IN THE COURT OF APPEALS OF IOWA

No. 1-171 / 00-0678
May 23, 2001

FILED
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CLERK SUPREME COURT

LOREN D. BAILEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Daniel Wilson, Judge.

Loren Bailey appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Christopher A. Clausen of the Boliver Law Firm, Marshalltown, for appellant.

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

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Loren Bailey appeals from the denial of his application for postconviction relief. He contends the trial court erred in (1) determining the arresting officer's statements at a subsequent hearing did not constitute newly discovered evidence, and (2) ruling *Knowles v. Iowa*, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), did not apply retroactively to his case. We affirm.

Background Facts and Proceedings. On February 16, 1997, Grinnell Police Officer Stuart Fricke observed a vehicle traveling at a "fast pace" and missing a left taillight. Fricke stopped the vehicle, driven by Bailey. The officer issued traffic citations and performed a search incident to the citations. He found a shaving kit containing methamphetamine and other drug paraphernalia on the floor of the driver's side of the car.

A trial information, filed May 5, 1997, charged Bailey with possession with intent to deliver, in violation of Iowa Code section 124.401(1)(c)(6). Bailey did not file a motion to suppress evidence seized during the search incident to citation. On February 25, 1998, a jury found Bailey guilty as charged.[1] The court sentenced him to an indeterminate ten-year term of incarceration. Bailey appealed contending his trial counsel was ineffective by failing to object to testimony concerning his prior drug involvement and related convictions. The court of appeals upheld the conviction in an unpublished opinion. *State v. Bailey*, No. 98-0584 (Iowa Ct. App. Feb. 24, 1999). Procedendo issued April 5, 1999.

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[1] It was Bailey's second trial on this charge. The first trial ended in a hung jury.

Bailey filed his application for postconviction relief on May 10, 1999. Bailey claimed: (1) intentional misrepresentations by Officer Fricke about an incident with Bailey which occurred subsequent to the February 1997 incident, if known by the jury at trial, would have affected the officer's credibility and therefore the outcome of the trial; and (2) the district court should have retroactively applied *Knowles* to his case, thereby rendering the search incident to citation a violation of his Fourth Amendment rights. After a hearing, the court denied relief. Bailey appeals.

Standard of Review. Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). We will not disturb the district court's denial of postconviction relief if the district court's findings of fact in support of its judgment are supported by substantial evidence and are justified as a matter of law. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994). However, when a postconviction petitioner asserts violation of constitutional safeguards, we make our own evaluation based on the totality of the circumstances. *Goodwin v. State*, 585 N.W.2d 749, 751 (Iowa Ct. App. 1998). This is the equivalent of a de novo review. *Id.*

Newly Discovered Evidence. With newly discovered evidence claims, the claimant must establish: (1) the evidence was discovered after the verdict; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the

trial. *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). Thus, by definition, newly discovered evidence refers to evidence in existence at the time of the trial proceeding. *Id.* Acts or events occurring subsequent to trial do not generally qualify as newly discovered evidence. *Id.*

Bailey's "newly discovered evidence" claim centers on testimony by Officer Fricke at a May 3, 1999 suppression hearing in connection with a second, unrelated drug charge against Bailey. On December 16, 1998, while Bailey was out on bond pending the appeal of his conviction for possession with intent to deliver, Officer Fricke stopped a car in which Bailey was a passenger. The stop and subsequent search of Bailey led to a second possession with intent to deliver charge.

Bailey moved to suppress evidence seized from him during the stop. At the suppression hearing, Officer Fricke testified he stopped the car at 10:38 p.m. because he noticed white light shining from the car's taillight, in violation of Iowa law. A videotape made by another officer at the scene and other evidence revealed the officer actually made the stop at 12:38 p.m., during daylight hours. Upon referring back to his notes at the hearing, Officer Fricke explained he had written 12:38 p.m. on a written warrant, "so it's possible when I typed up my report, I typed on the wrong time, administrative error."

Bailey claims Officer Fricke's confusion about the time of the stop amounts to an intentional misrepresentation. Bailey contends the intentional misrepresentations, under oath, constitute new evidence the jury deciding the

first possession with intent to deliver case should have been allowed to hear in evaluating the officer's testimony. Bailey's claim is without merit.

The officer's testimony at issue occurred after Bailey was convicted and sentenced on the first possession with intent to deliver charge. Even though the stop about which Officer Fricke testified at the suppression hearing occurred before Bailey's trial, the alleged "intentional misrepresentation" did not occur until long after trial and sentencing. Thus, the alleged "newly discovered evidence" did not exist at the time of trial. Bailey could not have introduced Officer Fricke's suppression hearing testimony at trial because the suppression hearing had not yet occurred by the time of trial.

Bailey cannot establish the third and fourth elements of his "newly discovered evidence" claim. Under the third element outlined in *Grissom*, the evidence might have impeached the officer's credibility, but it would not have been "material to the issue." In addition, Bailey has failed to show the "newly discovered evidence" would probably change the result if a new trial were granted.

Moreover, the testimony of Officer Fricke clearly shows he did not intentionally misrepresent the facts at the suppression hearing in May 1999. When he realized the error, he referred back to his notes and admitted the stop took place during daylight hours. The record contains no evidence Officer Fricke intentionally misrepresented facts at the suppression hearing. The record does not support Bailey's contention the officer lacked credibility. We affirm the district court on this issue.

Retroactive Application of *Knowles*. On December 8, 1998, the U.S. Supreme Court decided *Knowles*. A unanimous court held the issuance of a citation in lieu of arrest did not authorize an officer to conduct a full search of an automobile. *Knowles*, 525 U.S. at 114, 229 S. Ct. at 486, 142 L. Ed. 2d at 496. The court concluded such a "search incident to citation" violated the Fourth Amendment. *Id.* The court declined the State's invitation to extend the "bright-line rule" of a search incident to arrest "to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all." *Id.* at 118, 119 S. Ct. at 488, 142 L. Ed. 2d at 499.

The U.S. Supreme Court decided *Knowles* after Bailey's conviction and sentencing, but before this court affirmed his conviction. Bailey contends the *Knowles* decision should apply to his case because his conviction had not yet been affirmed on appeal when the U.S. Supreme Court decided *Knowles*. The court need not decide the substantive issue Bailey raises, however, because he failed to preserve error below.

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. *Adcock*, 528 N.W.2d at 647. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it previously. *Id.*

Bailey failed to preserve error because he never filed a motion to suppress in the underlying criminal case. He did not challenge the search on direct appeal, even though the U.S. Supreme Court granted certiorari in *Knowles* on

March 23, 1998, before his sentencing. *Knowles v. Iowa*, 523 U.S. 1019, 118 S. Ct. 1298, 140 L. Ed. 2d 465 (1998). His failure to challenge the search in the district court or on direct appeal did not give "opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling." *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999) (quoting *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983)). Moreover, Bailey failed to preserve error by including a statement of error preservation in his brief. *See* Iowa R. App. P. 14(a)(5).

The case before us closely resembles the situation before the supreme court in *State v. Holbrook*, 261 N.W.2d 480 (Iowa 1978). In an earlier case, *State v. Monroe*, 236 N.W.2d 24 (Iowa 1975), overruling *State v. Vietor*, 208 N.W.2d 894 (Iowa 1973), the court held (1) the burden of proving non-accommodation under a delivery of a controlled substance statute rested on the State, and (2) the rule operated both prospectively and retrospectively in appeals then pending or thereafter timely taken "in which error has been properly preserved." *Monroe*, 236 N.W.2d at 39. The *Monroe* decision was in response to an earlier U.S. Supreme Court decision, which held the U.S. Constitution places the burden of proof on the prosecution to establish the elements of a crime charged. *Holbrook*, 261 N.W.2d at 481-82.

In *Holbrook*, the defendant argued for the first time on appeal the same statute at issue in *Monroe* unconstitutionally placed the burden of proof on defendants. *Id.* at 481. Although his case was pending when the supreme court decided *Monroe*, the court held the rule did not retrospectively apply to his case:

> Defendant's problem in this appeal is that he did not preserve error; he made no objection in the trial court to the provision of section 124.410 placing the burden of proof on him, although a federal constitutional issue was involved, although the Court would be the final arbiter on such an issue and had not yet spoken, and although *Vietor* was a five-to-four pronouncement of a state court, with dissenters pointing out the federal constitutional infirmity in section 204.410.

Holbrook, 261 N.W.2d at 482.

Similarly, in the case now before us, Bailey made no objection to the search incident to citation, although a federal constitutional issue was involved, and although the supreme court filed two five-to-four decisions prior to Bailey's conviction in which the dissent questioned the constitutional reasonableness of Iowa Code section 805.1(4). *State v. Knowles*, 569 N.W.2d 601, 603 (Iowa 1997) (Neuman, J., dissenting); *State v. Doran*, 563 N.W.2d 620, 623-24 (Iowa 1997) (Neuman, J., dissenting). Bailey waived his claim of a Fourth Amendment violation.[2]

AFFIRMED.

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[2] The case before us differs from *State v. Scott*, 619 N.W.2d 371 (Iowa 2000). In *Scott*, defendant filed a motion to suppress evidence seized during a search incident to citation. *Id.* at 373. After the district court upheld the validity of the search as a search incident to citation, the U.S. Supreme Court decided *Knowles*. Scott filed a motion for new trial, raising once again the constitutionality of the search incident to citation. *Id.* at 374. The district court denied the motion for new trial believing a "good-faith exception" to the exclusionary rule should apply. *Id.* at 376. The Iowa Supreme Court, citing its rejection of the good-faith exception in *State v. Cline*, 617 N.W.2d 277 (Iowa 2000), held the searches and seizures could not be upheld on a good-faith basis, and allowed Scott the opportunity to defend them on retrial. *Id.* at 377. The defendant in *Scott*, unlike Bailey, raised the search incident to citation issue through a motion to suppress and a motion for new trial, thus preserving the claim on appeal.