IN THE COURT OF APPEALS OF IOWA

No. 6-272 / 02-0886
Filed May 24, 2006

ROBERT L. WRIGHT, JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Applicant Robert L. Wright, Jr. appeals from an order dismissing without prejudice his application for post-conviction relief. **REVERSED AND REMANDED.**

Christina Shriver, Hudson, for appellant.

Robert L. Wright, Jr., Oakdale, pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Applicant Robert L. Wright, Jr. appeals from an order dismissing without prejudice his application for postconviction relief. The district court, in dismissing the application, found there was an order issued directing applicant to pay an $80.00 filing fee within thirty days and that applicant had failed to pay the fee within that time. The Iowa Supreme Court noted on review of the file that applicant had requested to proceed in forma pauperis pursuant to Iowa Code section 610.1 (2001). The court ordered applicant to provide the court with a certified copy of his account balance to demonstrate his ability or inability to pay 20% of the $50.00 appellate docketing fee and the matter would be submitted to the court for consideration. That having been filed, the Supreme Court remanded the case to the district court for the limited purpose of ruling on applicant's request for counsel. In the order on remand the supreme court also directed the parties to brief, in addition to other issues they deem appropriate, the issue of whether the district court exercised its discretion under Iowa Code section 610A.1. The court further provided the parties should address whether applicant's application for postconviction relief implicates a limited, but constitutionally-protected liberty interest, and whether an applicant can be denied the ability to proceed with his application if the applicant has established an inability to pay fees and costs.

In his brief applicant contends (1) his application for postconviction relief was improperly dismissed by the district court, (2) the district court failed to exercise its discretion to waive prepayment of fees and costs under Iowa Code section 610A.1(2), (3) he was denied an opportunity to respond to the proposed

dismissal of his action, and (4) an applicant cannot be denied the opportunity to proceed with his or her application for postconviction relief if he or she has established an inability to pay fees and costs.

The State contends that (1) this postconviction action, filed over four years after applicant's guilty plea, is time-barred and applicant pled nothing to excuse this default, so the district court lacked jurisdiction; (2) applicant's postconviction claims were waived by his guilty plea, failure to file a motion in arrest of judgment, and failure to file a direct appeal; (3) it agrees with the applicant that a postconviction applicant cannot be denied the opportunity to pursue a postconviction application when an inability to pay fees has been shown; and (4) the district court did not abuse its discretion under Iowa Code section 610A.1 by not waiving prepayment of fees and costs.

The State contends the question of whether there is a limited but constitutionally-protected liberty interest that the supreme court said should be briefed is an issue not preserved for review. The State advances that (1) if applicant had properly shown his indigency, he would have been entitled to file a postconviction action without prepayment of fees as a matter of equal protection, and (2) a ruling on the due process issue would likely be merely hypothetical and an advisory opinion on an unripe constitutional issue which, citing *State v Wilson*, 234 N.W.2d 140, 141 (Iowa 1975), the State argues the Iowa appellate courts are loath to give.

BACKGROUND

The file shows that on December 31, 2001 the Black Hawk County clerk's office stamped filed a verified and notarized request to proceed in forma pauperis

in which applicant requested leave to proceed in forma pauperis pursuant to the Post Conviction Procedure Act, Iowa Code chapter 663A. On February 26, 2002, at 10:49 a.m. applicant filed a pro se application for postconviction relief pursuant to Iowa Code Chapter 822. At 10:50 that same day, applicant's previously filed request to proceed in forma pauperis with an "X" through the earlier filing date was stamped filed. The petition for postconviction relief addressed applicant's conviction and ultimate incarceration in Black Hawk County criminal case number FECR 068405. There applicant plead guilty to possession of cocaine with intent to deliver, being a second offender, failure to affix drug tax stamp, and being an habitual offender. The plea was accepted and judgment of guilty was entered on December 19, 1997. Applicant was sentenced to thirty years on count one, fifteen years on count two, and ordered to pay a fine. The execution of the sentence was suspended during good behavior and defendant was committed to the custody, care, and supervision of the First Judicial District Department of Correctional Services for a period of five years with up to one year to be served at the Waterloo Residential Facility.

There was a charge applicant violated his probation filed in September of 1999. A hearing was held in January of 2000 but applicant's probation was not revoked and his placement at the residential facility was reaffirmed. He had another violation in January of 2000 and he was sentenced to the violator's program in June of that year and in April of 2001 his probation was extended. He was again charged with a violation in May of 2001. On November 6, 2001, following a hearing, applicant's probation was revoked and the original sentence was imposed. It is this judgment that applicant challenged in his application for

postconviction relief. He says in his application, "counsel was ineffective, application of habitual applied incorrect, sentence inconsistent with the facts of case, prejudice and problems with the sentencing." His specific explanation of grounds and allegation of facts says "(1) counsel mislead applicant to law and severity, (2) drugs in question under a gram, a small amount, (3) use of prior convictions to enhance, prejudicial, (4) evidence not present, misleading plea bargain by state, (5) vague not in best interest to client and relief, and (6) relied too heavily on tainted and past facts."

CLAIMS TIME BARRED OR WAIVED

We first address the State's claim that applicant's claim is time barred because his plea and sentence was entered more than three years prior to the filing of his application.

Iowa Code Section 822.3. provides in relevant part:

> A proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction or sentence took place. However, if the applicant is seeking relief under section 822.2, subsection 6, the application shall be filed with the clerk of the district court of the county in which the applicant is being confined within ninety days from the date the disciplinary decision is final. *All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.*

(Emphasis supplied).

We agree with the State that those issues surrounding applicant's plea and conviction and initial sentence that could have been raised within three years of December 19, 1997 are time barred. What the State's argument fails to address is that applicant's application indicates the date of judgment of

conviction or sentence he is challenging is a November 5, 2001, probation violation. His application was filed in February of 2002, well within three years of the November sentence. Any claims as to the November 5, 2001 judgment could not have been raised at the time of applicant's conviction as they were not yet known. *See Harrington v. State*, 659 N.W.2d 509, 521 (Iowa 2003). Nor is the record before us sufficient to determine what claims, if any, relate to the November 5, 2001, order and/or whether there are issues raised as to the December 19, 1997 finding of guilt and sentence that were not known to applicant until a later time. An applicant's claims, even if we deem them improbable, require that he be allowed to present whatever proof he may have to support those claims. *See Manning v. State*, 654 N.W.2d 555, 562 (Iowa 2002). We therefore decline the State's invitation to dismiss on this ground.

The State further claims for the first time on appeal that all of applicant's postconviction claims are waived by his guilty plea, failure to file a motion in arrest of judgment, and failure to file a direct appeal. The only issue addressed by the district court in dismissing applicant's application was his failure to pay the filing fee. The record here is insufficient for us to address this claim.

APPLICATION SHOULD NOT HAVE BEEN DISMISSED

We next address applicant's contentions that (1) his application for postconviction relief was improperly dismissed by the district court, (2) the district court failed to exercise its discretion to waive prepayment of fees and costs under Iowa Code section 610A.1(2), (3) he was denied an opportunity to respond to the proposed dismissal of his action, and (4) an applicant cannot be denied the

opportunity to proceed with his or her application for postconviction relief if he or she has established an inability to pay fees and costs.

We review the dismissal of an application for postconviction relief for correction of errors at law. *Brown v. State*, 589 N.W.2d 273, 274 (Iowa Ct. App. 1998). However, to the extent the application raises issues of constitutional infirmity, our review is de novo. *McLaughlin v. State*, 533 N.W.2d 546, 547 (Iowa 1995).

Iowa Code section 610A.1, "Actions or appeals brought by inmates or prisoners," provides in relevant part:

> 1. Notwithstanding section 610.1 or 822.5, if the person bringing a civil action or appeal is an inmate of an institution or facility under the control of the department of corrections or a prisoner of a county or municipal jail or detention facility, the inmate or prisoner shall pay in full all fees and costs associated with the action or appeal.
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> a. Upon filing of the action or appeal, the court shall order the inmate or prisoner to pay a minimum of twenty percent of the required filing fee before the court will take any further action on the inmate's or prisoner's action or appeal and shall also order the inmate or prisoner to make monthly payments of ten percent of all outstanding fees and costs associated with the inmate's or prisoner's action or appeal.
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> 2. *The court may make the authorization provided for in section 610.1 if it finds that the inmate does not have sufficient moneys in the inmate's account or sufficient moneys flowing into the account to make the payments required in this section* or, in the case of a prisoner of a county or municipal jail or detention facility, that the prisoner otherwise meets the requirements of section 610.1.

(Emphasis supplied).

Did the district court abuse its discretion or fail to exercise its discretion under Iowa Code Section 610A.1(2), which provides:

> 2. The court may make the authorization provided for in section 610.1 if it finds that the inmate does not have sufficient moneys in the inmate's account or sufficient moneys flowing into

> the account to make the payments required in this section or, in the case of a prisoner of a county or municipal jail or detention facility, that the prisoner otherwise meets the requirements of section 610.1.

Applicant's Request to Proceed in Forma Pauperis with an X over the December 31, 2001, file stamp and a February 26, 2002 file stamp, requested leave to proceed in forma pauperis and stated applicant had $0.39 in his prison account and no other assets. Applicant signed the request and declared under penalty of perjury that it was true and the request was notarized on December 20, 2001. Attached to the request was a certificate showing applicant had $0.07 on deposit with the warden at the Iowa Medical and Classification Center, Oakdale, Iowa, on December 27, 2001.

Apparently no action was taken on applicant's December request, and when his application for postconviction relief was filed on February 26 of 2002, an X was placed over the December 31, 2001 filing date on his request to proceed in forma pauperis and the request was file-stamped February 26, 2002. Then on the same day the district court entered an order finding the application for postconviction relief had been filed that day together with an application to proceed without prepayment of fees. The court found that either the application to proceed without prepayment of fees showed the applicant had sufficient funds to pay the filing fees and accruing fees or no certificate was attached and the court was unable to determine whether applicant had sufficient funds to pay fees. The court found unless the $80 was paid within thirty days the case would be

dismissed. This order together with a supervisory order from Chief Judge Alan L. Pearson[1] was sent to applicant.

On March 8, 2002, applicant filed a certificate showing he had $2.13 in his account at the Iowa Medical and Classification Center. Then on April 23, 2002, applicant filed with the district court a written document advancing that a forma pauperis was currently on file and he attached a certificate showing he had $0.07 in his account at the classification center on April 19, 2002.

Applicant next contends that he was not given an opportunity to respond to the proposed dismissal of his action.

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for dismissal. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if a material issue of fact exists.

Iowa Code §822.6. Therefore, the court may dismiss an application without oral argument or presentation of evidence unless a material issue of fact exists. While a court need not conduct a trial on the merits, it must afford the applicant an opportunity to respond prior to final disposition. *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994) (citing *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980)).

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[1] The Chief Judge of the First Judicial District on November 26, 1997, entered a "Supervisory Order Applicable to all Civil filings by Inmates and Prisoners" which provided judges may dismiss a civil action or appeal for non payment of fees and cost provided for in Iowa Code Chapter 610A, but made no provision for the judges to make the discretionary call required by 610.1. In assessing this issue we consider the provisions of the Iowa Code, not Judge Pearson's supervisory order.

Applicant contends he was not given notice of the intention to dismiss his application and an opportunity to respond. He argues the only indication that was given of the possible dismissal of the application was the order of February 26, 2002 that said unless the filing fee of $80.00 was paid within thirty days, the case would be dismissed. The order stated that applicant either had sufficient funds to pay the filing fee or no certificate was attached and the court was not able to determine his ability to pay, and as a result he was ordered to pay the eighty dollars.

Applicant argues that while this order may have been sufficient to put him on notice of the court's intentions, it did not adequately provide him an opportunity to respond. He asserts nothing in the order requested a response from him or a date by which to respond. He contends the order left two possibilities, either pay the fee or have the case dismissed, and it did not provide an alternative scenario where applicant might respond by providing further documentation of his indigence and inability to pay to avoid dismissal. Applicant argues he did attempt to provide this information by filing two new certifications, but the case was still dismissed. Applicant contends that three times—once in his initial request to proceed without payment of fees and in his two subsequent certifications—he showed he did not have the money to pay the fee, yet his application was dismissed without opportunity to respond to the intended dismissal.

The State contends that the filing only showed his account at $0.07 on December 27, 2001, some two months prior to filing his postconviction action on February 26, 2002. It argues that section 610A.1(1)(b) requires a certified copy

of the inmate's account balance is to be filed at the time the action or appeal is filed.

What the State's argument ignores is that in assessing whether all fees could be waived we look to section 610.1, which required applicant to file an affidavit stating the nature of the suit and a brief financial statement showing his inability to pay costs, fees, or give security, which is what applicant filed on December 31, 2001.

The district court on February 26, 2002 appeared not to consider applicant's affidavit, nor did the court provide applicant with any opportunity to respond to the order other than paying the $80.00, which the only record made showed he did not have the ability to pay. However, applicant made his own opportunity to respond both by filing two additional certificates showing he did not have the ability to pay and by filing a document alerting the court to the fact he filed the affidavit showing his inability to pay. It appears the district court in dismissing the application gave no consideration to these filings. The district court failed to exercise its discretion in dismissing applicant's application. We reverse and remand to the district court to again consider applicant's request to proceed in forma pauperis. The applicant shall, within twenty days, file with the district court a current financial affidavit and certificate as to any monies available to him in his prison account. The district court shall promptly review his request and in doing so consider what funds if any he has available.

Having so decided, we need not address applicant's other issues.

REVERSED AND REMANDED.