IN THE COURT OF APPEALS OF IOWA

No. 7-429 / 06-1272
Filed August 8, 2007

TYLER L. REYNOLDS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Applicant Tyler L. Reynolds appeals from the district court's dismissal on the State's motion for summary disposition of his petition for postconviction relief. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill R. Pitsenbarger, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Applicant Tyler L. Reynolds appeals from the district court's dismissal on the State's motion for summary disposition of his petition for postconviction relief. Reynolds contends the matter should be reversed for further evidentiary proceedings. We affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND. Reynolds was convicted of kidnapping in the second degree, robbery in the first degree, burglary in the first degree, going armed with intent, assault while participating in a felony, conspiracy to commit kidnapping, robbery, assault, theft or burglary, and theft in the first degree. The State alleged that Reynolds entered the home of jewelry store owner, David Levin, with an accomplice, Gina Taylor. The State further alleged that Taylor confined Levin at his home while Reynolds robbed Grand Jewelers with the help of another accomplice, Jennifer Stewart, and that the three subsequently sold the jewelry at various pawn shops across the country over a several month period.

Reynolds contended on direct appeal that: (1) the guilty verdict was contrary to the law and evidence presented at trial, and the district court erred by not granting his motion for a new trial, (2) his constitutional right to confrontation was violated, (3) the district court erred by admitting into evidence two notices of alibi defenses, and (4) he was entitled to a new trial because of prosecutorial misconduct.

We affirmed Reynolds's convictions finding that (1) the verdict was not contrary to the law and evidence presented at trial and the district court did not

abuse its discretion when it found the jury's verdict was not contrary to the weight of the evidence, (2) Reynolds's constitutional right to confront witness Stewart was not violated, and (3) the admission of the notices of Reynolds's alibi defenses was not so prejudicial as to require reversal. *State v. Reynolds*, No. 01-1067 (Iowa Ct. App. Dec. 11, 2002). We did not address Reynolds's claim of prosecutorial misconduct, noting he failed to preserve error on that issue. While he objected to the prosecutor's offer of alleged prior bad act evidence on relevance grounds, he did not claim in the district court that the prosecutor's conduct rendered the trial unfair.

Reynolds next filed the petition for postconviction relief that led to this appeal. The State filed a motion for summary disposition seeking dismissal of the action. The district court granted the motion after an unreported hearing. Reynolds was not present at the hearing and claims he had no notice it would be held. It is somewhat unclear as to what the district court reviewed prior to entering its ruling.

Reynolds contends the district court erred in granting the motion and dismissing the case for there are fact questions which require an evidentiary hearing. He contends the district court should not have summarily dismissed his claims that the attorney who served both as his trial and appellate counsel was ineffective by (1) failing to preserve error on the claim of prosecutorial misconduct, (2) failing to withdraw the notices of his alibi defenses, (3) failing to object to a statement referred to as the "Holyfield statement" and failing to impeach an officer with a recording of his interview, (4) failing to move to strike

the testimony of Stewart after she invoked her Fifth Amendment right, (5) failing to challenge a juror for cause or failing to strike the juror from the panel, (6) not requesting the removal of jurors who spoke with the alleged victim during a break in the trial, (7) failing to inform Reynolds that all claims of ineffective assistance of trial counsel must be raised on direct appeal or waived, (8) failing to file an application for further review by the supreme court of our opinion in his direct appeal, and (9) failing to raise a motion for mistrial issue on direct appeal.

SCOPE OF REVIEW. We review postconviction relief actions involving statutory questions for errors at law. *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996); Iowa R. App. P. 6.4. When there is an alleged denial of constitutional rights, such as a claim of ineffective assistance of counsel, we review the totality of the circumstances in a de novo review. *Osbom v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

FAILURE TO HOLD AN EVIDENTIARY HEARING. Reynolds contends that because of the failure to hold an evidentiary hearing we should reverse the district court in total and remand for an evidentiary hearing.

We agree with Reynolds that Iowa Code section 822.7 provides for a trial on the merits of a postconviction relief application. Iowa Code § 822.7 (2005); *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). Section 822.7 provides that (1) a record of the proceedings shall be made and preserved, (2) all rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties, (3) the court may receive proof of affidavits, depositions, oral testimony, or other evidence, and (4) the court may

order the applicant brought before it for the hearing. Iowa Code § 822.7. Additionally, the statute requires that after the hearing, the court shall make specific findings of fact and conclusions of law relating to each issue presented and then enter an appropriate order. *Id.*

However, section 822.6 provides for a summary disposition of a postconviction relief application. It provides in relevant part:

> The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Iowa Code § 822.6. The goal of this provision "is to provide a method of disposition once the case has been fully developed by both sides, but before an actual trial." *Manning*, 654 N.W.2d at 559. Disposition under this provision is analogous to the summary judgment procedure provided for in Iowa Rules of Civil Procedure 1.981-1.983. *Id.*; *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). The principles underlying summary judgment procedure apply to motions of either party for disposition of an application for postconviction relief without a trial on the merits. *Manning*, 654 N.W.2d at 560; *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994). The rules for summary judgment apply to a motion for summary disposition under paragraph three of section 822.6. Those rules provide that summary judgment is only proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987). The moving party has the burden of showing the nonexistence of a material fact and the court is to

consider all materials available to it in the light most favorable to the party opposing summary judgment. *Knudson v. City of Decorah*, 622 N.W.2d 42, 48 (Iowa 2000); *Behr*, 414 N.W.2d at 341. A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. *Behr*, 414 N.W.2d at 341. With this in mind we address Reynolds's arguments separately, mindful that to prove trial counsel was ineffective the defendant must show counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

FAILURE TO PRESERVE ERROR. We found on direct appeal that Reynolds's trial attorney failed to preserve error on his claim of prosecutorial misconduct. In his affidavit Reynolds states that during the trial the prosecutor, among other things, asked questions that prompted testimony that Reynolds was in custody or jail on other charges and that Reynolds was out on bail and had been convicted of a different crime. The State also argues that Reynolds's trial attorney had no duty to preserve error because there was no error to preserve. The State further claims, citing *State v. Oppedal*, 232 N.W.2d 517, 527 (Iowa 1975), that the challenged evidence was admissible to explain the complete circumstances of the crimes in this case.

Reynolds further contends the prosecutor improperly told a witness to assert her Fifth Amendment rights. The State contends Reynolds's claim for postconviction relief on this ground should fail for he has not shown evidence that

would support a finding he was prejudiced by his attorney's failure to preserve error on this issue.

The district court did not appear to directly address this claim or make any specific findings supporting its dismissal. We cannot say the State has met its burden to show there were no genuine issues of material fact on this issue. *See Manning*, 654 N.W.2d at 561. The district court should not have summarily dismissed this claim.

ALIBI NOTICE. Reynolds's claim that the admission of certain alibi notices was error was raised and addressed on direct appeal. We found the admission of the notices was not so prejudicial as to require reversal. To succeed on a claim of ineffective counsel on this issue Reynolds would need to show prejudice. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The issue of showing prejudice has been adjudicated against Reynolds on direct appeal. Iowa Code section 822.8 precludes an applicant from raising a ground in a postconviction proceeding that was finally adjudicated. *See Jones v. Scurr*, 316 N.W.2d 905, 907 (Iowa 1982). A summary dismissal of this claim was correct.

HOLYFIELD ISSUE. A police officer testified at trial that during an interview with Reynolds, Reynolds told the officer he was "going to take his chances; and if he gets the right jury, he's going to see if he can pull a Holyfield." The officer was allowed to testify over a relevance objection that he believed the statement made by Reynolds was a reference to a recent boxing match between Evander Holyfield and Lennox Lewis where Holyfield won the decision and

retained his championship even though most boxing professionals believed Lennox had won the fight. Reynolds contends that his attorney should have objected to the opinion as an impermissible opinion and should have sought to impeach the testimony with a recording of the interview which Reynolds contends would have shown he never made the statement. Reynolds also contends the statement he was alleged to have made was an implied admission and the admission was prejudicial. The State contends the evidence was cumulative as there was evidence when a police officer told Reynolds that authorities knew he was involved Reynolds said, "You can't prove it. You can't place me there physically." The State contends this too was an implied admission on the part of Reynolds.

Reynolds contends in his response to the State's motion that he told his trial attorney the detective was lying and his attorney did not request or obtain a copy of the recording to impeach the detective's testimony.

The State has not met its burden to show there are no genuine issues of material fact on this claim. *See Manning*, 654 N.W.2d at 561. The district court should not have summarily dismissed it.

CONFRONTATION. Reynolds claims his trial attorney was ineffective by failing to move to strike the testimony of accomplice Stewart after she invoked her privilege against self-incrimination while being cross-examined by the defense. This court addressed and adjudicated this claim on direct appeal, finding Reynolds failed to show prejudice. To succeed on a claim of ineffective counsel on this issue Reynolds would need to show prejudice. *Strickland*, 466

U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. We found on direct appeal this failure was not prejudicial to Reynolds. Iowa Code section 822.8 precludes an applicant from raising a ground in a postconviction proceeding that was finally adjudicated. *See also Jones*, 316 N.W.2d at 907. We affirm the dismissal of this issue.

CHALLENGED JUROR. Reynolds contends his trial attorney should have challenged or struck a juror from the panel because the juror knew a police officer who would testify in the case. The officer had helped the juror with a Boy Scout activity but the juror had not seen the officer for eight or more years. The juror said he would judge the credibility of the police officer the same as the other witnesses and he did not believe that police officers were more trustworthy than other witnesses or that their memories were superior to other persons.

The State argues Reynolds cannot show his attorney was ineffective on this issue because an attorney is not ineffective for failing to advance a position with no merit and there was no reason to sustain the challenge for cause. The State correctly notes that (1) the trial court has considerable discretion in acting on challenges to prospective jurors, *see State v. Grove*, 171 N.W.2d 519, 520 (Iowa 1969), and (2) the fact a juror knows a witness is not a basis for a challenge for cause. Iowa R. Crim. P. 2.18(5) (detailing grounds of challenges for cause); *see also State v. Sommer*, 249 Iowa 160, 175-76; 86 N.W.2d 115, 124-25 (1957).

What this argument misses is that the juror could have been removed from the jury by the exercise of one of Reynolds' strikes. We cannot say the State proved there was not a factual issue on this claim.

CHALLENGE TO JURY PANEL. Reynolds next complains his attorney was ineffective by failing to object to an exchange between the victim and four jurors. The victim asked the jurors if they were tired and said the evidence would be concluding soon. One of the jurors said he hoped that was the case. Reynolds's trial attorney moved for a mistrial on the basis of this exchange. He did not ask that the respective jurors be dismissed and Reynolds now contends his trial attorney should have done so. He further contends his attorney should have raised the issue of the district court's failure to grant a mistrial on direct appeal.

We review the court's ruling on such motions for an abuse of discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). We will not find an abuse of discretion "unless the defendant shows that the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable." *Id.* An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *Id.* The district court did not find any prejudice and admonished the jury to reach a verdict based on the evidence and instructions.

Reynolds's attorney stated he would not move to strike any particular juror as there were four in the group and there were only three alternates. The challenge was adequately put to the district court in the motion for a mistrial. A

mistrial is appropriate when "an impartial verdict cannot be reached" or the verdict "would have to be reversed on appeal due to an obvious procedural error in the trial." *Id.* at 902. There is no showing that the district court abused its discretion in denying the mistrial. We affirm dismissal on this issue.

APPELLATE ISSUES. Reynolds contends that as appellate counsel his attorney was ineffective by (1) failing to inform him that all claims of ineffective assistance of trial counsel need to be raised on direct appeal, (2) failing to ask for further review by the Supreme Court of our decision, and (3) failing to appeal the refusal of the district court to grant a mistrial. We addressed the third issue above and found it to be without merit. The first issue is also without merit. Reynolds cannot show prejudice, as the State has conceded that because Reynolds was represented by the same attorney at trial and on direct appeal, he was not required to raise ineffectiveness of trial counsel on direct appeal. Reynolds has failed to show evidence his attorney was ineffective in not filing an application for further review. The only evidence as to the outcome of a possible further review application is an affidavit of his trial and appellate attorney that there were no grounds to support further review. The district court properly dismissed these claims.

We affirm the district court's dismissal of all of Reynolds' claims except those that his trial attorney failed to (1) preserve error on the claim of prosecutorial misconduct, (2) failed to object to the reference to the Holyfield statement and obtain a recording of the interview, and (3) failed to strike the juror from the panel who knew the police officer witness. As to these issues we

remand to the district court to hold an evidentiary hearing and make findings of fact and conclusions of law on each issue raised. *See Jones v. State*, 731 N.W.2d 388, 392 (Iowa 2007); *Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006). We do not retain jurisdiction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.