IN THE COURT OF APPEALS OF IOWA

No. 8-658 / 07-1516
Filed October 1, 2008

BRIAN A. MCGEE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

The applicant appeals from the denial of his postconviction relief application. **AFFIRMED.**

Brian Farrell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee State.

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

POTTERFIELD, J.

Applicant Brian A. McGee appeals from the denial of his postconviction relief application. We conclude the postconviction court properly dismissed on summary disposition, and therefore affirm.

Background Facts and Proceedings.

On September 16, 1994, a court found McGee guilty of attempted murder, first-degree burglary, and willful injury. The court later sentenced him to serve consecutive twenty-five year indeterminate terms for the attempted murder and burglary charges. It also sentenced him to serve ten years on the willful injury conviction to be served concurrently with the first two convictions. These convictions were affirmed on direct appeal. McGee later filed applications for postconviction relief in 1996 and 1998, both of which were dismissed.

On January 16, 2007, McGee filed a third postconviction application, claiming that he was improperly denied a parole eligibility interview and that the denial of his opportunity for a parole release interview amounted to an illegal ex post facto law. On May 29, 2007, the State filed an answer and motion for summary dismissal. Following a hearing, the court granted the State's motion and dismissed McGee's application. It held the application was filed beyond the statute of limitations, no genuine issue of material fact existed, and that Iowa Code section 906.5 (2007) did not entitle him to an in-person interview with the parole board.

McGee appeals from this ruling. He claims (1) the court abused its discretion in considering the State's untimely motion for summary dismissal, (2) the court erred in finding his postconviction relief application barred by the statute

of limitations, (3) the denial of parole interviews under the 1993 amendment to Iowa Code section 906.5 and the 1999 amendment to Iowa Administrative Code rule 205-8.6 violated the Ex Post Facto Clause, and (4) the amended Iowa Administrative Code section conflicts with his right to an interview under section 904A.4.

Scope and Standards of Review.

Postconviction relief proceedings are reviewed for correction of errors at law. *De Voss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). However, McGee's claim that the application of the changed parole review procedures to his case violates ex post facto principles is constitutional in nature. Our review of this claim is de novo. *State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000). Under this review, we must make an independent evaluation of the totality of the circumstances as shown by the entire record. *State v. Kinkead*, 570 N.W.2d 97, 99 (Iowa 1997).

Summary disposition of a postconviction application is authorized **"**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. Disposition under this provision is similar to the summary judgment procedure set forth in Iowa Rule of Civil Procedure 1.981(3). *Manning v. State*, 654 N.W.2d 555, 559-60 (Iowa 2002). Further,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in the pleadings, but the

> response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.

Iowa R. Civ. P. 1.981(5). It can be fatal to the party resisting the summary judgment motion to rely alone on a perceived weakness in the movant's contention. *Suss v. Schammel*, 375 N.W.2d 252, 254 (Iowa 1985).

Discussion.

Initially, we address McGee's claim that the State's answer and attached motion for summary dismissal were not timely filed. Iowa Code section 822.6 requires that the State file an answer to a postconviction relief application within thirty days of the docketing of the application "or within any further time as the court may fix . . . ." The rule further gives the court authority to "make appropriate orders for . . . extending the time of the filing of any pleading." Iowa Code § 822.6 (2007). These provisions explicitly authorize the court to extend deadlines; such discretionary calls are "presumptively correct" and will be disturbed on appeal only by a clear showing of abuse of discretion. *Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 334 (Iowa 1982). In this case, we find no such abuse of discretion.

At the time McGee committed the foregoing offenses, Iowa Code section 906.5(1) (1993) provided that:

> [W]ithin one year after the commitment of a person other than a class "A" felon, class "B" felon convicted of murder in the second degree and serving a sentence of more than twenty-five years, or a felon serving a mandatory minimum sentence, other than a class "A" felon, to the custody of the director of the Iowa department of corrections, a member of the board *shall interview the person.* Thereafter, at regular intervals, not to exceed one year,

> the board shall interview the person and consider the person's prospects for parole or work release. (emphasis added).

In addition, section 904A.4(1) provided that the "board of parole shall interview inmates according to administrative rules adopted by the board." Thus, by virtue of these two statutory authorities, the board of parole was required to personally interview certain inmates on a yearly basis. However, effective July 1, 1993, section 906.5(1) of the Code was amended to require case file reviews instead of personal interviews. Iowa Code § 906.5(1) (1995). Section 904A.4(1) and the administrative rule that interpreted the statute to require annual personal interviews remained unchanged until the administrative rule was amended in 1999 to make discretionary the decision to grant a personal interview. Section 904A.4(1) (2007) remains unchanged and provides for personal interviews, but only "according to administrative rules adopted by the board". *See* Iowa Code § 904A.4 ("The board of parole shall interview and consider inmates for parole . . . .").

We next address McGee's claim the postconviction court erred in concluding his application was filed beyond the applicable statute of limitations. Iowa Code section 822.3 provides that

> applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

Here, while McGee's conviction was affirmed on appeal and procedendo issued on February 21, 1995, he did not file this application until 2007.

At their essence, both of McGee's substantive claims on appeal are premised on the 1999 amendment to Iowa Administrative Code rule 205-8.6, which changed the personal interview from a mandatory into a discretionary decision by the board of parole. In particular, he claims the 1999 amendment to the rules constituted an ex post facto law and that he is currently being denied his right to an interview under section 904A.4. He also claims that the 1999 amendment is inconsistent with the provision for personal interviews in Iowa Code section 904A.4. Because the amendment in question did not occur until 1999, we conclude these are not the types of claims that could have been made within three years of the issuance of procedendo on McGee's direct appeal. Accordingly, the statute of limitations is not implicated because it is not a "ground of . . . law that could not have been raised within the applicable time period." We therefore proceed to the merits of McGee's claims and the postconviction court's holding that no genuine issue of material fact was generated as to McGee's right to an interview and as to his ex post facto claim.

At the time McGee was sentenced, Iowa Code section 906.5 required the parole board to personally interview him on a yearly basis. That Code provision and a related administrative code section were later amended to require a yearly file review of his parole status. This, McGee contends, constitutes an ex post facto increase in the terms of his punishment. In *Taylor v. State*, No. 07-626 (Iowa Ct. App. Feb. 13, 2008), this court rejected this claim as to section 906.5. We first noted that an essential element of an ex post facto claim is that the action—here the denial of an interview—create a "significant risk of increased punishment." *Garner v. Jones*, 529 U.S. 244, 255, 120 S. Ct. 1362, 1371, 146 L.

Ed. 2d 236, 247 (2000). We then affirmed the district court's ruling, finding the applicant had "failed to prove that receiving annual case file reviews instead of personal interviews creates a significant risk of serving a longer term of incarceration."

A similar analysis applies here. First, the amendment to the administrative code that McGee complains of does not extend the length of his incarceration on its face. Moreover, there is absolutely nothing in the record from which a fact finder could infer that those inmates who merely receive yearly case reviews statistically serve longer sentences than those granted an interview. At best, McGee can only offer on appeal that "it is possible to conclude that there is a significant risk that [he] will suffer increased punishment due to the denial of personal interviews." This is nothing more than speculation, and is insufficient to meet his obligation at the summary disposition stage "to set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). Accordingly, the court correctly granted summary disposition on this claim.

Finally, we affirm the district court's summary disposition on McGee's final claim—that rule 205-8.6 (1999) conflicts with and is in violation of legislative intent espoused in Iowa Code section 904A.4. Rule 205-8.6 purports to act under the authority of Iowa Code section 906.5, which provides for annual case "reviews" rather than a full interview. Rule 205-8.6(2), permitting interviews as a matter of discretion, does not conflict with this provision. Accordingly, this claim was properly subjected to summary disposition as well. We therefore affirm.

AFFIRMED.