

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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CHARLES ROBERT POLLY,

)

Filed November 29, 1982

Plaintiff-Appellant,

)

vs.

)

2-218
67107

)

STATE OF IOWA,

)

Defendant-Appellee.

)

Appeal from Monona District Court, Donald Pendleton, Judge.

Postconviction relief applicant appeals from trial court's refusal to grant relief due to failure to appeal. REVERSED AND REMANDED.

Robert L. Sikma, Sioux City, for plaintiff-appellant.

Thomas J. Miller, Attorney General, Joseph Weeg, Assistant Attorney General, and Michael P. Jensen, Monona County Attorney, for defendant-appellee.

Considered en banc.

In August 1975 Douglas Robert Polly pled guilty to an open charge of murder. The trial court accepted his plea, found him guilty of second-degree murder, and pronounced a thirty-year jail sentence. At his plea and sentencing hearings, the trial court failed personally to inform Polly, inter alia, of his sixth amendment right of confrontation and his fifth amendment privilege against self-incrimination. In addition, the trial court did not conduct a degree-of-guilt hearing as required by Iowa Code § 690.4 (1975)(repealed by Act of June 28, 1976, ch. 1245(4), § 526, 1976 Iowa Acts 774). Polly did not file an appeal of his conviction and sentence.

In September 1980, Polly filed this chapter 663A proceeding for postconviction relief. The postconviction trial court found that the sentencing court had failed to conduct a section 690.4 hearing and to follow the Sisco-Brainard requirements, see infra. Nonetheless, the postconviction trial court denied relief on the ground that Polly's failure to appeal precluded any postconviction relief. Polly appealed and we now reverse.

I. Scope of Review

A proceeding under chapter 663A is at law and our review is not de novo. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, where the postconviction petitioner asserts violations of constitutional safeguards, we make our own evaluation of the totality of circumstances. Id. Our review is accordingly so limited.

II. Sisco-Brainard Requirements

In State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969), the supreme court held that a court should not accept a plea without first addressing the defendant personally in order to determine whether any promise, force, or threat were used to obtain the plea. Similarly, the supreme court in Brainard v. State, 222 N.W.2d

711, 713, 722 (Iowa 1974) held that the judge must personally inform the defendant of the right to confront adverse witnesses and not to be required to testify at trial. In the case at bar, the court did not ask Polly whether any promise, force, or threat were used to obtain the plea. The court also failed personally to inform the defendant of his rights under the fifth and sixth amendments. We therefore agree with the postconviction trial court finding that the sentencing court in accepting Polly's guilty plea did not follow the Sisco-Brainard requirements.

III. Section 690.4 Hearing

Iowa Code § 690.4 (1975) provided:

Upon the trial of an indictment for murder, the jury, if it finds the defendant guilty, must inquire, and by its verdict ascertain and determine the degree; but if the defendant is convicted upon a plea of guilty, the court must, by the examination of witnesses, determine the degree, and in either case must enter judgment and pass sentence accordingly.

The record in the instant case does not reveal any examination of witnesses by the court to determine the degree of murder as required by section 690.4. Failure to satisfy the section 690.4 requirement has been held to be "manifest error." State v. Martin, 243 Iowa 1323, 1329, 55 N.W.2d 258, 261-62 (1952).

IV. Failure to Appeal

Having concluded that the sentencing court failed to satisfy the Sisco-Brainard and section 690.4 requirements, the critical issue must now be resolved, viz., whether Polly's failure to appeal bars postconviction relief under chapter 663A. The Iowa Supreme Court addressed this exact issue in Redding v. State, 274 N.W.2d 315 (Iowa 1979), holding that "[a] failure to take an appeal does not alone constitute a waiver of the right to attack the conviction by postconviction action." Id. at 317. Rather,

[f]ailure to appeal bars relief in a postconviction action on the ground of abuse of process only as to factual and legal contentions which the postconviction applicant knew of at the time of the original trial court proceeding and which he deliberately and inexcusably failed to pursue on appeal.

Id. (emphasis added). The question to which we must now address ourselves is whether Polly deliberately and inexcusably failed to appeal the sentencing court's failure to satisfy the Sisco-Brainard and section 690.4 requirements.

On February 13, 1981, the district court denied the State's motion for summary disposition of Polly's application for postconviction relief. In the course of its ruling, the court said:

Not having appealed, applicant does not now have to allege sufficient reason for not asserting the grounds of postconviction relief on appeal. Respondent's second contention is thus equally without merit.

The court, in reaching this conclusion, relied upon Redding .

On the basis of its ruling, the defendant would have been fully justified in concluding that he did not have the burden of going forward to allege such reason or to prove that he had such reasons for having failed to appeal. The burden then shifted to the State to prove that the defendant had grounds for taking a direct appeal, but had not done so. The State gave no notice that it would ask that this matter be relitigated, and the State did not seek an interlocutory appeal concerning it. However, in its proposed findings of facts and conclusions of law, the State said the burden was on the defendant.

On July 21, 1981, a different judge on final ruling concluded that "applicant is not entitled to postconviction relief, because defects in the sentencing procedure could have been raised in appeal, and the court cannot find good cause why they were not." Thus, the court was at that point assuming that the burden was upon Polly to prove that he had sufficient reason for not asserting the grounds for postconviction relief on appeal, precisely the opposite of the earlier interlocutory ruling. We should note that the first ruling was entered by Judge Wolle, and that the final judgment was entered by Judge Pendleton.

A court may, of course, change or modify a preliminary order. Allied Mutual Casualty Company v. Long, 107 N.W.2d 682, 683 (Iowa 1961). "A court may always correct error into which it has fallen, before final judgment." Kuiken v.

Garrett, 243 Iowa 785, 792, 793, 51 N.W.2d 149, 154 (1952)(emphasis added). When there has been a change of judges, the court is nevertheless the same court, "and a court may correct its own error before final judgment." Cowman v. LaVine, 234 N.W.2d 114, 124 (1975), citing State v. Richards, 229 N.W.2d 229, 233 (Iowa 1975); Long, supra; Kuiken, supra (emphasis added). A later judge is not bound to follow an earlier judge's rulings in the case if he does not think they are correct, and may correct his own or an earlier judge's ruling "at any time before final judgment." State v. Richards, supra, at 233 (emphasis added). All of these decisions have in common the emphasis upon the necessity of any change in the ruling coming prior to final judgment. This stands to reason, for it is an elementary principle of procedural due process that a party to a case must have an opportunity to prepare adequately for trial and arguments, and that he cannot do so if he is led by the court to believe that the law governing the case is one thing, and then, without notice, learns at the moment when judgment is pronounced that the court has decided the case on an entirely different principle. This is especially so when the issue is burden of proof. "To comport with due process, a person must ordinarily be informed somehow of the issues involved in order to prevent surprise at the hearing and allow an opportunity to prepare [citation]. The test is fundamental fairness, not whether the notice meets technical rules of common-law pleadings." Wedergren v. Board of Directors, 307 N.W.2d 12, 16 (Iowa 1981).

V. Conclusion.

For these reasons, we reverse and remand to the district court. On remand, the court may reconsider the issue as to the party upon whom the burden of proof lies. If the court should determine that the burden of proof lies upon the defendant, then Polly must be given adequate notice and an opportunity to go forward with his evidence.

REVERSED AND REMANDED.

DONIELSON, J. (concurring specially)

The postconviction court found that the trial court did not follow the requirements set forth in State v. Sisco, 169 N.W.2d 542, 549 (Iowa 1969), in accepting applicant's guilty plea and did not conduct an adequate degree of guilty hearing in violation of Iowa Code § 609.4 (1975). But the court found that these matters "could have been considered on direct appeal" and that "[t]here was no evidence presented as to why there was no direct appeal." After citing Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979), the court concluded that:

[the] applicant and his attorney knew of the right to appeal, and the attorney knew the remedies he might obtain by appeal. Applicant and his attorney were evidently satisfied as to the procedure at the sentencing. Neither said applicant nor Robert Prichard, his attorney at sentencing, testified as to the reason why there was no appeal. This court concludes applicant is not entitled to postconviction relief, because defects in the sentencing procedure could have been raised in appeal, and the court cannot find good cause why they were not.

This case turns on the interpretation given Iowa Code §§ 663A.2 and 663A.8. The Iowa Supreme Court has indicated that these sections must be considered together. Carstens v. Rans, 210 N.W.2d 663, 664 (Iowa 1973). It is important, therefore, that they be set forth in full:

663A.2 Situations where law applicable.

Any person who has been convicted of, or sentenced for, a public offense and who claims that:

1. The conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
2. The court was without jurisdiction to impose sentence;
3. The sentence exceeds the maximum authorized by law;
4. There exists evidence of material facts, not previously presented and heard, that requires

vacation of the conviction or sentence in the interest of justice;

5. His sentence has expired, his probation, parole, or conditional release has been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error formerly available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

This remedy is not a substitute for nor does it affect any remedy, incident to the proceedings in the trial court, or of direct review of the sentence conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory, or other remedies formerly available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

* * *

663A.8 Grounds must be all-inclusive. All

grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application. (emphasis added)

I disagree with the majority's interpretation of these sections and of the cases decided under them. It is clear from these cases that where a postconviction applicant has previously sought review of his conviction or sentence via direct appeal or previous postconviction action, he is barred from addressing issues which he failed to pursue in the previous proceeding unless he

carries his burden to show a sufficient reason why the claim was not asserted. Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981) (defendant not allowed to claim, in postconviction proceeding, that trial court has erred in issues which were not properly presented for review on direct appeal but where facts of the trial proceeding giving rise to the claim were known to defendant when direct appeal was taken); Armento v. Baughman, 290 N.W.2d 11, 13 (Iowa 1980) (applicant foreclosed from making claim in postconviction proceeding unless he shows sufficient reason for not asserting claim in his direct appeal); Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975) (postconviction applicant precluded from raising issue of ineffective assistance of counsel since he did not carry burden to show sufficient reason for not raising issue in prior proceeding); Carstens v. Rans, 210 N.W.2d 663, 665 (Iowa 1973) (failure to raise on appeal issue of trial court's failure to order competency hearing precluded postconviction relief on such grounds). On the other hand, where the applicant does show that the issues were excusably not litigated or that the issues raised assert new legal basis for granting relief, then the postconviction action will be maintained. See Edwards v. State, 249 N.W.2d 851 (Iowa 1977); Stanford v. Iowa State Reformatory, 279 N.W.2d 28 (Iowa 1979); Zacek v. Brewer, 241 N.W.2d 41 (Iowa 1976).

The situation with which we are presented here has been addressed only once. In this situation there was no prior appeal. In Redding v. State, 274 N.W.2d 315, 317 (Iowa 1979), the court addressed this issue and, without discussing the facts of the case in detail, stated that:

Nor is the action barred because of failure to appeal. The voluntariness claim could not have been decided on direct review because it depended on evidence which would not appear in the record of the plea proceeding. Failure to raise an issue on appeal is excused when the issue could not have been decided there. Fontaine v. United States, 411 U.S. 213, 93 S. Ct. 1461, 36 L. Ed. 2d 169 (1973); State v. Boge, 252 N.W.2d 411

(Iowa 1977). A postconviction action is an appropriate way to make a claim which depends on evidence de hors the original record. See, e.g., State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978).

Even though the Sisco claim could have been asserted on direct review, it could not be presented unless an appeal was taken, and none was taken here. A distinction exists between the right to maintain a postconviction action when an appeal or prior postconviction action was pursued and the right to do so when no prior proceeding was held.

* * *

Postconviction actions are not ordinarily available to correct errors which should have been raised in an earlier proceeding, when an earlier proceeding has actually taken place. . . . when a postconviction relief applicant has previously sought review of his conviction either by direct appeal or prior postconviction action, he must establish a sufficient reason why each new ground for relief was not previously asserted. Bledsoe v. State, 257 N.W.2d 32, 34 (Iowa 1977).

However, this burden does not exist when the conviction has not previously been attacked. A failure to take an appeal does not alone constitute a waiver of the right to attack the conviction by postconviction action. Failure to appeal bars relief in a postconviction action on the ground of abuse of process to factual and legal contentions which the postconviction applicant knew of at the time of the original trial court proceeding and which he deliberately and inexcusably failed to pursue on appeal. Horn v. Haugh, 209 N.W.2d 119, 120-121 (Iowa 1973) (approving ABA Standard, Post-Conviction Remedies, § 6.1(c)). (emphasis added).

The emphasized portion of the court's language, which is also set forth in the majority opinion, suggests that there can indeed be a situation in which the failure to appeal would bar relief. The majority reads this language to mean that we must focus solely on the applicant's knowledge at the time of the original proceeding. But unlike the majority, I believe that whether or not the applicant

entertained such knowledge is a fact to be gleaned from the record as a whole. This is a fact to be decided by the court considering the postconviction application. Indeed, this is the approach apparently used in Redding when the court "agree[d] with the postconviction trial court that" there was "no basis under the present record for finding that Redding knew of his Sisco contention at the time of the original proceeding and nevertheless deliberately and inexcusably failed to pursue it on appeal." Redding, 274 N.W.2d at 317. This approach was also employed recently in Scurr where, although the applicant had entertained a prior proceeding, the court declined to consider an issue which the court found should have been raised on appeal since all of the facts necessary to raise the issue were apparent from the record. Scurr, 304 N.W.2d at 235. There the court said:

The facts of the trial proceedings giving rise to this claim were known to defendant at the time his direct appeal was taken. He is not relying on any facts outside the record which he developed on postconviction to support his ineffective assistance of counsel claim. He did not make any new evidentiary record on postconviction. . . . Where no new facts are asserted in claiming ineffective assistance of counsel, . . . we do not find sufficient reason for failing to raise the ineffective assistance of counsel claim on direct appeal. We decline to consider an issue that should have been raised on direct appeal.

Id.

I do not believe that the standard is any different where the applicant has not appealed previously. To hold otherwise would abrogate the court's own language in Redding that failure to appeal an issue may bar relief; it is inconceivable that an applicant would ever state expressly that he had full knowledge that his guilty plea was lacking but that he was not going to pursue it on appeal. I believe this is a fact which must be determined by the postconviction court and should be considered by us within the bounds of our judicial review. To

decide this issue any other way would be to allow the postconviction applicant an alternative route to appeal; a "substitute" for "direct review" that Iowa Code § 663A.2 expressly proscribes. I further believe that these cases place the burden on defendant to show that, at the time of the original trial court proceeding, he did not know of the legal and factual contentions and, therefore, that there was a sufficient reason why these contentions were not previously raised. None of the cases suggest that the burden shifts to the State to prove that defendant had grounds for taking a direct appeal, but had not done so. I do not believe the court, on remand, may determine who has the burden; the burden is on the defendant.

In the instant case, the record clearly demonstrates that defendant was operating on the assumption that he carried no burden to show sufficient reasons why the grounds for postconviction relief were not pursued on appeal. This misunderstanding was facilitated by the district court's February 13, 1981, ruling which is set forth in the majority opinion. I believe, under these circumstances, the case must be reversed and defendant given an opportunity to present reasons why the grounds for postconviction were not sought on direct appeal. I would reverse and remand for this determination only.