and fails to challenge the jurisdiction or legality of the court's order, we annul the writ and preserve Brown's ineffective-assistance-of-counsel claims for post conviction relief proceedings.

I. BACKGROUND AND PROCEEDINGS. On September 21, 2007, Brown pled guilty to and was sentenced for one count of fraudulent practice in the third degree in violation of Iowa Code section 249A.8 (2007).¹ He was sentenced to two years of incarceration. The execution of his sentence was suspended, and he was placed on two years probation. He was fined \$625 plus a thirty-two percent surcharge and court costs. The fine and the surcharge were suspended. He was assessed the law enforcement initiative surcharge in the amount of \$125, ordered to pay restitution to the victim as set out in a statement of pecuniary damages to be filed within sixty days of the sentence, and ordered to pay court-appointed attorney fees. The Department of Corrections or other

¹ For the facts of the underlying criminal case, see *State v. Brown*, No. 09-1404 (Iowa Ct. App. Oct. 6, 2010).

supervising agency or institution was ordered to prepare a Plan of Payment for the restitution ordered and to submit the same for court approval.

On April 1, 2008, the State filed a restitution statement asserting \$12,783.12 was owed to Iowa Medicaid. Brown filed a request for a hearing on the amount of restitution on April 28, 2008. This hearing was continued several times until it was finally held on September 17, 2009. At the hearing, the court ordered Brown to pay restitution in the amount of \$12,129.50. Brown appealed that order and the case was remanded for a new hearing. *State v. Brown*, No. 09-1404 (Iowa Ct. App. Oct. 6, 2010).

On September 18, 2009, a report of a probation violation was filed alleging Brown had failed to pay \$942.14 in costs and the \$125 law enforcement initiative surcharge. The same day, the court set a probation violation hearing for October 2, 2009, and ordered Brown arrested and notified of the hearing. Brown was arrested September 28, 2009, and bonded out. However, he failed to appear at the October 2, 2009 hearing so Brown was arrested a second time on October 10, 2009, and bonded out again. A hearing was held on October 30, 2009, at which an attorney was appointed to represent Brown and the probation violation hearing was set for January 4, 2010.

At the hearing, a settlement agreement was reached between Brown and the State whereby Brown admitted to violating the terms of his probation by willfully failing to timely pay \$942.14 in court costs and the \$125 surcharge, and in exchange receiving thirty days in jail and eligibility for work or school release.

The court ordered his probation to continue, and ordered him to reimburse the State for court-appointed attorney fees and court costs. The district court then commemorated the hearing by filing a written order on contempt finding Brown admitted he violated the conditions of his probation and that he is in contempt of court. The court stated Brown was convicted of contempt under Iowa Code section 665.2 (2009) for failing to comply with the court-ordered payment of financial obligations. The order then laid out the terms of the settlement agreement.

On January 14, 2010, Brown filed a pro se request for stay of sentencing pending a petition for writ of certiorari. The supreme court denied the stay, but treated the request as a petition for writ of certiorari and ordered Brown to file a statement within fourteen days to explain why certiorari should be granted. Brown filed his statement on February 12, 2010. On April 1, 2010, the supreme court granted the writ and ordered a stay on further proceedings to enforce the January 4, 2010, order finding Brown in contempt.

II. SCOPE OF REVIEW. This matter comes to us on a writ of certiorari. “Certiorari is an action at law; and therefore, our review is at law.” *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007).

III. WRIT OF CERTIORARI. In a certiorari action, we only examine the jurisdiction of the district court and the legality of its actions. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). When considering the legality of the court’s action, we look to see if the court’s findings of fact are supported by substantial evidence and if the court has properly applied the law. *Amro v. Iowa*

Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988). A party can challenge a finding of contempt only by filing a petition for a writ of certiorari, as there can be no direct appeal. See Iowa Code § 665.11. In contrast, a probation violation finding is properly challenged by filing an application for post conviction relief under Iowa Code section 822.2(e).

In this case, Brown asserts his counsel was ineffective at the probation violation hearing. He contends his attorney was ineffective for failing to require the judge to follow the proper procedure under Iowa Code chapter 665. He asserts his counsel was ineffective for reaching a settlement with the State when it was apparent he was not put on any reasonable schedule of payments while he was on probation. He complains counsel failed to object to an illegal order that required him to pay the \$125 law enforcement initiative surcharge when he had not been convicted of a qualifying offense. Finally, he asserts counsel was ineffective for agreeing to extend his probation beyond the legal limit.

Brown does not assert the district court acted without jurisdiction in finding him in contempt for violating his probation. He also does not assert the court acted illegally by not having substantial evidence to find him in contempt or by misapplying the law. All of his claims allege his attorney failed to render effective assistance during the probation violation proceeding. These claims are best resolved in a postconviction relief proceeding as there is insufficient evidence from which we can determine whether counsel was ineffective in his representation of Brown. *State v. Arne*, 579 N.W.2d 326, 328–29 (Iowa 1998).

In addition, preserving the claims for postconviction relief will also give counsel an opportunity to explain his conduct. *Id.*

WRIT ANNULLED.