

IN THE COURT OF APPEALS OF IOWA

No. 6-717 / 06-0166
Filed October 11, 2006

JASON ROSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Jason Ross appeals the district court's ruling dismissing his application for postconviction relief. **AFFIRMED.**

Todd Miller, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, John Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Jason Ross appeals the district court's ruling dismissing his application for postconviction relief. He claims both his trial attorney and his first postconviction relief attorney rendered ineffective assistance of counsel when they failed to assert claims regarding his psychological condition. We affirm.

I. Background Facts and Proceedings

On June 7, 2001, Ross pleaded guilty to three counts of third-degree sex abuse and one count each of first-degree burglary, willful injury, and assault on a peace officer causing injury. At his plea hearing, the following colloquy took place:

THE COURT: Are you under the care of any physician, psychiatrist, or therapist at this time?

ROSS: No.

THE COURT: Are you taking any medication for any reason at all?

ROSS: No.

...

THE COURT: Are you suffering any ill effects at this time from your substance abuse?

ROSS: I don't believe so, no.

THE COURT: And as you stand here today, are you clearheaded and know what is going on?

ROSS: Yes, sir.

THE COURT: Have you had sufficient time to talk to Mr. Lipman about your case?

ROSS: Yes, sir.

THE COURT: Are you satisfied with his services?

ROSS: Very.

Ross waived a presentence investigation report and did not file a motion in arrest of judgment. He was sentenced to an indeterminate term of incarceration not to exceed forty-two years. He did not appeal.

Ross filed a pro se application for postconviction relief raising several claims of ineffective assistance of counsel. One of them alleged the court was unaware of his psychological condition. Ross claimed he was not given his prescribed psychological medications while he was at the Polk County Jail. The State filed for summary judgment. At the hearing, Ross's counsel did not address the issue of Ross's psychological condition. The district court determined that Ross had been fully and clearly advised of his rights prior to pleading guilty, but did not specifically address his claim regarding the medication. Ross appealed. His appeal was dismissed as frivolous.

Ross filed a second application for postconviction relief on April 25, 2005. Again, he alleged both his trial counsel and his first postconviction relief counsel were ineffective for failing to raise the issue of his mental condition. His court-appointed attorney, however, filed a report to the court stating that Ross's application was frivolous. In response to the court's intent to dismiss, Ross claimed he was confused at the time of his plea. He offered no other support for his claim. The court dismissed his action on January 10, 2006, and stated in part:

The Iowa Supreme Court and the petitioner's original appellate attorney both determined that the Iowa District Court was correct in dismissing the original PCR matter on procedural and issues preservation grounds. Even if petitioner's PCR attorney's level of representation fell below the normal standard of care, the outcome of the case would not have changed. When the petitioner entered his guilty plea and was sentenced, he waived his right to file a motion in arrest of judgment. He also did not file a direct appeal. His procedural issue will also remain as an obstacle to a successful second PCR action. The record would also show that the plea was made voluntarily, knowingly and intelligently and therefore petitioner would not be able to show prejudice. In essence, the outcome would not change.

Ross appeals.

II. Standard of Review

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when ineffective assistance is alleged, we review de novo. See *Nguyen v. State*, 707 N.W.2d 317, 322-23 (Iowa 2005). We also review claims of ineffective assistance of postconviction counsel de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

III. Merits

Ross raised his allegation in his first postconviction relief application, but failed to file a rule 1.904(2) motion to amend or enlarge the court's findings with regard to his claim. As a result, he has waived his argument. See *Meier v. Senecaut*, 641 N.W.2d 532, 541 (Iowa 2002) (holding failure to call court's attention to its failure to consider an issue constitutes waiver of the issue).

Even if we were to consider Ross's allegations, he has consistently failed to put forth facts to support his claims. Once the State files for summary judgment, it is up to the plaintiff to provide proof regarding his or her previous failure to raise the claim. *Rivers v. State*, 615 N.W.2d 688, 689 (Iowa 2000); see Iowa Code § 822.8 (2005). In other words, when the State moves for summary judgment, "it becomes necessary [for the plaintiff] to provide specific facts rather than mere legal conclusions." *Rivers*, 615 N.W.2d at 689. Ross has not provided those facts.

In addition, Ross's reliance on *State v. Boge*, 252 N.W.2d 411 (Iowa 1977), and *State v. Munz*, 382 N.W.2d 693 (Iowa Ct. App. 1985), to support his appeal is misplaced. Those cases are easily distinguishable in that the district court failed to make any plea inquiry concerning the defendant's medical condition. With regard to Ross, the colloquy clearly and thoroughly covers his medical condition as well as the use of any medications. We agree with the district court that prejudice could not be established.

For these reasons, the district court's ruling dismissing his application for postconviction relief is affirmed.

AFFIRMED.