

IN THE COURT OF APPEALS OF IOWA

No. 2-1167 / 12-1088
Filed February 13, 2013

LEONARD PEEL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Michael J. Moon (application for postconviction relief) and Timothy J. Finn (amended application for postconviction relief), Judges.

A postconviction relief applicant appeals the summary disposition of his application, challenging (A) the absence of a record below, (B) his postconviction attorney's failure to request an evidentiary hearing, and (C) his original trial attorney's failure to object to a jury instruction. **AFFIRMED.**

Patrick W. O'Bryan, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Stephen Holmes, County Attorney, and Timothy Meals, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Leonard Peel appeals the summary disposition of his postconviction relief application. He challenges (A) the absence of a record, (B) his postconviction attorney's failure to request an evidentiary hearing, and (C) his trial attorney's failure to object to a jury instruction.

I. Background Proceedings

This case has a lengthy procedural history detailed in prior opinions. See *State v. Peel*, No. 10-1219, 2011 WL 2090035, (Iowa Ct. App. May 25, 2011); *State v. Peel*, No. 08-0327, 2009 WL 2170252, (Iowa Ct. App. July 22, 2009). The pertinent proceedings for purposes of this appeal are as follows.

A jury found Peel guilty of second-degree robbery. Following trial, Peel filed a motion in arrest of judgment and for new trial, asserting in part that the district court erred in giving the jury a particular instruction absent his attorney's request for the instruction.

The district court ruled that Peel's attorney did not preserve error by lodging an objection to the instruction before it was submitted to the jury. The court nonetheless concluded that expedience and fairness favored consideration of the issue on the merits. After summarizing Iowa Supreme Court precedent on the subject, the court concluded the instruction should not have been given absent a request from defense counsel, and Peel was entitled to a new trial.

On the State's appeal, this court reversed the ruling. We concluded that Peel's failure to object to the instruction prevented the district court from considering the posttrial challenge on the merits. *State v. Peel*, No. 01-0371,

2002 WL 985025, at *2 (Iowa Ct. App. May 15, 2002). We remanded the case for reinstatement of the jury verdict. *Id.*

For reasons detailed in prior opinions, Peel was not sentenced until 2008. He filed a postconviction relief application in 2011,¹ alleging (1) the Court of Appeals erred in reversing the district court's grant of a new trial and (2) the district court imposed an illegal sentence. His attorney amended the application to raise the first claim under an ineffective-assistance-of-counsel rubric.

The State moved for summary disposition of the original and amended applications, alleging procedural bars to the first application and a failure to cite facts supporting the amended application. The district court granted the motion as to the original postconviction relief application and scheduled a hearing on the ineffective-assistance-of-counsel claim raised in the amended application. Before disposition of the amended application, the State and Peel's attorney separately notified the court that a hearing was not needed. The district court reviewed the matter and dismissed the application "for the reasons stated" in the prior order. This appeal followed.

II. Analysis

A. Absence of Record. Peel contends "[i]t is unclear from [the first] order . . . what arguments were raised or what evidence [he] presented in his own behalf as there simply is no transcript of the proceedings." Because the hearing on his original postconviction relief application "was not transcribed," he contends the appellate court is unable to review his assertion that "he is being

¹ His postconviction relief application was filed within three years of the imposition of his sentence.

illegally held.” This ground for relief must fail because it was Peel’s duty to produce a record, and he failed to do so. See *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005).

B. Evidentiary Hearing. Peel next asserts that he was entitled to an evidentiary hearing on his amended application for postconviction relief and his postconviction attorney was ineffective in waiving that right. To prevail, Peel must establish (1) the breach of an essential duty and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Peel cannot establish the first prong.

Under our postconviction statute:

The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Iowa Code § 822.6 (2011). As noted, Peel’s amended postconviction relief application alleged that his trial attorney was ineffective in failing to object to the jury instruction that was the subject of the new trial ruling. Because the application raised no fact issues other than trial counsel’s failure to object, summary disposition of the amended application was appropriate.

Notably, Peel does not now allege any facts that he contends his postconviction attorney overlooked. He simply asserts that counsel “requested no further hearing.” This bare allegation, without more, is insufficient to establish that postconviction counsel breached an essential duty in failing to insist on an

evidentiary hearing rather than summary disposition. Because there is no breach, this ineffective-assistance-of-counsel claim necessarily fails.

C. Trial Counsel's Failure to Object to Jury Instruction. Peel contends his trial attorney was ineffective in failing to object to the jury instruction that was the subject of the new trial ruling. He does not argue or cite authority on this point. Accordingly, we conclude he has waived error. See Iowa R. App. P. 6.903(2)(g)(3); *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001).

We affirm the district court's summary disposition of Peel's postconviction relief application. We find it unnecessary to address other arguments raised by the parties.

AFFIRMED.