IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-108 / 95-1128

000145

WILLIAM SCHOENECK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Fayette County, James L. Beeghly, Judge.

William Schoeneck appeals the district court's ruling denying his application for postconviction relief. **AFFIRMED.**

Brad V. Driscoll, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, W. Wayne Saur, County Attorney, and Joel Dryer, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

William Schoeneck was convicted of the crime of possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.401(1)(c) (1989). He filed an application for postconviction relief, claiming there was newly-discovered evidence in the case. The district court denied Schoeneck's application for postconviction relief. We affirm.

At Schoeneck's criminal trial the evidence showed that on January 31, 1990, police officers executed a search warrant at the home of Schoeneck's estranged wife. Schoeneck was present at the time of the search. Officers found a blue denim jacket in the living room. In the jacket pockets officers found two prescription bottles containing medication prescribed to Schoeneck, a small bottle of cocaine, five plastic bags containing a white powdery substance, and the vehicle registration form for Schoeneck's vehicle. Officers found Schoeneck had on his person $2500 in an envelope and another $2610 in cash.

At the trial, Schoeneck admitted it was his jacket. He testified he had given it to his friend Daniel Hahn. He stated Hahn had been wearing the jacket on January 31, 1990. Hahn testified he had never worn the jacket.

The jury convicted Schoeneck of possession of a controlled substance with intent to deliver. He was sentenced to a term of imprisonment not to exceed ten years.

His conviction was affirmed on appeal. *State v. Schoeneck*, No. 2-145 / 90-1554 (Iowa App. June 25, 1992) (Unpublished).

On September 9, 1994, Schoeneck filed an application for postconviction relief claiming the existence of material facts, not previously presented, required vacation of his conviction. Schoeneck submitted a written statement by Hahn admitting the coat and the illegal drugs were his. Hahn said the county attorney and a police officer had pressured him into giving false testimony. Hahn later filed an affidavit in which he stated it was his own free choice to testify at Schoeneck's criminal trial.

At the postconviction hearing, Hahn testified he had borrowed the jacket from Schoeneck about a week before the arrest. He denied that the county attorney or a police officer had told him to lie. He stated he testified against Schoeneck because he was afraid of spending more time in prison. Hahn had been at the prison in Anamosa at the same time as Schoeneck.

The district court denied Schoeneck's application for postconviction relief. The court noted Hahn had stated in his written statement that he had been pressured into his trial testimony by the police and county attorney. However, he recanted this portion of his statement and stated it was his own free choice to testify. Also, in the written statement, Hahn stated the jacket was his. At the hearing, however, he stated the jacket belonged to Schoeneck and he had borrowed it. By noting these changes in Hahn's testimony, the court apparently determined Hahn was not credible.

Schoeneck appeals the denial of his application for postconviction relief. He claims he is entitled to postconviction relief on the ground that Hahn's affidavit that he owned the drugs presented newly-discovered material facts.

A proceeding for postconviction relief is a civil action and is triable at law. *Overton v. State*, 493 N.W.2d 857, 858 (Iowa 1992). We will not disturb the trial court's denial of postconviction relief if the trial court's findings of fact in support of its judgment are supported by substantial evidence and are justified as a matter of law. *Carroll v. State*, 466 N.W.2d 269, 271 (Iowa App. 1990).

Postconviction relief is not a means for relitigating claims that were or should have been properly presented at trial or on direct appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993). 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.* Evidence which is newly-discovered may satisfy the sufficient reason requirement for not raising an issue on direct appeal. *Frank v. State*, 376 N.W.2d 637, 639 (Iowa App. 1985).

In order to prevail on a claim of newly-discovered evidence, a postconviction applicant must show: (1) the evidence in question could not have been discovered before judgment in the exercise of due diligence; (2) the evidence is material to the issue and not merely cumulative or impeaching; and (3) its admission would likely

change the result if a new trial were granted. *Brewer v. State*, 444 N.W.2d 77, 80 (Iowa 1989) (citing *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 32-33 (Iowa 1979)).

The postconviction court is not required to believe a recantation of testimony, and has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result. *State v. Folck*, 325 N.W.2d 368, 377 (Iowa 1982). The reviewing court will not interfere unless there is a clear abuse of discretion. *Id.*

A witness's recantation testimony is looked upon with the utmost suspicion. *Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991). We find there is substantial evidence in this record to support the district court's conclusion in this case that Hahn was not credible. It is extremely difficult to give much credibility to a person who takes the stand and testifies that he previously lied under oath. Also, as the district court noted, Hahn's more recent statements have not been consistent. He first stated he had been pressured into his trial testimony, then stated he made a free choice to testify. Moreover, he stated the jacket was his, then stated the jacket belonged to Schoeneck, but he had borrowed it.

We find no abuse of discretion in the district court's determination that looking at the whole record, Schoeneck received a fair trial and a new trial would not likely produce a different result. Hahn's affidavit was cumulative to evidence which was produced at the trial. Schoeneck, his estranged wife, Hahn's girlfriend, and another

friend all testified Hahn had been wearing the blue denim jacket and that Hahn used cocaine. Schoeneck has not shown the jury would be more likely to believe Hahn's affidavit than it was to believe the evidence presented at the trial. Schoeneck has failed to show a different result would be likely if a new trial were held.

We affirm the decision of the district court denying Schoeneck's application for postconviction relief. Costs of this appeal are assessed to Schoeneck.

AFFIRMED.