IN THE COURT OF APPEALS OF IOWA

No. 2-160 / 10-0560
Filed March 28, 2012

BENJAMIN T. GORDON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, Paul R. Huscher, Judge.

Benjamin Gordon appeals the district court's summary dismissal of his postconviction action. **AFFIRMED.**

Scott A. Sobel of Sobel Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael K. Jacobsen, County Attorney, and Susan Wendel, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Benjamin Gordon appeals from the district court's summary dismissal of his application for postconviction relief. He contends his postconviction counsel was ineffective in failing to respond to the State's motion for summary dismissal and in failing to arrange for his participation in the hearing. Upon our review, we conclude Gordon cannot show a reasonable likelihood the result of the proceeding would have been different had counsel responded to the State's motion for summary dismissal or arranged for his participation in the hearing. We affirm.

I. Background Facts and Proceedings.

On April 28, 2008, the district court entered judgment and sentence finding Gordon guilty of inmate assault on a jailer as a habitual offender, in violation of Iowa Code sections 708.3B(1) and 902.8 (2007). On April 29, 2008, Gordon filed a pro se appeal of his conviction, arguing the conviction was an "intentional illegal guilty conviction"; the conviction was "illegally obtained by use of a false statement"; he was "denied proven insanity plea"; his trial was "unfair and bias and/or partial"; the judges were "involved in a conspiracy" against him; and he received ineffective assistance of counsel. On March 31, 2009, our supreme court reviewed the record and concluded "the appellant's appeal is frivolous." The court granted appellate counsel leave to withdraw and dismissed Gordon's appeal pursuant to Iowa Rule of Appellate Procedure 6.104. Procedendo issued on April 20, 2009.

On May 4, 2009, Gordon filed a pro se application for postconviction relief, alleging the same grounds as raised in his prior appeal. On August 26, 2009, the State filed an answer and motion for summary dismissal, and on December 21, 2009, filed an amended and substituted motion for summary dismissal, alleging all of the claims raised by Gordon had been previously raised and rejected by the supreme court in his direct appeal.[1] On January 8, 2010, Gordon filed a pro se brief in support of his application, arguing the supreme court "did not take into consideration all grounds/issues raised" in his appeal, and dismissed the appeal without "explanation for their decision(s)."

An unreported hearing on the State's motion took place on March 8, 2010. Gordon's court appointed postconviction relief attorney appeared at the hearing. In a calendar entry dated March 8, 2010, the district court dismissed Gordon's postconviction application and entered the following order:

> Issues raised in Application for Postconviction Relief have been previously raised and denied, or are waived. The Motion for Summary Dismissal is granted. The Application for Postconviction Relief is dismissed at appellant's cost. The trial set for March 31, 2010, is cancelled.

Gordon now appeals, arguing his postconviction counsel was ineffective in failing to respond to the State's motion for summary dismissal and in failing to arrange for his participation in the hearing on the State's motion.

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[1] In his brief, Gordon refers to the State's "motions"; however, because the State's initial motion was subsequently amended and substituted, we refer only to a single motion for summary dismissal filed by the State.

II. Standard of Review.

We review the summary dismissal of an application for postconviction relief for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, when claims raise constitutional infirmities, including allegations of ineffective assistance of counsel, we conduct a de novo review. *Id*. In determining whether the summary dismissal is warranted, the moving party has the burden of proving the material facts are undisputed, and we examine the facts in the light most favorable to the nonmoving party. *Id.*

III. Ineffective Assistance of Counsel.

To establish a claim of ineffective assistance of counsel, a defendant must prove 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. Fountain*, 786 N.W.2d 260, 265–66 (Iowa 2010). The claim may be disposed of if the defendant fails to prove either of the two prongs. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). Accordingly, we need not determine whether counsel's performance was deficient before examining the prejudice prong of an ineffectiveness claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To resolve the issues in this case, we focus on the prejudice prong of Gordon's claims.

To establish prejudice, Gordon must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984); *accord Bowman v. State*,

710 N.W.2d 200, 203 (Iowa 2006); *see State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *accord Maxwell*, 743 N.W.2d at 196.

A. Failure to Respond to Motion for Summary Dismissal. Gordon argues his postconviction counsel was ineffective in failing to advance the claims he raised in his postconviction application by failing to resist the State's motion for summary dismissal. Upon our review, we conclude Gordon cannot show a reasonable likelihood the result of the proceeding would have been different had counsel responded to the State's motion for summary dismissal. As previously noted Gordon's counsel was present at the hearing based upon the docket entry.

Iowa Code chapter 822 authorizes the court to grant a motion for summary disposition of a postconviction 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 (2009); *see also State v. Dryer*, 342 N.W.2d 881, 883 (Iowa Ct. App. 1983) ("Summary disposition is proper in situations where petitioner's allegations are directly contradicted by the record, unless petitioner has raised a legitimate question concerning the credibility of that record."). Chapter 822 further requires that all grounds for relief available to an applicant must be raised "in the applicant's original, supplemental or amended application." Iowa Code § 822.8.

> Any ground finally adjudicated . . . in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Id.; *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971) (observing this provision is "clear and unambiguous . . . . Relitigation of previously adjudicated issues is barred."); *see also Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009).

The issues raised in Gordon's postconviction application were sufficiently set forth in Gordon's direct appeal filed in April 2008. The supreme court reviewed the record, and dismissed the appeal in March 2009. Gordon did not contest or object to the court's dismissal of the appeal. Rather, Gordon filed an application for postconviction relief in May 2009, alleging identical claims. Accordingly, as the district court determined, the issues raised in the postconviction application had been raised and denied. *See Manning v. State*, 654 N.W.2d 555, 561 (Iowa 2002); *Stanford v. Iowa State Reformatory,* 279 N.W.2d 28, 34 (Iowa 1979). Counsel's failure to respond to the State's motion in furtherance of Gordon's claims did not affect the outcome of the proceeding. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (observing prejudice exists when it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged breach); *Maxwell*, 743 N.W.2d at 195 (requiring defendant to show both that counsel failed to perform an essential duty and that prejudice resulted in order to prevail on a claim of ineffective assistance of counsel).

B. Failure to Procure Participation in the Hearing. Gordon contends his postconviction counsel was ineffective in failing to have him "available to participate in the final, and ultimately the dispositive scheduled hearing, by telephone to allow Gordon to advance his claims and resist the Motion . . . ." As Gordon further argues, he "authored his application and authored the resistance to dismissal [brief in support of his application] and clearly knew what his issues and arguments were, and only he had the requisite understanding to articulate his position to the Court . . . ."

Gordon relies on this court's recent holding in *State v. Arnzen*, No. 10-1150 (Iowa Ct. App. Aug. 10, 2011), in support of the proposition a defendant is "afforded ineffective assistance of counsel by counsel's failure to arrange for [the applicant's] telephonic participation in the postconviction hearing or seek a continuance until his participation could be procured." *Arnzen* is distinguishable from the instant case. In *Arnzen*, the hearing at issue was not a summary dismissal hearing, but rather, a hearing on the merits of the claims alleged in his application. *Id*. Those issues had not previously been raised and decided on direct appeal. *Id*. And we therefore determined the applicant's presence at the hearing was critical in order to decipher and assure the issues raised in the application were "identified and addressed." *Id*.

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). Accordingly, Gordon's right to due process did not include a right to be personally

present for the hearing, but it did require "fundamental fairness" in the proceedings. *See Webb v. State*, 555 N.W.2d 824, 825–26 (Iowa 1996).

Here, Gordon did not have an opportunity to participate in the hearing on the State's motion for summary dismissal.[2] Specifically, the hearing was in regard to whether the issues alleged in Gordon's application "were previously raised and adjudicated." Indeed, the district court determined the issues had been raised and decided, and summary dismissal was proper. The merits of the issues were not litigated at the hearing.

Under these facts, it was not fundamentally unfair to deny Gordon an opportunity to participate in the hearing. His inability to present and articulate his claims did not affect the outcome of the proceeding. We conclude Gordon cannot show a reasonable likelihood the result of the proceeding would have been different had counsel arranged for his participation in the hearing on the State's motion.

Having addressed the issues raised on appeal, we affirm the district court's summary dismissal of Gordon's application for postconviction relief.

AFFIRMED.

[2] The State notes that because the hearing was unreported, "[i]t is possible that Gordon was present at the proceeding." Viewing the facts in the light most favorable to Gordon, we assume Gordon was not present at the hearing.