

IN THE COURT OF APPEALS OF IOWA

No. 7-543 / 06-1434
Filed October 12, 2007

TIMOTHY D. JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Amanda P. Potterfield, Judges.

Timothy D. Jones appeals the district court's denial of postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Harold Denton, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Timothy D. Jones appeals the district court's denial of postconviction relief (PCR). He argues the district court erred in refusing to address his pro se claims and alternatively seeks relief due to ineffective assistance of counsel. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

In April 2001, Jones was charged with sexual abuse in the second degree. He faced the possibility of serving eighty-five per cent of a twenty-five year sentence. After a hearing, the court granted Jones's application for reduced bond. On May 31, 2001 Jones pled guilty to the reduced charge of sexual abuse in the third degree. On June 7, 2001 he was sentenced to an indeterminate, ten-year sentence without a mandatory minimum. Jones did not file a direct appeal.

On December 13, 2001 Jones filed a pro se application for postconviction relief alleging his confession was coerced and containing other vague complaints. He also filed an application seeking appointed counsel. On January 16, 2002 Jones filed a pro se request for the production of documents seeking medical records, police reports, and county attorney papers. In April 2002, the court appointed an attorney for Jones and ordered the clerk to provide filed documents to the PCR attorney.

On May 28, 2002 Jones filed a pro se request for production of the identical documents sought in his January request. The court ruled on Jones's production request on June 11, 2002. Noting the prior order appointing counsel

specified all motions, pleading, notices and other requests shall be made by the attorney, the court ruled the court-appointed attorney, not Jones, should seek any further documents needed.

In September 2002, Jones wrote to a Judge Russell requesting action on his discovery requests. On October 1, 2002 the court ordered the letter be provided to Jones's attorney so the attorney could proceed with discovery. Jones again wrote to Judge Russell in December 2002 seeking documents and the court again entered an order that any request for discovery or documents had to come from the court-appointed attorney.

In May 2003, Jones filed a pro se amendment setting forth additional grounds for postconviction relief: (1) Sixth Amendment violation due to not being offered the right to waive a speedy trial; (2) Eighth Amendment violations claiming excessive bail and cruel and unusual punishment because his sentence was excessive; and (3) Fourteenth Amendment violations due to lack of investigation by his attorney and due to statements at the sentencing hearing by the victim's mother he claimed libeled and slandered him. Jones simultaneously filed a request for transcripts. The amended petition was accepted and the court ruled the discovery request had to be made through Jones's attorney.

In June 2003, Jones filed a pro se motion for default judgment. The court ordered that any motions had to come from his attorney.

In September 2003, Jones wrote a letter to Judge Russell asking him to rule on the PCR case. On October 10, 2003 Jones's attorney filed a motion for discovery that was much broader than Jones's pro se discovery motion and

would include the medical records, police reports, and county attorney papers sought by Jones's pro se request.

In April 2004, the PCR attorney applied to take depositions at public expense, including the deposition of the five-year-old victim. On June 11, 2004 Jones's PCR attorney deposed Jones's trial attorney.

In November 2004, Jones's PCR attorney filed a second amendment to the PCR application. This amendment alleges Jones's attorney had been ineffective in discovery and investigation and ineffective in not moving to suppress statements Jones made to the police.

On April 25, 2005 the State resisted Jones's efforts to depose the victim. In June 2005, the court denied the motion to depose the child, ruling Jones had been allowed to plead to a reduced charge in exchange for his agreement not to engage in prolonged discovery, including a deposition of the young victim.

In February 2006, Jones's PCR attorney moved to withdraw from the case stating, after his investigation of the claims, there was no use in further pursuing the matter. The court denied the motion.

A hearing on Jones's application for PCR was held on June 29, 2006. Due to the sex offender registry provisions, Jones wanted his PCR complaints processed even though he had discharged his sentence. The deposition of the trial attorney was entered into evidence. Jones's PCR attorney was unable to contact Jones by letter or phone, so Jones was not a witness. The PCR attorney noted that up until a few months before the hearing, Jones would call him periodically, but those calls had stopped. The parties jointly asked the court to take judicial notice of the underlying criminal case file.

On August 17, 2006 the court issued a ruling denying Jones's application for postconviction relief.

II. SCOPE AND STANDARDS OF REVIEW.

Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134, 131 (Iowa 2001). However, when the petitioner alleges ineffective assistance of counsel, we review that claim de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007). To prove ineffective assistance of counsel, the appellant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted." *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). There is a presumption the attorney acted competently, and prejudice will not be found unless there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998).

III. MERITS.

A. PRESERVATION OF ERROR.

Initially, we must address the lack of a direct appeal by Jones. The State argues Jones has waived all his claims for postconviction relief by his failure to challenge his plea on direct appeal. We disagree.

On July 1, 2004, Iowa Code section 814.7 became effective and provides an ineffective assistance of counsel claim "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes." Iowa Code § 814.7(1). While Jones's underlying criminal plea and PCR initial complaint both occurred before the statute became effective, the district court's PCR judgment occurred after the effective date.

The Iowa Supreme Court's decision in *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007), is controlling. The *Hannan* court noted most statutes are presumed to be prospective in application; however, courts may apply remedial or procedural statutes retroactively. *Id.* at 51. Concluding section 814.7 is the Iowa "legislature's attempt to fix a procedural wrong," the statute should be applied retroactively. *Id.* Therefore, Jones's lack of a direct appeal does not prevent a determination of his PCR issues concerning ineffective counsel.

B. PRO SE CLAIMS.

Jones claims his pro se claims were not adequately addressed by the district court, citing *Gamble v. State*, 723 N.W.2d 443 (Iowa 2006). The *Gamble* court rejected the common trial practice of having court appointed counsel evaluate the merits of the pro se client's claims and issue a report to the court. *Id.* at 446. This procedure was not utilized in the present case.

The *Gamble* court also discussed the requirements of section 822.7 requiring district courts to make findings of fact and conclusions of law. "[W]e have said that substantial compliance is sufficient. Even if the court does not respond to all of the [pro se] applicant's *allegations*, the ruling is sufficient if it responds to all the *issues* raised." *Id.* (emphasis in original).

Jones claims error occurred because the court did not specifically respond to his numerous pro se requests for discovery, his numerous letters, his motion for default judgment and the constitutional issues asserted in his amended PCR application. While a better practice might have been to respond directly to the merits of each of the numerous discovery requests and letters, no prejudicial

error occurred because the discovery motion eventually filed by Jones's PCR attorney was broader than Jones's pro se request for specific documents. Additionally, Jones's non-discovery pro se issues were sufficiently addressed in the court's final ruling on the PCR application as discussed below.

First, the trial court sufficiently detailed the *issues* raised in Jones's two pro se applications for PCR:

Mr. Jones' original Application makes a claim that his confession was coerced and involuntary as a result of a promise of leniency given by the interrogating officer. He also makes reference to "Pamela Sue Jones," "Rule 412 of the State and Federal Rules of court procedure," and a "9-year-old boy." An Amendment to Post-Conviction Relief alleges that Mr. Jones' Sixth Amendment right to speedy trial was violated because he was not offered the right to waive a speedy trial; that his Eighth Amendment rights were violated when he was held on excessive bail and subjected to cruel and unusual punishment, and that his Fourteenth Amendment rights were violated when his trial counsel failed to investigate the accusations, and when the victim's mother made her victim impact statement at sentencing, subjecting him to libel and slander.

Second, the trial court's findings of fact were specific and meet the *Gamble* standard of substantial compliance. The court detailed the discussions Jones had with his attorney concerning the waiver of speedy trial and the fact the attorney had prepared and discussed such a waiver with Jones. The court discussed the conversations with the attorney regarding the confession being coerced, discussed the police interview of Jones's brother-in-law, and noted the existence of a family feud. The district court also stated:

[The attorney] discussed with Mr. Jones the advantages and disadvantages of challenging the confession and the search of his apartment and of deposing the witnesses in light of the plea offer. In his opinion, a motion to suppress a confession made after a valid *Miranda* warning and a motion to suppress items seized after a consent search would have little likelihood of success. There were

numerous conversations between Mr. Jones and his lawyer, which were emotional, but in which Mr. Jones seemed aware of his options. [The criminal attorney], an experienced defense attorney, made it clear to Mr. Jones that he would follow through on all the motions and the depositions, if Mr. Jones chose to relinquish the plea bargain. Mr. Jones had recently discharged a five-year prison sentence and was very aware that he would serve 85% of a 25-year sentence if he were convicted of Sexual Abuse in the Second Degree.

Third, the trial court's conclusions of law respond to all the pro se issues raised by Jones. After a lengthy discussion, with citations, of the legal standards applicable to PCR, the court ruled:

Here defense counsel acted well within the range of competence with regard to the advice he gave Mr. Jones and Mr. Jones' decision to plead guilty. Counsel investigated basic components of the State's case, discussed it with his client, and obtained an advantageous plea bargain. The undisputed evidence is that Mr. Jones made an informed decision to take advantage of the plea offer rather than to engage in further discovery, depositions or challenges to the evidence. Courts are unwilling to engage in second-guessing and hindsight, where an attorney has made a strategic decision after a competent investigation. (citations omitted).

Mr. Jones has failed to prove that his lawyer was ineffective, or that he suffered prejudice as a result of his attorney's actions or inactions. His claims regarding speedy trial, excessive bail, libel and slander are without merit and are overruled.

The trial court's ruling described the pro se issues raised by Jones, made specific and detailed findings of fact, and reached a legal conclusion on the pro se issues. We conclude the district court substantially complied with section 822.7 as required in *Gamble*.

C. INEFFECTIVE ASSISTANCE OF COUNSEL.

Jones makes a general allegation that his PCR attorney had a duty to litigate and preserve the issues previously addressed in his appellate brief. He

makes this claim only if this court finds any of the issues were not preserved for appellate review. Because we found these issues were preserved and we have addressed them, we do not address any claim of ineffective assistance of PCR counsel.

AFFIRMED.