IN THE COURT OF APPEALS OF IOWA

No. 5-072 / 93-1528

FILED
APR 28 1995
CLERK SUPREME COURT

DAVID HILL,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Wapello County, Dan Morrison, Judge.

Applicant appeals from the summary dismissal of his application for postconviction relief. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William H. Appel, County Attorney, and R.T. Starken, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

CADY, J.

David Hill appeals from the district court's summary dismissal of his application for postconviction relief. He asserts he was denied an opportunity to resist the State's motion for summary disposition when a hearing was set but no provision for his attendance was made. Upon our review, we affirm.

The underlying offenses occurred in 1985 and 1991 respectively. In 1985 Hill was convicted of assault by displaying a dangerous weapon. In 1991, he was convicted of possession of a firearm by a felon in violation of Iowa Code sections 724.25 and 724.26 (1991). Hill requested a new trial. He claimed the court erred in refusing to allow evidence that he believed he was not a convicted felon and was permitted to possess firearms. He also alleged the court improperly instructed the jury that a conviction of assault by displaying a dangerous weapon made him a felon as a matter of law. The district court denied Hill's motion and he appealed. In his appeal, he challenged the district court's ruling on his motion for change of venue and asserted ineffective assistance of counsel. The Supreme Court affirmed his conviction.

On August 9, 1993, Hill filed the instant application for postconviction relief. He was pro se and asserted the following grounds for relief in his prepared form:

> 12a. Charged under the wrong code.
> 12b. Violated constitutional rights.
> 13a. I was charged under a felony code instead of a misdemeanor.

> 13b. Violated 5 amendment by allowing State to bring in documents from underlying charge, self-incrimination.
> 20. On underlying charge, county attorney promised I got to keep my right to have fire arms, Stewart Peppers deposition.

The State answered and on August 26, filed a motion for summary disposition. The State alleged that Hill had not offered sufficient reason for failing to raise the matters on direct appeal. On September 7, 1993, the district court set the motion for hearing on September 20, 1993, at 1:30 p.m. The court did not appoint counsel for Hill and made no provision for Hill to appear by telephone conference or in person. Hill did not file a resistance to the State's summary judgment motion. On September 20, 1993, the court filed an order dismissing the application.

At 1:31 p.m. on September 20, 1993, Hill drafted a "motion for acquittal" in which he contended he was denied access to the courts. The district court denied the motion on September 28, 1993, noting it "exercised its discretion in not ordering the appearance of the applicant . . . ." The court also indicated it decided the petition on issues of law, and saw no need to order the appearance of the applicant on these issues.

Hill—appeals. He claims the court denied him a meaningful opportunity to resist the State's motion. Hill asserts the court should have provided him with transportation to the hearing or arranged a conference call. Alternatively, Hill argues if the court was not

going to allow him to be present at the hearing, the hearing notice should have informed him a written resistance was required. Hill argues further if the court had provided him with this information he might have requested counsel.

Post conviction relief proceedings are considered civil actions and are ordinarily reviewed for errors of law. Thompson v. State, 492 N.W.2d 410, 412 (Iowa 1992). Both parties agree that our review is the present case is for errors at law.

Initially we must determine if the court complied with the provisions of Iowa Code section 822.6 (1993) for postconviction proceedings. Section 822.6 allows summary disposition on the motion of either party "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."

The language in section 822.6 is comparable to that in Iowa Rule of Civil Procedure 237 relating to summary judgments. State v. Mulqueen, 188 N.W.2d 360, 367 (Iowa 1971). The principles underlying our summary judgment procedure also apply to summary dispositions under the postconviction procedures. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981). Under the procedural rule of summary judgment, the court must set the motion for hearing and

both parties are given an opportunity to resist and argue the motion. Poulin v. State, 525 N.W.2d 815, 816 (Iowa 1994). Our supreme court has recognized it is error for the court not to set for hearing the state's application for a motion to dismiss a postconviction proceeding. Hines v. State, 288 N.W.2d 344, 346 (Iowa 1980); Chartier v. State, 223 N.W.2d 255, 257 (Iowa 1974).

The issue facing us in this case, is whether Hill, a pro se applicant, had an adequate opportunity to resist the state's summary judgment motion when no arrangements were made for his presence at the hearing. Under the facts of this case, we conclude Hill was offered an opportunity to resist the state's motion. Hill received a copy of the state's summary judgment motion. The court set the motion for hearing and Hill received notice of the hearing with statutorily adequate time to reply.

Hill acknowledges these steps were taken. He argues, however, that the court had an affirmative duty to ensure his presence at the hearing, particularly because he was in prison and proceeding pro se. We decline to place such a burden on the district court. Hill, not the court, was responsible for requesting the measures necessary for his participation in the hearing. He should have motioned for transportation or a telephone conference. Instead, Hill waited until the day of the hearing and the drafted a "motion for acquittal" because he was "denied access to the courts."

Moreover, Hill's decision to proceed pro se does not diminish his responsibility or excuse his failure to file a written resistance to the state's motion. Iowa Rule of Civil Procedure 237(c) clearly states, any party resisting a summary judgment motion shall file a resistance within ten days from the time a copy of the motion has been served. We do not utilize a deferential standard when persons choose to represent themselves. Metropolitan Jacobson Dev. Venture v. Board of Review, 476 N.W.2d 726, 729 (Iowa App. 1991). Lay persons and lawyers are expected to act with equal competence. Id. If lay persons decide not to utilize professional assistance they should be ready to take the consequences. State v. Walker, 236 N.W.2d 292, 295 (Iowa 1975). We conclude the court properly followed the procedural requirements of section 822.6 and Hill had notice and an opportunity to respond. Hill cannot now blame the court for his failure to act.

Finally, Hill does not challenge the merits of the summary judgment order. We, therefore, affirm the district court.

AFFIRMED.