IN THE COURT OF APPEALS OF IOWA

No. 6-275 / 04-1559
Filed June 14, 2006

MARK D. MORGAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Mark D. Morgan appeals from the district court's summary dismissal of his application for postconviction relief. **REVERSED AND REMANDED.**

Scott J. Nelson, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Fred H. McCaw, County Attorney and Christine O. Corken, Assistant County Attorney, for appellee.

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

MILLER, J.

Mark D. Morgan appeals from the district court's summary dismissal of his application for postconviction relief. We reverse and remand.

Pursuant to a plea and sentencing agreement Morgan pled guilty to eleven criminal charges, consisting of charges of lascivious acts with a child, sexual exploitation of a minor, indecent exposure, lascivious conduct, and harassment. He subsequently filed a motion in arrest of judgment. The district court denied the motion. The court entered judgments of conviction and sentenced Morgan to consecutive sentences totaling fifty years imprisonment. Morgan appealed, and this court affirmed his convictions and sentences. *See State v. Morgan*, No. 01-0584 (Iowa Ct. App. July 19, 2002).

Morgan thereafter filed various post-judgment actions, including one or more applications for postconviction relief, a petition for writ of certiorari in the Iowa Supreme Court, and a petition for writ of habeas corpus in the United States District Court. After those claims for relief were denied, and any appeals dismissed, Morgan filed this current application on August 8, 2004. On August 10, 2004, the district court entered an order providing the State thirty days to respond to Morgan's application, and further stating that the file would then be returned to the court for review. The State apparently did not answer or otherwise respond to Morgan's application or the court's invitation for a response. On September 13, 2004, the court summarily "denied" Morgan's application, finding he "has already filed an application for post conviction relief on the same grounds and it was dismissed on February 5, 2003."

Morgan appeals, contending the district court erred in summarily dismissing his application. He concedes that all but one of the grounds raised in the application have either previously been raised or were available at the time he filed a previous application of postconviction relief and are thus barred by Iowa Code section 822.8 (2003). He points out, however, that one ground alleged in his current application claims the existence of "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice," "evidence that could, and would have exonerated the Applicant of all criminal charges had it not been suppressed by the state." Morgan claims the court's summary disposition of his application contravened principles related to summary judgment and denied his right to due process of law.

"Postconviction proceedings are law actions ordinarily reviewed for errors of law. But when the basis for relief is a constitutional violation, our review is de novo." *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003) (citations and quotations omitted).

Two methods, one of which is disposition on the court's initiative, are available for summary disposition of a postconviction relief application. Iowa Code § 822.6; *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). Disposition on the court's initiative is not permitted if a material issue of fact exists. *See* Iowa Code § 822.6 (second unnumbered paragraph) ("Disposition on the pleadings and record is not proper if a material issue of fact exists.").

In his verified application Morgan alleges the existence of newly discovered exculpatory evidence that had been suppressed by the State.

Although Morgan's application raised certain grounds that had been raised in a previously dismissed application, nothing in the record presented on appeal shows, and thus apparently nothing in the record before the district court at the time of its challenged action showed, that Morgan had raised the present claim of "newly discovered evidence" in a previously dismissed application.

The State argues that by pleading guilty Morgan has waived his claim regarding suppression of exculpatory evidence. We find no merit to this argument, as suppression of material, exculpatory evidence violates a defendant's right to due process of law by, through no fault of counsel, depriving the defendant of effective assistance of counsel and rendering a plea of guilty involuntary and unintelligent. *See Zacek v. Brewer*, 241 N.W.2d 41, 47-54 (Iowa 1976).

The State further argues Morgan has "waived error" by not specifying what evidence he relies on, that his allegation "is not specific enough to satisfy the relevancy test established in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003)," and that he thus "cannot avoid the bar posed by Iowa Code section 822.8 (2005)." The cited portion of *Harrington*, however, deals with what the applicant "must show" at trial to avoid a statute of limitations defense, see 659 N.W.2d at 520-21, and does not address what an applicant must allege to avoid summary dismissal.

We resolve in favor of the applicant any doubt whether an application asserts a new legal basis for granting relief. *Zacek*, 241 N.W.2d at 46. We conclude that under the state of the record as it existed at the time the district

court dismissed Morgan's application the allegations of the application were sufficient to withstand the summary dismissal ordered by the court.

We conclude the district court erred in summarily dismissing Morgan's application.[1] We therefore reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

[1] In view of this conclusion we need not and do not address the question of whether the district court also erred in dismissing Morgan's application without giving notice of its intention to dismiss, stating reasons for the intended dismissal, and giving Morgan an opportunity to reply to the proposed dismissal. *See* Iowa Code § 822.6; *see also Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980) ("The common thread which runs through paragraphs two and three of section [822.6] is that of protecting the applicant from having his application dismissed by the court without an opportunity to resist in some manner, either at hearing before the court or through an opportunity to reply to a court-proposed dismissal."); *Dodd v. State*, 232 N.W.2d 472, 473-74 (Iowa 1975) (holding trial court erred in dismissing application for postconviction relief on its own initiative without giving notice of its intention to do so).