**IN THE COURT OF APPEALS OF IOWA**

No. 1-375 / 10-1150
Filed July 13, 2011

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JOHN WILLIAM ARNZEN III,**
Defendant-Appellant.

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**JOHN WILLIAM ARNZEN III,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

John Arnzen appeals from the district court's ruling denying his motion to correct an illegal sentence and declining to order the parole board to recalculate for time served. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**DANILSON, J.**

John Arnzen appeals from the district court's ruling on his consolidated postconviction and criminal files denying his motion to correct an illegal sentence and declining to order the parole board to recalculate for time served. He contends, and we agree, that he was denied an opportunity to be heard in respect to his postconviction claims and motions. We further conclude Arnzen was afforded ineffective assistance of counsel by counsel's failure to arrange for Arnzen's telephonic participation in the postconviction hearing or seek a continuance until his participation could be procured. Because Arnzen's motions were intertwined with the relief he sought in his application for postconviction relief, we determine Arnzen is also entitled to a new hearing on the motions. We therefore reverse the ruling of the district court and remand for a new hearing on Arnzen's application for postconviction relief and motions.

**I. Background Facts and Proceedings.**

In May 2002, Arnzen was charged by trial information with sexual abuse in the second degree and two counts of lascivious acts with a child. After reaching a plea agreement with the State, Arnzen entered a written plea to three counts of indecent contact with a child, in violation of Iowa Code section 709.12 (2001). The district court sentenced Arnzen to a term not to exceed two years on each count, with two counts to run concurrently and one count to run consecutively to the other counts. Pursuant to section 901A.2(1), the two-year sentence for each offense was doubled, and Arnzen was required to serve eighty-five percent of the

sentence. Pursuant to section 901A.2(7),[1] the parole board was required to impose an additional two years of parole or work release for each of the three sentences.

Sometime around June 2007, Arnzen filed an undated pro se letter challenging the part of his sentence that imposed two years parole. On July 6, 2007, the court appointed attorney John Kies to represent Arnzen. Arnzen later decided he did not wish to challenge the legality of his sentence. On December 5, 2007, Attorney Kies filed a motion to dismiss the claim.

On April 23, 2010, Arnzen filed an application for postconviction relief, alleging in part that he had not been released from prison and placed on parole pursuant to Iowa Code section 901A.2(8) (2009). The court appointed attorney Natalia Blaskovich to represent Arnzen.

On that same day, Arnzen also filed a motion for correction of an illegal sentence in his original criminal file and requested appointment of counsel. The court set a hearing for June 1, 2010, at 2:30 p.m. and arranged for Arnzen to participate by phone. The court sent a copy of the order to Arnzen. Arnzen filed a pro se motion for transport demanding he be transported to Dubuque for the hearing. The court denied his motion for transport. The court sent the order to Attorney Kies who had represented Arnzen three years earlier. The court also sent an order to Attorney Kies changing the time of hearing by fifteen minutes.

On May 14, 2010, Arnzen filed a motion for specific performance of plea agreement. On May 17, Arnzen sent a letter to the court indicating he had no attorney. On May 21, Arnzen filed a motion for implementation of special

[1] This subsection is now renumbered and can be found at Iowa Code section 901A.2(8) (2009).

sentence. On May 27, the court ordered Arnzen's motions to be considered at the June 1 hearing.[2]

The combined hearing on Arnzen's postconviction relief and criminal files took place on June 1. Arnzen did not participate by phone or otherwise.[3] On July 1, the court entered an order stating as follows:

> This matter comes before the Court pursuant to the Defendant's Pro Se filings concerning what he believes to be an illegal sentence. Chris Corken appeared on behalf of the State. Attorney Natalia Blaskovich appeared on behalf of the Defendant.
>
> The issue before the Court seems to focus on the imposition of a sentence and the computation of time against the sentence. The Defendant argues that the Board of Parole has not given him appropriate credit against his sentence, which he believes should begin on January 28, 2009. According to the disposition order entered herein, Counts I and II of the Trial Information were to run concurrent to each other and consecutive to Count III. The disposition order entered on May 10, 2002. Pursuant to Iowa Code 901A.2(7), the Court ordered the Parole Board to impose an additional two years of parole for each of his three offenses. Although not stated within the disposition order, statutorily the Defendant is entitled to credit for time served against this sentence.
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> The Court hereby finds that the Motion for Reconsideration of an Illegal Sentence is **DENIED**. The issue pertaining to the computation of time for the sentence served herein is an issue with the Parole Board and its administrative duties. The Court cannot order the Parole Board to calculate the time in any different manner than is prescribed by their rules and regulations.

On July 6, Arnzen filed a pro se notice of appeal pertaining to his criminal file, stating in part: "A hearing was held 6-1-10 regarding the issue of illegal sentence, as applied to the above case. Evidence was presented and all parties were given an opportunity to present or resist the issue of illegal sentence." On July 19, Arnzen filed another pro se notice of appeal pertaining to his criminal file

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[2] This order was not filed until July 2, 2010. A copy was sent to Arnzen.

[3] Arnzen wrote a letter, dated June 10 and postmarked June 14, to the clerk of court stating he was unable to participate in the hearing because his counselor failed to place the call. The letter also referenced another motion for implementation of special sentence, and asked for the name of any attorneys assigned to represent him.

*and* his postconviction file. On July 21, Attorney Blaskovich filed a notice of appeal in both cases as well. On August 4, an appellate defender was appointed to represent Arnzen. On October 19, the supreme court ruled the appeal in the criminal matter would be consolidated with the appeal in the postconviction matter.

**II. Opportunity to Present Postconviction Claims.**

Arnzen contends the district court erred in dismissing the postconviction action without ensuring he was given an opportunity to be heard. Postconviction proceedings are law actions ordinarily reviewed for the correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). When a postconviction applicant asserts a violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996).

In this case, the district court combined the postconviction action with Arnzen's criminal file and scheduled a hearing on June 1, 2010, to address Arnzen's claims. Arnzen's court-appointed attorney, Natalia Blaskovich, appeared at the hearing. The hearing was unreported, and the court's order entered July 1, 2010, stated, "The issue before the Court seems to focus on the imposition of a sentence and the computation of time against the sentence."

Arnzen was aware of the June 1 hearing, as he had previously filed a motion for transport demanding that he be transported to Dubuque for the hearing, which the court had denied. Arnzen later advised the clerk in a letter (dated June 10 and postmarked June 14) that he was unable to participate in the hearing because his counselor failed to place the call.

Arnzen argues his failure to participate at the hearing denied him a reasonable opportunity to assert his postconviction claims. The State contends Arnzen failed to adequately preserve error on this issue. However, to correct an error of constitutional magnitude we are nevertheless required to address it even if the issue was not preserved. *In re S.P.*, 672 N.W.2d 842, 846 (Iowa 2003). We also observe that Arnzen sent a letter to the clerk after the hearing indicating his inability to participate in the hearing because his counselor did not make the arrangements. Although the letter was not in the form of a motion, we could construe it as rule 1.904 motion for reconsideration. Accordingly, we are compelled to address Arnzen's due process claim.

Postconviction proceedings are civil actions. *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996). An inmate does not have a constitutional right to be present at a civil action. *Myers v. Emke*, 476 N.W.2d 84, 85 (Iowa 1991). Arnzen's right to due process did not include a right to be personally present for the hearing, but did require "fundamental fairness" in the proceedings. *See Webb*, 555 N.W.2d at 825-26 (concluding defendant was allowed reasonable opportunity to participate in postconviction hearing because counsel was present, and defendant was allowed to participate by phone, and despite the fact that defendant refused to participate by phone and court denied request for transport); *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994) (reversing to allow defendant opportunity to participate after district court summarily dismissed defendant's application without hearing, notice, and an opportunity to respond to defendant's counsel's motion for dismissal). Here, Arnzen was denied his request to personally appear for the hearing and was not afforded the opportunity

to participate by telephone. We believe it was fundamentally unfair to deny Arnzen his "day in court," albeit by telephone.

Further although it is undisputed Attorney Blaskovich was present at the hearing, without a record of the proceedings we do not know if counsel presented the claims Arnzen sought to raise in his postconviction action. Arnzen's application for postconviction relief was not prepared by his counsel but rather by Arnzen himself, and we cannot expect Arnzen to articulate his arguments with as much specificity as his attorney. The very fact the district court stated in its ruling, "[t]he issue before the Court seems to focus . . ." emphasizes the need for the applicant's participation in a postconviction relief proceeding to assure the applicant's issues are identified and addressed.

**III. Ineffective Assistance of Counsel.**

Arnzen also argues he received ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995).

Arnzen essentially argues Attorney Blaskovich failed to advance his claims, and he proceeds to set forth the merits of the argument he raised to the

district court in numerous motions and letters. In particular, Arnzen argues Attorney Blaskovich performed deficiently in failing to have the postconviction hearing reported.

Arnzen must show Attorney Blaskovich's performance fell outside a normal range of competency resulting in prejudice, and in order to establish the requisite prejudice, Arnzen must show that, but for counsel's errors, the result would have been different. *See, e.g.*, *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000) (observing postconviction applicant must state the specific ways counsel's performance was deficient and how competent representation would have changed the outcome). We believe it is incumbent upon postconviction counsel to arrange for the applicant to participate telephonically in the postconviction hearing if the applicant is incarcerated, unless the applicant waives participation. The record here, as shown by Arnzen's letter to the clerk of court dated June 10, 2010, clearly reflects he desired to participate and did not waive that right.

We also acknowledge the hearing from which Arnzen appeals was not reported. As our supreme court has observed, "Without the benefit of a full record of the lower courts' proceedings, it is improvident for us to exercise appellate review." *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005); *see also* Iowa R. Civ. P. 1.903 (requiring all trial proceedings to be reported). In this case, it was Arnzen's duty to provide a record on appeal affirmatively disclosing the alleged error relied upon. *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007). We cannot speculate as to what took place or predicate error on such speculation. *See F.W.S.*, 698 N.W.2d at 136; *Ricklefs*, 726 N.W.2d at 362-63.

However, the record does reflect the district court order which makes no reference to Arnzen's appearance, and there is no dispute that he did not participate in the hearing.

**IV. Motions.**

The hearing set for June 1, 2010, also encompassed Arnzen's motion for correction of illegal sentence, motion for specific performance of plea agreement, and motion for implementation of specific sentence. Inasmuch as Arnzen's motions are intertwined with the relief he seeks in his application for postconviction relief, or at least they appear to be interrelated, we believe fundamental fairness requires a new hearing on the motions so Arnzen may participate telephonically. In this fashion, the district court may ferret out all of Arnzen's issues and determine if he is entitled to any relief.

**V. Conclusion.**

Upon our review of this consolidated appeal, we conclude Arnzen was denied an opportunity to be heard in respect to his postconviction claims. We further find Arnzen was afforded ineffective assistance of counsel by counsel's failure to arrange for his telephonic participation in the postconviction hearing or seek a continuance until his participation could be procured. Because Arnzen's motions were intertwined with the relief he sought in his application for postconviction relief, we determine Arnzen is also entitled to a new hearing on the motions. We therefore reverse the ruling of the district court and remand for a new hearing on Arnzen's application for postconviction relief and motions.

**REVERSED AND REMANDED.**