

**IN THE COURT OF APPEALS OF IOWA**

No. 6-136 / 05-0998  
Filed May 10, 2006

**AKERA A. STIGLER,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,  
Judge.

Akera Stigler appeals the summary judgment dismissal of his  
postconviction action. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and David A. Adams, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant  
Attorney General, John Sarcone, County Attorney, and Jeff Noble, Assistant  
County Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

**MAHAN, J.**

**I. Background Facts and Proceedings**

Akera Stigler was charged with second-degree robbery after an incident involving stealing shoes from a store in Urbandale, Iowa. He pled guilty to the reduced charge of first-degree theft on August 30, 2000. Prior to sentencing Stigler filed, then withdrew, a motion in arrest of judgment. On October 11, 2000, the district court sentenced Stigler to a ten-year term of imprisonment, suspended the sentence and placed Stigler on probation for two years. At sentencing, the district court noted that Stigler had a ten-year criminal history, dating back to the age of fifteen. The court concluded, “Mr. Stigler, it’s on you now. You’re twenty-five years old. It’s time to get your act together. No ‘ifs’ or ‘ands’ or ‘buts’ about it.” After a series of probation violations, including arrests on other charges, the court revoked probation and imposed the original ten-year sentence of imprisonment on March 20, 2002.

Stigler filed an application for postconviction relief on August 20, 2003, raising claims of ineffective assistance of counsel. The State filed a motion for summary judgment, citing Iowa Code section 822.8 (2003)<sup>1</sup> and noting Stigler had failed to file a direct appeal.

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<sup>1</sup> Iowa Code section 822.8 provides:

All grounds for relief available to an applicant under this chapter must be raised in the applicant’s original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived 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.

At a hearing on the motion, held on December 24, 2003, the court granted a request by Stigler's postconviction counsel to defer its ruling pending counsel's deposition of Stigler's trial counsel. Stigler's postconviction counsel subsequently withdrew, and new counsel was appointed on April 5, 2004. The district court never ruled on the State's pending summary judgment motion.

On September 8, 2004, Stigler's postconviction action came on for hearing. Stigler failed to appear. His counsel explained Stigler had walked away from the work release facility where he was confined and had been on escape status since June 15. A warrant for his arrest had been issued. Due to Stigler's absence, his counsel requested a voluntary dismissal without prejudice pursuant to Iowa Rule of Civil Procedure 1.943 and asked the court to impose a special condition, allowing Stigler to re-file his post conviction relief action and bring it to trial within a six-month period. The State agreed to the proposal. The court asked Stigler's counsel to prepare an order memorializing the parties' agreement.

On September 14, 2004, the district court filed an order dismissing the action pursuant to rule 1.943 with conditions. The order stated, "The State of Iowa agreed to the dismissal and conditions without waiving any arguments it may have regarding any procedural defects in the original or re-filed petition." The court ordered the matter dismissed and stated, "The applicant may re-file his petition within six (6) months of the date of this order. If the petition is not re-filed within the above time frame this dismissal shall be deemed a dismissal with prejudice and the applicant barred from re-filing."

On February 3, 2005, Stigler filed a request to re-file his postconviction relief action. The State requested a hearing on its original motion for summary judgment. Following the hearing on April 4, 2005, the district court filed a ruling dismissing Stigler's application. The court concluded the application was not timely filed pursuant to Iowa Code section 822.3 (requiring applications for postconviction relief be filed within three years of the date of the conviction). It further concluded the court's September 2004 order dismissing the application without prejudice "did not and could not operate to extend the statute of limitations created" by section 822.3. The court also noted "that if somehow [Stigler's] application to re-file had operated to reinstate the original claim, then his claim would have been barred as set forth in the State's motion for summary judgment."

Stigler filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), arguing the postconviction relief action was not barred by the statute of limitations due to the application of Iowa Code section 614.10.<sup>2</sup> The court enlarged its previous ruling to provide that to the extent Stigler's case "was an attempt to re-file the action previously existing, it is dismissed for failure to plead and prove that the original dismissal was not due to his own negligence."

Stigler appeals, arguing (1) the district court erred in dismissing his postconviction relief action and (2) his postconviction counsel was ineffective.

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<sup>2</sup> Section 614.10 provides:

If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

## **II. Standard of Review**

We review the dismissal of an application for postconviction relief to correct errors of law. *Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998). Our review is de novo when there is an alleged denial of constitutional rights. *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995). Thus, we review de novo claims of ineffective assistance of counsel, including claims of ineffective assistance of postconviction counsel. *Collins v. State*, 588 N.W.2d 399, 401 (Iowa 1998); *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

## **III. Dismissal of Postconviction Action**

Stigler argues the written order filed following the September 8, 2003, hearing does not accurately reflect the agreement of the parties to permit Stigler to re-file his postconviction relief application. Specifically, he contends the State's agreement to dismissal "without waiving any arguments it may have regarding any procedural defects in the original or re-filed petition" is a misstatement of the record. Stigler further argues the re-filed application was intended and treated by all parties to be a continuation of the original action. Therefore, the original filing date applies and the action was filed within the statute of limitations. In the alternative, Stigler argues the parties waived the application of section 822.3. Finally, Stigler contends section 614.10 either does not apply to the case because "the voluntary dismissal should not be viewed as a 'failure' on the part of" Stigler, or the parties waived its application to this case.

The State contends Stigler's arguments on appeal were never raised in the district court. Neither party filed briefs or memoranda in support or resistance of the State's motion prior to the April 4, 2005 hearing. The April 4, 2005 hearing

was not reported, and no supplemental statement of the record under Iowa Rule of Appellate Procedure 6.10(3) has been filed. Stigler's argument on appeal related to section 614.10 directly opposes the argument he made in district court. "Our error preservation rule 'requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.'" *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (citation omitted); see also *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). From the record before us, we cannot conclude Stigler has adequately preserved these issues for our review. Therefore, we will not address them.

#### **IV. Ineffective Assistance of Postconviction Counsel**

Stigler argues postconviction counsel was ineffective in two respects: (1) for failing to raise the arguments raised for the first time on appeal regarding the agreement of the parties as it related to the voluntary dismissal, and (2) for failing to file an amended postconviction relief application.

To prevail on his ineffective-assistance-of-counsel claims, Stigler must prove by the preponderance of the evidence that counsel failed in an essential duty and that prejudice resulted. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). In order to show prejudice, Stigler must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). Although ineffective-assistance-of-counsel claims are ordinarily preserved for postconviction relief actions, we will consider them on direct appeal if the record is adequate. *Ceaser*, 585 N.W.2d at 195.

### ***Voluntary Dismissal***

Stigler contends that had his postconviction counsel made the arguments outlined earlier in this opinion, his postconviction action would not have been dismissed on the State's motion for summary judgment. We agree.

It appears from the record that the district court was not privy to the transcript of the September 2004 hearing when it ruled on the State's motion for summary judgment in April 2005. It is clear from the transcript of the hearing and the parties' subsequent actions that the parties implicitly—if not explicitly—agreed Stigler's re-filing would be a continuation of the first action. The key illustration of the parties' agreement is the State's reliance, in the re-filed postconviction relief action, on the summary judgment motion it filed in the initial postconviction relief action. In addition, we find it hard to believe the parties would have agreed to the dismissal without implicitly agreeing that the re-filing would be a continuation of the first action, because the statute of limitations would have already run on Stigler's postconviction relief claims in September 2004.

Postconviction counsel's failure to raise the arguments Stigler raises for the first time on appeal resulted in prejudice. Had counsel raised these arguments before the district court and presented the district court with the transcript from September 2004 proceeding, the result of the proceeding would likely have been different. This is because the district court's alternate ground for dismissal was in error.

The district court alternatively concluded Stigler's postconviction relief claims would have been barred under Iowa Code section 822.8. However, Iowa

Code section 814.7, effective July 1, 2004, applies to save Stigler's ineffective-assistance-of-counsel claims from the application of section 822.8.<sup>3</sup> Therefore, summary judgment was not appropriate in this case.

## **V. Conclusion**

We have no illusions as to what this case is really about. Clearly, this is the case of a defendant who, when given a good deal by the State and the district court, messed up on numerous occasions and landed himself in jail. At that point, he decided something was wrong in the guilty plea process and decided to file his postconviction relief. Nevertheless, we conclude the most prudent thing to do is to send this case back for a hearing. Therefore, we reverse the district court and remand for a full postconviction hearing. We need not address other issues raised by Stigler in this appeal.

**REVERSED AND REMANDED.**

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<sup>3</sup> Iowa Code section 814.7 provides that ineffective assistance of counsel claims need not be raised on direct appeal from the criminal proceedings in order to preserve such claims for postconviction relief purposes. See Iowa Code § 814.7 (2005). Generally, "statutes controlling appeals are those that were in effect at the time the judgment or order appealed from was rendered." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003) (citation omitted); see also *Young v. State*, No. 03-0277 (Iowa Sept. 1, 2004). The district court's order was filed in April 2005, well after the effective date of section 814.7.