IN THE COURT OF APPEALS OF IOWA

No. 8-551 / 06-1530
Filed October 1, 2008

JEFFERY ALLEN GERARD BAKER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles, Judge.

Applicant appeals the district court order granting summary judgment to the State on his request for postconviction relief. **REVERSED AND REMANDED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Kasey E. Wadding, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

NELSON, S.J.

I. Background Facts & Proceedings

Jeffery Baker was convicted of kidnapping in the first degree, robbery in the second degree, and operating without the owner's consent. Baker filed a motion for new trial. He claimed there was juror misconduct because one juror improperly threatened another juror during deliberations. He also claimed the jury had been improperly influenced by a newspaper article which was present in the jury room. The article mentioned Baker was facing sexual abuse charges in another county. Four jurors were called to testify, and they stated they had not read the article. The district court denied Baker's motion for a new trial.

On direct appeal, the Iowa Court of Appeals addressed the issue of juror misconduct. *See State v. Baker*, No. 99-0950 (Iowa Ct. App. July 26, 2000). We also preserved for possible postconviction proceedings the following claims of ineffective assistance of counsel:

> The record before us is inadequate to determine whether there were strategic reasons trial counsel (1) did not further develop the record concerning a newspaper article read by a juror or jurors; (2) did not move for a change of venue; and (3) did not call Baker to testify in his own defense.

Id.

On February 12, 2001, Baker filed a pro se application for postconviction relief, raising the three issues of ineffective assistance of counsel noted above and again raising the issue of juror misconduct. Court-appointed counsel, James Moriarty, recast the petition to raise two issues – the issue of juror misconduct and whether the jury was improperly exposed to the newspaper article. These

issues were not raised under a theory of ineffective assistance of counsel. No additional evidence was presented at the postconviction hearing held on March 4, 2003. The case was submitted based on the record in the criminal trial and the arguments of counsel.

The district court found the issue regarding juror misconduct had been thoroughly analyzed and rejected by the Court of Appeals. On the other issue, the court noted that of the four jurors who testified, none recalled reading a newspaper account of the trial. The court concluded "[t]he evidence does not establish that extraneous information (the newspaper article) was calculated to and with a reasonable probability did influence the verdict." The court denied Baker's request for postconviction relief.

Baker appealed. His counsel, Moriarty, filed a motion to withdraw, asserting there were no grounds of merit for an appeal. The appeal was dismissed as frivolous and procedendo issued on April 18, 2005.

Baker filed a second pro se application for postconviction relief on July 25, 2005, alleging he received ineffective assistance of counsel. The State filed a motion for summary judgment based on Iowa Code section 822.8 (2005), which provides all grounds for relief in a postconviction action must be raised in the original application. Baker's court-appointed counsel, Patrick Dillon, resisted on the ground that the motion was untimely.

A telephone hearing on the motion for summary judgment was held on August 28, 2006. The hearing was not reported. The district court granted the motion for summary judgment, finding "Baker does not assert any facts which

were not reasonably ascertainable at the time of the first application for postconviction relief."

Baker appealed the denial of his second application for postconviction relief. Because no transcript was available, Baker and the State submitted statements pursuant to Iowa Rule of Appellate Procedure 6.10(3). Baker asserted that his counsel argued he should be permitted to proceed with the second postconviction action because he received ineffective assistance of counsel during the first postconviction action. On the other hand, the State asserted "[w]hile the State does agree that Mr. Dillon disagreed with the approach of the first postconviction relief attorney, Mr. Moriarty, it's the State's belief that he did not actually assert ineffectiveness." The district court judge had no recollection of the arguments made at the hearing, and did not retain his notes. The judge stated he was unable to resolve the differences set forth in the statements of the parties.

II. Standard of Review

Postconviction proceedings are civil actions, and are generally reviewed for the correction of errors at law. Iowa R. App. P. 6.4; *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). The district court may grant summary judgment in a postconviction action if "there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6. "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." *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002).

III. Merits

The district court granted summary judgment based on section 822.8, which provides:

> All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this section, a postconviction relief applicant should raise all grounds for relief in an original postconviction relief petition. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998).

An exception to this requirement arises when there is "sufficient reason" for failing to raise an issue in an earlier proceeding. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005); *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). A postconviction applicant has the burden to show a sufficient reason why an issue was not raised in an original postconviction application. *Manning*, 654 N.W.2d at 561; *Bugley*, 596 N.W.2d at 896.

Ineffective assistance of counsel may be a sufficient reason for failure to earlier raise a claim. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); *Collins*, 588 N.W.2d at 403. Where an applicant claims "the grounds raised in this postconviction action were not raised in his prior application because his first

postconviction counsel acted below the range of normal competency" the applicant must state specific ways in which counsel's performance was inadequate and how the applicant was prejudiced by counsel's performance. *Rivers v. State*, 615 N.W.2d 688, 689-90 (Iowa 2000). The applicant must "provide specific facts rather than mere legal conclusions." *Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995).

A. In support of his second application for postconviction relief, Baker submitted a brief which discussed the issue of ineffective assistance of postconviction counsel in the first postconviction proceeding, as follows:

> In this case, the arguable position is that evidence still exists outside this record that would show that the newspaper article was deliberately placed in the jury room by a juror, court personnel, or other outside influence; that said newspaper article had prejudicial impact; and improperly influenced the verdicts in this case.
>
> Central to a sound consideration of this issue is that there were twelve jurors. At the hearing on motions and sentencing held subsequent to trial, only four of the twelve jurors were examined. No record exists as to why these other eight jurors were not called.

Baker noted the Court of Appeals had preserved for postconviction relief the issue of why trial counsel "did not further develop the record concerning a newspaper article read by a juror or jurors." *Baker*, No. 99-0950 (Iowa Ct. App. July 26, 2000). Baker claims he received ineffective assistance from postconviction counsel Moriarty because the issue concerning the development of the record by trial counsel was not raised in his first postconviction action.[1]

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[1] In the first postconviction action, the issue concerning the newspaper article was raised solely within the context of whether the district court abused its discretion in ruling on the motion for new trial based on the evidence presented at that hearing. The issue of whether Baker received ineffective assistance due to counsel's failure to present additional evidence at that hearing was not considered.

We conclude Baker has shown a "sufficient reason" for failing to raise this issue in his original postconviction application. Baker has set forth specific facts to support his claim of ineffective assistance of counsel in the original postconviction proceeding. We determine the district court improperly granted summary judgment to the State based on section 822.8.

B. Baker contends he should be given an opportunity to raise the other two issues preserved for postconviction relief by the Court of Appeals – whether he received ineffective assistance due to trial counsel's failure to move for a change of venue or call Baker to testify in his own defense. *See Baker*, No. 99-0950 (Iowa Ct. App. July 26, 2000). He asserts that his second postconviction counsel, Dillon, argued he received ineffective assistance from his first postconviction counsel during the summary judgment hearing, and that this provided "sufficient reason" for failing to raise these claims in the first postconviction proceeding. In the alternative, Baker argues that if Dillon did not adequately present this issue, then he received ineffective assistance from Dillon.

We note there is an inadequate record to show whether Baker's second postconviction counsel argued at the summary judgment hearing that the failure to raise these two claims of ineffective assistance of counsel was due to the ineffective assistance of Moriarty. Although section 822.7 provides, "A record of the proceedings shall be made and preserved," no record was made of the summary judgment hearing. Baker attempted to overcome this problem by filing a statement pursuant to rule 6.10(3). The State disagreed with the recollection of

Baker's attorney. The matter was then submitted to the district court judge, but the judge did not settle the matter.[2] *See State v. Rademacher*, 433 N.W.2d 754, 759 (Iowa 1988) (noting any difference of opinion as to what occurred before a trial court is to be settled by that court).

The lack of a record of the district court proceedings does not preclude Baker from relief, however, under the specific circumstances of this case. On appeal, Baker is claiming that if the matter of the ineffective assistance of his first postconviction counsel was not adequately presented in the second postconviction action, this was due to the ineffective assistance of his second postconviction counsel. We conclude Baker has shown a "sufficient reason" for failure to raise these two claims of ineffective assistance of counsel in previous proceedings.

We reverse the district court's grant of summary judgment to the State in this postconviction relief action, and remand for further proceedings before the district court.

REVERSED AND REMANDED.

[2] Rule 6.10(3) states, "Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included in the record on appeal."