IN THE COURT OF APPEALS OF IOWA

No. 8-317 / 07-0888
Filed October 1, 2008

DANA RONALD WOOLISON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals the district court's denial of postconviction relief. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Dana Woolison appeals the district court's denial of postconviction relief arguing newly-discovered evidence requires a new trial. We affirm.

I. Background Facts and Proceedings.

Our decision upholding Woolison's criminal convictions details the case background:

> Nicole Hythecker took her [three-year-old] son, Dylan, to the doctor on November 8, 2000. Dylan's presenting injuries included discoloration of the eyes, a bruise to the jawbone, a bruise to the left temple, a scratch on the left eyelid, bruises on the chest, a distended and bruised abdomen, a bruise on the penis, an abrasion on the lower spinal column, tenderness with palpation to the head, a bite mark on the left side of the neck, and a healing burn on the right hand. After further examination, more injuries were discovered. These injuries included healing fractures of the right radial and ulnar bones, fracture of the left tibia, and a skull fracture on the right side of his head. The distended and bruised abdomen led to a diagnosis of a lacerated pancreas. Dylan was transferred to the University of Iowa Hospitals, and was eventually released on December 22, 2000.
>
> Nicole's live-in boyfriend, Dana Woolison, was charged with willful injury and child endangerment-multiple acts. Trial was held in May, 2001, and Woolison was found guilty on both charges. He was sentenced to ten years for willful injury and fifty years for child endangerment.

State v. Woolison, No. 01-1071 (Iowa Ct. App. April 30, 2003).

Hythecker was also convicted in the joint criminal trial. Subsequently, Hythecker was represented by attorney Valainis in child in need of assistance (CINA) and termination of parental rights proceedings. During this process, in August 2001, Valainis's paralegal obtained an affidavit from Kelly Toepfer. Toepfer is Hythecker's mother and Dylan's grandmother. The affidavit was made for general use in the juvenile court proceeding.

In 2003 Woolison sought postconviction relief arguing new evidence in the Toepfer affidavit entitled him to a new trial. Relief was denied after an evidentiary hearing in 2007 and Woolison appeals.

II. Scope of Review.

Postconviction relief proceedings are not criminal proceedings, but rather are civil proceedings "triable at law to the court." *Jones v. State,* 479 N.W.2d 265, 269 (Iowa 1991). Generally, we review postconviction relief proceedings for errors at law. *Ledezma v. State*, 626 N.W.2d 134,141 (Iowa 2001). "We give weight to the lower court's findings concerning witness credibility." *Id.*

III. Merits.

Under Iowa Code section 822.2(4) (2003), an applicant may seek postconviction relief if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." The Iowa Supreme Court has interpreted section 822.2(4) to require an applicant to establish four elements before a new trial will be granted:

> (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted.

Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998).

Toepfer did not testify at the postconviction hearing. The first part of her 2001 affidavit states her trial testimony was affected by statements made by both a DHS employee and a Davenport police investigator. The district court ruled:

> [Toepfer] is not specific about what portion of her testimony at trial was incorrect. The affidavit is thus not a retraction or recantation of

> any of her testimony. If it were a recantation it would be treated with great skepticism under Iowa law.

We find no error in the district court's conclusion.

The second part of the affidavit sets out statements Dylan allegedly made to Toepfer shortly after the criminal trial. Toepfer states: "Dylan told me that the doctors told him 'Dana did it.' However, Dylan told me specifically that Dana Woolison did not hurt him, rather, that he fell down the steps." Toepfer also asserts the November injuries were caused by Dylan falling off a bed because Dylan told her "I already fell off the bed, at my old house."

The district court ruled Dylan's post-trial statements to Toepfer were hearsay, could only be admitted for impeachment purposes, and would not change the result of the trial. We agree.

Woolison has failed to establish a right to a new trial by failing to meet three of the four elements identified in *Summage*. First, "by definition, newly-discovered evidence refers to evidence which existed at the time of the trial," and subsequent acts or events "do not generally qualify as newly-discovered evidence." *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). Woolison's trial occurred in May 2001 and the affidavit, created in August 2001, did not exist in May. Additionally, the statements by Dylan allegedly exonerating Woolson were made after the trial and are subsequent events.

However, Iowa has an exception to the requirement the evidence exist at the time of trial. "It is found in extraordinary cases when an 'utter failure of justice will unequivocally result' if the new evidence is not considered or where it is no longer just or equitable to enforce the prior judgment." *Id.* at 185.

Our review of the record reveals the "extraordinary exception" does not apply in this case. The affidavit attributes Dylan's injuries to a fall down steps and falling off a bed. Woolison and Hythecker also suggested these explanations as the causes of Dylan's injuries and these explanations were rejected at trial. The overwhelming medical evidence showed Dylan suffered numerous severe injuries in different stages of healing when he was hospitalized for a life-threatening injury to his pancreas. The medical evidence revealed falls would not have generated enough force to cause Dylan's injuries.

Additionally, the affidavit's subsequent and cumulative evidence concerning falls does not address the abuse evidenced by the adult bite marks found on Dylan's neck or the burn on the back of his hand. Dylan told a doctor Woolison burned him. Dylan's relatives were so concerned about him they contacted the Iowa Department of Human Services at the end of September, over a month before his November hospitalization. Dylan's mother testified Dylan was in Woolison's care only during the last week before his November hospitalization. Hospital staff observed Dylan demonstrated a great fear of Woolison. As stated by Dr. Bishop:

> [Dylan] had a constellation of injuries none of which could be explained by a single event including a very large skull fracture, fractures of the right arm and left leg, history of multiple bruises observed on his body and more superficial scratches and then the very severe pancreatic injury. All of those things occurring in one child – which had obviously occurred at different points in time as well – point toward a pattern of injury that is very strongly suggestive if not even diagnostic of child abuse.

We conclude this is not the extraordinary case where it is no longer just or equitable to enforce the prior judgment.

Second, Woolison has failed to prove the evidence is not merely cumulative or impeaching. The statements the affidavit attributes to Dylan are inadmissible hearsay and this "evidence, given its greatest possible weight, has impeachment value only. Newly-discovered evidence which is merely cumulative or impeaching does not entitle one to a new trial." *Varney v. State*, 475 N.W.2d 646, 651 (Iowa Ct. App. 1991).

Third, Woolison has failed to prove the newly-discovered evidence "would probably change the result if a new trial is granted." Dylan's grandmother created the affidavit on her daughter's behalf while her daughter was involved in post-trial CINA and termination of parental rights proceedings. We adopt the conclusion of the district court:

> This evidence would not probably change the result of the trial if postconviction relief were granted. There is too much other substantial evidence of [Woolison's] guilt in the record before the court to believe that one hearsay statement from a three year old to his maternal grandmother was the true story of what happened to him rather than what he told the doctors, the nurse, and the supporting evidence of Dylan's fear of [Woolison] while in treatment.

Therefore, without the probability of a different result, a new trial is not warranted.

For all of the above reasons, we affirm the dismissal of Woolison's application for postconviction relief.

AFFIRMED.