

**IN THE COURT OF APPEALS OF IOWA**

No. 3-342 / 12-0403  
Filed January 9, 2014

**RONNIE SANDERS,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Webster County, Kurt L. Wilke,  
Judge.

Ronnie Sanders appeals the dismissal of his application for postconviction  
relief. **REVERSED AND REMANDED.**

Douglas Cook, Jewell, for appellant.

Ronnie Lee Sanders, Fort Dodge, appellant pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant  
Attorney General, and Ricki Osborn, County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

**BOWER, J.**

Ronnie Sanders appeals the dismissal of his application for postconviction relief (PCR). He argues his PCR counsel was ineffective in unilaterally moving to dismiss the action. We reverse and remand.

**I. Background Facts and Proceedings**

In December 2008, Sanders was convicted of second-degree sexual abuse and willful injury. We affirmed his conviction on direct appeal, finding no merit to his sufficiency-of-the-evidence claim or to his various ineffective-assistance-of-counsel claims. See *generally State v. Sanders*, No. 08-1981, 2009 WL 3337616, at \*1 (Iowa Ct. App. Oct. 7, 2009).

Sanders filed a pro se PCR application in July 2010. Attorney James McCarthy was appointed to represent him. In March 2011 the State filed a partial motion to dismiss, arguing *some* of Sanders's pro se claims had already been addressed on direct appeal and other claims that were not raised in the direct appeal are waived "absent sufficient reason to excuse the failure to preserve the issue." Further:

9. [Sanders] should not be allowed to assert the same claims that were ruled upon by the Iowa Court of Appeals nor should he be allowed to assert new claims other than new claims for ineffective assistance of counsel that was not addressed by the Iowa Court of Appeals.

10. The State further requests that if [Sanders] chooses to pursue the claim of ineffective assistance of counsel that he be required to specifically state how his trial counsel was ineffective so the State can prepare accordingly.

A hearing on the State's motion was set for March 30, 2011. On March 30 the court ordered the motion should be addressed at the April 20 PCR trial but on April 22 the court ordered the motion to be heard on May 6, 2011.

On April 27 Sanders filed a letter to the court<sup>1</sup> stating he had a court date scheduled for April 20, and "I have no idea if it happened or not. I am completely in the dark on anything happening" despite writing my attorney and leaving messages for my attorney. Sanders asked the court if a hearing took place on April 20 and "what was the nature of the hearing?" Also,

I have attempted to contact Mr. McCarthy before this with no response. The last contact I had was over six months ago. I have a letter from him that says he would come to see me and that a transportation order had been requested for me to be present at the court.

On May 6 the court stated the motion to dismiss was to be heard but the court cancelled the hearing "subject to reapplication by either party." The court's order also notes it appears some PCR claims were resolved on appeal and some were not raised on appeal. "In any event, the applicant is requesting additional time to sort out some of these matters and file an additional petition to which the State will have an opportunity to respond."

On July 6, 2011, the State requested a hearing on its motion to dismiss "in an effort to narrow the claims" to be heard at the September 2011 trial. The State alleged that on May 6 applicant's counsel stated he would file an amended application in ten days but nothing had been filed. In response, the court set a hearing for July 25 and noted Sanders "may appear by telephone."

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<sup>1</sup> The clerk of court sent the letter to attorney McCarthy and to the State.

On July 25, 2011, the date of the hearing on the State's motion to dismiss, McCarthy filed a dismissal with prejudice, stating the PCR issue of trial counsel's failure to challenge the constitutionality of Iowa Code chapter 903B had been addressed and rejected on the direct appeal. McCarthy also stated that upon his review of the record, he "determined there were no further issues that could be raised." Finally, McCarthy stated that "following a number of hours of in-depth discussion," Sanders "agrees that there are no further issues to raise regarding ineffective assistance of counsel or any other issue properly raised in a [PCR] petition."

In November 2011, Sanders wrote to the court requesting new counsel because McCarthy has "failed to answer letters and phone calls," "refused to do what I have requested on my case," and "refused to release information/paper work to my spouse or myself." The court responded his PCR action had been dismissed with prejudice on July 25, 2011, and because there is no pending action, "you are not entitled to appointment of new counsel."

On December 16, 2011, Sanders filed a pro se motion to reinstate his PCR action "errantly dismissed by applicant's counsel without the examination by the court." Sanders explained the court's November 2011 response to his questions was the first time he knew of the dismissal. Sanders alleged PCR counsel McCarthy acted against his wishes and argued it "is not within" Iowa Code chapter 822 "for him, the applicant's counsel, to dismiss [applicant's] case. This applicant never did get a ruling from the district court." Sanders argued the court erred in not having a hearing involving him before dismissing his

application, and he “had no opportunity to defend or explain his position to the court.” Sanders requested a hearing on his reinstated application after he had fully discussed the case with his attorney, citing *Gamble v. State*, 723 N.W.2d 443 (Iowa 2006), and Iowa Code section 822.7 (“The [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.”).

McCarthy filed a response, stating that he moved to dismiss the PCR action “following two conferences” with Sanders “and a time-consuming and painstaking review of the record,” in which he “could not find any area or circumstance in which [Sanders’s trial] counsel was ineffective.” McCarthy’s response also stated he informed Sanders “that none of the issues in [Sander’s] original [PCR petition] were either *legitimate* or unaddressed by the [appellate court,] . . . [and] he did not see any other potential issues which could be addressed.” In the interests of judicial economy, McCarthy requested a hearing “for the purpose of making a dispositive record.” (Emphasis added.)

On January 3, 2012, the district court denied Sanders’s motion to reinstate, ruling “the proper recourse for [Sanders] is to appeal the dismissal to the appellate courts.”

On appeal, Sanders contends PCR counsel was ineffective in dismissing his action without his consent. The State responds the record is devoid of evidence to dispute McCarthy’s statement in the dismissal motion that Sanders agreed to the dismissal, and therefore, no duty was breached. Also, because none of Sanders’s PCR claims have merit, no prejudice has been shown.

## II. Scope and Standard of Review

We review Sanders's claims of ineffective assistance of PCR counsel de novo. See *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011).

## III. Analysis

In order to establish ineffective assistance of counsel, Sanders must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). Sanders must prove both elements by a preponderance of the evidence. See *id.* In order to demonstrate prejudice, Sanders must show "a reasonable probability that the result would have been different." *Id.* at 572. Here, the result Sanders is seeking is an opportunity to be heard on the State's motion to dismiss.

Sanders claims PCR counsel breached an essential duty by unilaterally moving to dismiss his PCR action with prejudice without his consent or ability to respond. Asserting he "is not seeking to overturn the State's motion or win the case on his merits," Sanders seeks reinstatement of his action in order to defend against the State's motion to dismiss, an opportunity allegedly denied to him by his attorney's ineffectiveness. Sanders argues he was prejudiced because "dismissing a case set for hearing without record or client consent" is prejudicial on its face.

We disagree with the State's assertion nothing in the record shows Sanders did not agree to the dismissal as alleged in PCR counsel's dismissal motion. Sanders's two letters and pro se application for reinstatement show a lack of communication and a lack of consent to his counsel's actions.

Our analysis is guided by the Iowa Supreme Court's rulings in *Leonard v. State*, 461 N.W.2d 465 (Iowa 1990), *Gamble*, 723 N.W.2d at 443, and *Jones v. State*, 731 N.W.2d 388 (2007).

In *Leonard*, the court addressed the dilemma a PCR applicant faces when a district court refuses to remove counsel the applicant wants to dismiss. 461 N.W.2d at 468. The court tempered future district court refusals to dismiss counsel by ruling: "A [PCR] applicant may file applications, briefs, resistances, motions, and all other documents the applicant deems appropriate in addition to what the applicant's counsel files. *This qualification should give the applicant assurance that all matters the applicant wants raised before the district court will be considered.*" *Id.* (emphasis added).

Here, there is no question that McCarthy's dismissal extinguished matters that Sanders wanted addressed in a court ruling.

In *Gamble*, the case specifically cited by Sanders, the PCR applicant argued on appeal that the court erred by ordering his attorney to assess the applicant's case, by adopting his counsel's report, and by failing to address the applicant's pro se claims. 723 N.W.2d at 445. When Gamble's PCR counsel filed his court-ordered report, counsel also filed an amended application containing the one issue counsel believed had merit. *Id.* at 444. Subsequently, the PCR court ruled on counsel's amended application, rejecting that one claim. *Id.* The court did not rule on applicant Gamble's pro se claims. *Id.*

Our supreme court found the process inappropriate, noting an applicant's counsel should not "be expected to criticize or diminish their own client's case;

that role should be filled, if at all, by counsel for the resisting party.” *Id.* at 466. The court remanded for a new hearing on the applicant’s pro se claims, holding the PCR court was required to make findings of fact and conclusions of law with respect to each *issue* raised by the applicant. *Id.* (“Even if the court does not respond to all of the applicant’s allegations, the ruling is sufficient if it responds to all the issues raised.”).

Here, McCarthy’s filing of a dismissal without Sanders’s consent is the ultimate diminishment of Sanders’s case. Further, McCarthy’s characterization of “legitimate” claims shows counsel and not the opposing party acted to diminish his own client’s case.

Recently, in *Jones*, the PCR court refused to consider any of the applicant’s pro se pleadings because the applicant was represented by counsel. 731 N.W.2d at 389. Citing *Gamble*, the *Jones* court stated the PCR court “must give the applicant an opportunity to be heard on his pro se claims and must then rule on each issue raised.” *Id.* at 392. This process is required because “an applicant’s opportunity to supplement counsel’s pleadings and raise additional claims pro se would be meaningless if the applicant did not have a corresponding opportunity to be heard on the pro se claims and obtain a ruling on them.” *Id.* The *Jones* court concluded the PCR court erred in refusing to consider the applicant’s pro se filings and remanded for the applicant to “be given an opportunity to submit evidence in support of his claims.” *Id.*



Likewise, Sanders had no opportunity to be heard because the court rescheduled the first hearing set on the motion to dismiss, and McCarthy's dismissal filing prevented the next attempt at a hearing on the State's motion.

Under the principles and processes delineated in *Leonard*, *Gamble*, and *Jones*, we conclude PCR counsel rendered ineffective assistance. We remand for the court to rule on Sanders's pro se *issues* in the context of the State's motion to dismiss.

**REVERSED AND REMANDED.**