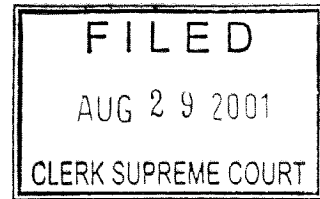


IN THE COURT OF APPEALS OF IOWA

No. 1-066 / 99-1759
Filed August 29, 2001



LARUE SNAKE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman (ruling on renewed postconviction relief motion), Dewie J. Gaul (ruling on first summary judgment motion), Judges.

Applicant appeals from the district court ruling granting the State's renewed motion for summary judgment and dismissing his application for postconviction relief. He argues the court erred in granting the renewed motion because (1) it was barred by the doctrine of res judicata, (2) he is entitled to a hearing on the merits of his application, and (3) genuine issues of material fact exist on his claims involving his trial counsel's ineffectiveness and whether his guilty plea was voluntary and intelligent. **AFFIRMED IN PART; REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill Pitsenbarger, Assistant County Attorney, for appellee.

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

MILLER, J.

Larue Snake appeals from the district court ruling granting the State's renewed motion for summary judgment and dismissing his application for postconviction relief. He argues that court erred in granting the renewed motion because (1) it was barred by the doctrine of res judicata, (2) he is entitled to a hearing on the merits of his application, and (3) genuine issues of material fact exist on his claims of ineffective assistance of counsel and whether his guilty plea was voluntary and intelligent. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND FACTS

On March 30, 1995 the State charged Snake with first-degree murder as part of a six-count trial information in connection with the stabbing death of Randy Hall in Sioux City. Snake entered a plea of guilty to the reduced charge of second-degree murder and the State dismissed the remaining counts against Snake as part of a plea agreement. The State retained the right to re-file or reinstate the charges in the event Snake appealed or applied for postconviction relief. At the time of the plea proceeding Snake requested immediate sentencing. He waived his right to file a motion in arrest of judgment, his right to the use of a presentence investigation report at sentencing, and his right to time before sentencing. The district court then sentenced Snake to an indeterminate term of fifty years. Snake did not file a direct appeal.

Almost three years later Snake filed an application for postconviction relief. He made a number of claims, including prosecutorial misconduct and ineffective assistance of counsel. The State shortly thereafter filed a motion for

summary judgment. Snake resisted the State's motion arguing his ineffective assistance of trial counsel claim excused any waiver of claims which would otherwise result from the lack of direct appeal. District Judge Dewie J. Gaul overruled the State's motion for summary judgment.

About eight months later the State filed a renewed motion for summary judgment. It urged that Snake's failure to file a direct appeal from the judgment and sentence constituted waiver under Iowa Code section 822.8 (1999). It further addressed the merits of Snake's claims for relief. Snake filed a resistance to the renewed motion, making arguments similar to those made in his previous resistance. A hearing was held on the renewed motion. District Judge John D. Ackerman granted the State's motion for summary judgment. Snake appealed.

II. STANDARD OF REVIEW

Postconviction proceedings are law actions ordinarily reviewed for errors of law. When summary judgment is granted in a postconviction relief action, we examine the record to determine if a genuine issue of material fact exists and whether the moving party is entitled to a judgment as a matter of law. However, when there is an alleged denial of constitutional rights our review is de novo.

Bugley v. State, 596 N.W.2d 893, 895 (Iowa 1999).

We apply de novo review to claims of ineffective assistance of counsel.

Osborn v. State, 573 N.W.2d 917, 920 (Iowa 1998).

III. PROCEDURAL ISSUES

On appeal Snake contends the district court erred in granting the State's renewed motion for summary judgment because (1) the second motion was barred by the doctrine of res judicata, (2) he is entitled to a hearing on the merits of his application based on Iowa Code section 822.7, and (3) genuine issues of

material fact exist on his claims of ineffective assistance of counsel and whether his guilty plea was voluntary and intelligent. The State asserts Snake's claims are not properly before the court because he may not challenge the voluntariness of his guilty plea after failing to filing a motion in arrest of judgment and not filing a direct appeal challenging his conviction and sentence.

A. Res Judicata

As a preliminary matter Snake claims the State was barred by the doctrine of res judicata from filing its renewed motion for summary judgment, arguing that it raised the same issues overruled by the district court in the State's initial motion for summary judgment. Although this claim was not raised in Snake's resistance to the motion for summary judgment and was not addressed by the district court, the State does not assert that error was not preserved. We therefore briefly address the claim.

According to the doctrine of res judicata, a generic term that includes both issue preclusion and claim preclusion,

a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Bennett v. MC # 619, Inc., 586 N.W.2d 512, 516 (Iowa 1998) (quoting *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 440 (Iowa 1996)). However, the district court's denial of the State's initial motion for summary judgment was not a "final judgment on the merits." See *Iowa Elec. Light and Power Co. v. Lagle*, 430 N.W.2d 393, 395-96 (Iowa 1988) (holding grant of partial summary judgment was not a final judgment or order). Iowa adheres to the rule that a district court judge

may review and change a prior interlocutory ruling in the same case. *McCormick v. Meyer*, 582 N.W.2d 141, 144 (Iowa 1998); *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991).

Therefore, because the trial court's ruling on the first motion was not a final judgment the State was not barred by principles of res judicata from filing its renewed motion for summary judgment. The district court had the authority to consider the merits of the State's renewed motion for summary judgment, and to grant the motion if appropriate. Snake's res judicata claim therefore must fail.

B. Right to a Hearing on the Merits

Snake also claims that based on the language of Iowa Code section 822.7 he is entitled to a hearing on the merits of his application for postconviction relief. This claim was raised in Snake's resistance, but was not addressed by the district court. The State does not assert that error was not preserved, however, so we therefore briefly address this claim.

Section 822.7 (1999) provides in relevant part:

The application shall be heard in, and before any judge of the Court in which the conviction or sentence took place. . . . A record of the proceedings shall be made and preserved. . . . The Court may receive proof of affidavits, depositions, oral testimony, or other evidence, and may order the applicant brought before it for the hearing. . . . The Court shall make specific findings of fact, and state expressly its conclusion of law, relating to each issue presented.

However, the trial court may when appropriate grant a motion for summary disposition of a postconviction application. Iowa Code § 822.6 (1999). The applicant need only receive proper service and notice of, and be given adequate time to respond to, a motion for summary dismissal in a postconviction relief action. *Brown v. State*, 589 N.W.2d 273, 275 (Iowa Ct. App. 1998). Both of

these requirements were met here. Snake filed a resistance to both of the State's motions and a hearing was held on each. Snake clearly was apprised of and had sufficient opportunity to respond to the State's motions. Snake's argument that a full hearing is required and summary judgment can never be granted dismissing an application for postconviction relief is without merit.

IV. PRESERVATION OF ERROR

In his application for postconviction relief Snake appeared to allege, in relevant part, prosecutorial misconduct and ineffective assistance of trial counsel. He stated, in relevant part, that

said prosecuting attorney failed to produce exculpatory evidence dealing with the Applicant and improperly conducted herself in this action. In addition, the applicant asserts that he was given ineffective assistance of counsel in several respects including, but not limited to, failing to pursue an intoxication defense, misrepresenting what would occur if the applicant entered a plea of guilty as set out in the plea agreement and failing to properly defend the Applicant.

In both his application for postconviction relief and an affidavit filed in resistance to the State's motion for summary judgment, Snake also asserted that he had "discussed the above allegations with my counsel, at the time, but he never followed up on them."¹ In his brief on appeal Snake states that he claimed in his application and affidavit "that his trial counsel failed to pursue claims of prosecutorial misconduct on the part of the prosecuting attorney failed to produce exculpatory evidence dealing with the applicant and improperly conducted herself

¹ Snake also asserted additional grounds for postconviction relief in his application, affidavit, or both, such as newly discovered evidence, insufficiency of the evidence, and improper sentencing, and also asserted he had discussed these additional allegations with his counsel but counsel did not follow up on them. However, the trial court's grant of summary judgment did not address these claims and Snake does not pursue them on appeal. We therefore deem them abandoned.

in this action.” Although Snake’s application and affidavit might be read as making a straightforward claim of prosecutorial misconduct, his brief on appeal clarifies the matter and makes it clear his complaint is that trial counsel failed to pursue claims the prosecutor engaged in misconduct. We therefore deal with Snake’s claim that trial counsel failed to pursue claims of prosecutorial misconduct as a claim of ineffective assistance of trial counsel.

Snake challenges those portions of the trial court’s ruling on the State’s motion for summary judgment which granted summary judgment on his claims of ineffective assistance of trial counsel, including the subsumed claim of prosecutorial misconduct. The State asserts Snake has not preserved error because he (1) pled guilty but did not file a motion in arrest of judgment, waived the right to file a motion in arrest of judgment, and does not directly assert his waiver of the right to file a motion in arrest of judgment was due to ineffective assistance of counsel, and (2) waived claims made in his application for postconviction relief by not filing a direct appeal challenging his conviction and sentence.

Snake did not file a motion in arrest of judgment. This precludes him from directly attacking his plea of guilty. Iowa R. Crim. P. 23(3)(a); *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999). He may, however, challenge his guilty plea through an ineffective assistance of counsel claim. *Miller*, 590 N.W.2d at 725. In his application for postconviction relief and in his affidavit in resistance to the State’s motion for summary judgment Snake asserted that he discussed his claims with counsel but counsel never followed up on them. We read this as an assertion that his waiver of the right to file a motion in arrest of judgment and his

failure to file such a motion are attributable to ineffective assistance of trial counsel. We conclude that under these facts Snake's failure to file a motion in arrest of judgment does not in and of itself preclude him from pursuing what may otherwise be a legally cognizable claim for postconviction relief, his claim that his plea of guilty was not voluntary and intelligent because it was induced by ineffective assistance of counsel.

Snake did not file a direct appeal. Postconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal, and any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim and actual prejudice resulted from the claimed error. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999); Iowa Code § 822.8. Stated conversely, a claim of ineffective assistance of trial counsel may be made in a postconviction proceeding, even if not made on direct appeal, if an applicant establishes by a preponderance of the evidence that sufficient reason exists for not having raised the issue at trial and on direct appeal, and also establishes actual prejudice resulting from the alleged errors. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

Ineffective assistance of appellate counsel may constitute the sufficient reason or cause to permit the issue of trial counsel's ineffective assistance to be raised for the first time in a postconviction proceeding. *Id.* There was no appellate counsel, as Snake did not pursue a direct appeal. However, as noted above, Snake asserts that he discussed his claims with his trial counsel but counsel never followed up on them. We read this as an assertion that his failure

to pursue a direct appeal is attributable to ineffective assistance of trial counsel. Just as ineffective assistance of appellate counsel can constitute sufficient reason or cause for not having raised an issue or claim on direct appeal, ineffective assistance of trial counsel should qualify as sufficient reason or cause for failing to file a direct appeal. We conclude that under the facts of this case Snake's failure to file a direct appeal does not in and of itself preclude him from pursuing what may otherwise be a legally cognizable claim for postconviction relief.

The essence of the asserted grounds for postconviction relief which Snake claims the trial court erred in summarily dismissing, as clarified by his brief on appeal, is that his plea of guilty was involuntary as a result of ineffective assistance of trial counsel. Such a challenge is not waived by a plea of guilty. *See State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000) (recognizing that a claim of ineffective assistance which calls into question the voluntariness of a guilty plea may be brought following a guilty plea). Finding no procedural bar to Snake's action for postconviction relief, we proceed to address the merits of his appeal, whether the trial court erred in granting summary judgment on his various claims.

V. CLAIMS AND MERITS.

To prevail on an ineffective assistance claim an applicant must prove both that counsel failed in an essential duty and prejudice resulted. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). We judge ineffective assistance claims, whether of appellate counsel or trial counsel, against the same two-pronged test, deficient performance and resulting prejudice. *Ledezma v. State*, 626 N.W.2d

134, 141 (Iowa 2001). If this case had gone to trial on the merits, to prove counsel's failure to pursue a direct appeal resulted in prejudice Snake would have to show that one or more of his underlying substantive claims of ineffective assistance of trial counsel would have prevailed if it had been raised on direct appeal. See *id.* (stating that to prove appellate counsel's deficient performance resulted in prejudice the applicant must show his ineffective assistance of trial counsel claim would have prevailed if it had been raised on direct appeal).

To prevail on the merits of a claim Snake would have had to prove deficient performance and prejudice. *Ledezma*, 626 N.W.2d at 141. Summary judgment in a postconviction relief proceeding is analogous to summary judgment procedure under our rules of civil procedure. *Ridinger v. State*, 341 N.W.2d 734, 736 (Iowa 1983). The burden of showing the nonexistence of a material fact issue is on the moving party. See *Knapp v. Simmons*, 345 N.W.2d 118, 121 (Iowa 1984) (holding burden is on moving party in summary judgment proceeding under Iowa Rule of Civil Procedure 237). To be entitled to summary judgment on any of Snake's underlying claims of ineffective assistance the State would have to show that the claim was waived, the claim was not preserved, or there was no genuine issue of material fact concerning deficient performance or resulting prejudice. Therefore we must analyze the grounds for postconviction relief concerning which Snake claims the trial court erred in granting summary judgment to determine, among other things, which if any raise genuine issues of material fact and must be remanded for evidentiary hearing, and which do not and were thus properly summarily dismissed. *Kyle v. State*, 322 N.W.2d 299,

302 (Iowa 1982). Because an alleged denial of a constitutional right is involved our review is de novo. *Bugley*, 596 N.W.2d at 895.

Snake claims the trial court erred in granting summary judgment on his claims that trial counsel was ineffective in (1) failing to pursue claims the prosecutor engaged in misconduct by failing to produce exculpatory evidence dealing with Snake and improperly conducting herself, (2) failing to pursue an intoxication defense, (3) misrepresenting what would occur if Snake pled guilty to murder in the second degree, (4) failing to properly defend Snake, (5) failing to introduce the criminal records of the victim (Randy Hall), and (6) failing to litigate a motion to suppress. As noted above, we read Snake's application for postconviction relief and affidavit in resistance to the State's motion for summary judgment as claiming his failure to raise these claims in a motion in arrest of judgment and failure to raise them in a direct appeal are the result of ineffective assistance of trial counsel. We can affirm on any basis appearing in the record. *Drennan v. Ault*, 567 N.W.2d 411, 413 (Iowa 1997); *Wenck v. State*, 320 N.W.2d 567, 569 (Iowa 1982).

The first and fourth of these claims are very general and conclusory in nature. To avoid summary judgment an applicant for postconviction relief must set forth facts showing there is a genuine issue for trial. See *Summage v. State*, 579 N.W.2d 821, 822-23 (Iowa 1993) (affirming grant of summary judgment where applicant failed to set forth facts as to how newly discovered evidence would probably change the result if a new trial were granted). To avoid summary judgment an applicant must state how competent representation would have changed the outcome. *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000)

(affirming grant of summary judgment where applicant did not state how competent representation would have changed the outcome).

As pointed out by the trial court, in claiming prosecutorial misconduct for failure to produce exculpatory evidence Snake does not set forth what evidence he claims was not disclosed or how the alleged nondisclosure was improper and gives no indication of how the non-disclosed evidence might have changed the result. Under such circumstances Snake's first claim of ineffective assistance of trial counsel is too general to grant relief or preserve for further proceedings. See *Bugley*, 596 N.W.2d at 898 (affirming grant of summary judgment where applicant failed to state specific ways in which counsel's performance was inadequate and how competent representation would have changed the outcome). We conclude the trial court properly granted summary judgment on Snake's first claim of ineffective assistance.

Snake's fourth claim of ineffective assistance, counsel's failure to properly defend him, was not addressed or passed on by the trial court. As discussed below in connection with his sixth claim, failure to litigate a motion to suppress his confession, Snake has failed to preserve this claim for appellate review. If we were to address the merits of Snake's fourth claim, what we have said regarding his first claim applies to his fourth claim as well. Although he claims counsel failed to properly defend him, he failed to state any specific ways in which counsel's performance was inadequate or how competent representation would probably have changed the outcome. Summary judgment was therefore appropriate on his fourth claim as well.

Snake claims his counsel was ineffective in failing to pursue an intoxication defense. However, intoxication is not a complete defense to a crime but instead is relevant only to a defendant's specific intent when specific intent is an element of the public offense. *State v. Broughton*, 425 N.W.2d 48, 49 (Iowa 1988); *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986). Proof of specific intent is not an element of second-degree murder. *State v. Miller*, 359 N.W.2d 508, 511 (Iowa Ct. App. 1984). Snake plead guilty to murder in the second degree. Because the crime to which he pled guilty does not require proof of specific intent, Snake cannot have been prejudiced by any alleged failure of counsel to pursue an intoxication defense. The trial court did not err in granting summary judgment on this second claim of ineffective assistance of counsel.

Snake's third claim is that counsel misrepresented what would occur if he pled guilty to second-degree murder. In his affidavit in support of his resistance to the State's motion for summary judgment he stated that his attorney and attorney's office told him he would be on parole within five years if he pled guilty (to second-degree murder), but he had subsequently learned it would be ten to twelve years before being eligible for release on parole. He further stated his attorney told him he could serve his time in Wisconsin, and that did not transpire. The affidavit of the attorney who had represented Snake directly contradicted Snake's sworn statements and created a genuine issue of fact. The question that remains is whether the issue is of "material" fact.

An issue of fact is "material" only when its resolution might affect the outcome of the suit. *Baratta v. Polk County Health Servs.*, 588 N.W.2d 108, 109 (Iowa 1999). If a defendant has been affirmatively misled by an attorney

concerning the consequences of a plea, the plea may be invalid even though the consequences are characterized as collateral. *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987) (citing *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983)). The alleged misadvice by counsel would be material if relied on by Snake in deciding to plead guilty to second-degree murder. Snake should have an opportunity to prove that such misadvice occurred and that it induced his decision to plead guilty. See, e.g., *State v. West*, 326 N.W.2d 316, 318 (Iowa 1982) (holding that remand for such a hearing was appropriate in the case of statement by the trial court implying sentencing discretion, when no discretion existed, which may have induced defendant's guilty plea). We conclude the trial court erred in granting summary judgment on this claim of ineffective assistance and reverse and remand for further proceedings on this claim.

Snake's fifth claim, that counsel was ineffective for "failure to introduce the criminal records of the victim," presents no genuine issue of material fact.² The general rule is that when the accused denies the crime or contends it was unintentional evidence of a homicide victim's character is not admissible. *State v. Pletka*, 310 N.W.2d 525, 528 (Iowa 1982); *State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977); *Miller*, 359 N.W.2d at 510. An exception applies when the accused asserts he or she acted in self defense.³ *Jacoby*, 260 N.W.2d at 837; *Miller*, 359 N.W.2d at 510. The violent, quarrelsome, dangerous or turbulent character of the deceased is then admissible because relevant to the defendant's

² We note as a preliminary matter that there was no trial and no claim or showing is made that such records were admissible or should have been introduced in evidence at any pre-trial hearing. There was thus never an opportunity or reason to "introduce" such records.

³ The same exception would logically apply when the accused asserts he or she acted in defense of a third person.

state of mind, who the aggressor was, or both. *Jacoby*, 260 N.W.2d at 837. The affidavit of Snake's attorney establishes as uncontested fact that Snake did not know the victim. More importantly, Snake did not assert he acted in self-defense or in defense of a third person. Evidence of the victim's criminal records is not shown to be relevant to any issue. Snake therefore cannot have been prejudiced by counsel's alleged omission to act. The trial court did not err in granting summary judgment on this claim.

Snake claims the trial court erred in granting summary judgment on his claim that trial counsel was ineffective in failing to litigate a motion to suppress his confession. The essence of his claim appears to be that, as with his several other claims, there is a genuine issue of material fact concerning whether his plea of guilty was voluntarily and intelligently entered. More specifically, his claim appears to be that there is strong evidence he invoked his right to remain silent; that right was violated when officers thereafter continued to question him and he then made incriminating statements; and therefore counsel breached an essential duty, resulting in prejudice to him, by not litigating the motion to suppress. For the reasons that follow we find the claim of ineffective assistance that Snake claims the trial erred in granting was not in fact addressed or passed on by the trial court, and we conclude Snake has therefore not preserved error on this claim.

Snake filed a motion to suppress his confession, asserting a violation of his Fifth Amendment right to remain silent. See U.S. Const. amend V. He later pled guilty without a hearing or ruling on the motion. His application for postconviction relief makes no specific complaint or mention of the motion to

suppress or counsel's failure to litigate the motion. In his affidavit in resistance to the State's motion for summary judgment Snake then asserts he advised law enforcement officials that he "wanted a lawyer" but the police kept questioning him, thus asserting a violation of his Sixth Amendment right to counsel. See U.S. Const. amend VI. In his affidavit he made no mention of a violation of his Fifth Amendment right to remain silent. His brief in support of his resistance to the State's renewed motion for summary judgment returned to the theme of his "right to remain silent" and raised no issue or concern regarding his right to counsel.

The trial court held a hearing on the renewed motion for summary judgment, and apparently heard unreported arguments. Its ruling, while noting that the motion to suppress raised the issue of Snake's "right to remain silent," points out that Snake's argument was that he had asked for a lawyer but his "request for counsel" was not honored. The trial court addressed Snake's claim as a claim that counsel was ineffective for failing to litigate suppression of his confession on the ground his *right to counsel* had been violated, and granted summary judgment on that claim.

On appeal Snake's claim of ineffective assistance of trial counsel focuses exclusively on a failure to litigate a claim that his *right to remain silent* was violated. This issue was not addressed or passed on by the trial court. We do not address issues, even of a constitutional nature, first raised on appeal. *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982). "Issues must ordinarily be presented to and passed on by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (emphasis added). "It is well settled that a rule 179(b) motion is essential

to preservation of error when a trial court fails to resolve on issue, claim, defense, or legal theory” *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984) (citations omitted). Snake makes no claim to have presented a rule 179(b) motion to the trial court. Although we decline to address the merits of the claim Snake presents on appeal because of the fatal variance between it and the claim addressed and passed on by the trial court, we do note that where the district court complies with Iowa Rule of Criminal Procedure 8(2)(b) in accepting a guilty plea claims such as this do not survive the entry of the guilty plea. *Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000); *State v. Sharp*, 572 N.W.2d (917, 918-19 (Iowa 1997). Snake makes no claim that the district court did not fully comply with that rule in accepting his guilty plea. Further, any failure of counsel to secure suppression of inculpatory evidence is not a circumstance that bears on the knowing and voluntary nature of a plea of guilty. *Speed*, 616 N.W.2d at 159.

VI. SUMMARY AND DISPOSITION

The trial court’s ruling denying the State’s first motion for summary judgment did not preclude it from addressing the merits of the State’s renewed motion. Snake’s argument that summary judgment can never be granted dismissing an application for postconviction relief is without merit. Genuine issues of material fact exist concerning Snake’s claim that this plea of guilty was involuntary because counsel was ineffective in misrepresenting what would occur if Snake pled guilty to murder in the second degree. The trial court erred in granting summary judgment regarding this claim and we reverse and remand for further proceedings concerning it. All other claims and issues that Snake raises

on appeal either present no issues of material fact, were not preserved, or were waived by his plea of guilty.

**AFFIRMED IN PART; REVERSED IN PART, AND REMANDED FOR
FURTHER PROCEEDINGS.**