FILED
MAR 2 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-633 / 91-737

DOUGLAS K. LINDAMAN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

167

Appeal from the Iowa District Courts for Floyd and Mitchell Counties, Ronald Schechtman, Judge.

Lindaman appeals a judgment of the district court denying his application for postconviction relief. **AFFIRMED.**

Douglas K. Lindaman, Mount Pleasant, pro se, for appellant.

Bonnie J. Campbell, Attorney General, Roxann M. Ryan, Deputy Attorney General, James Kivi, Assistant Attorney General, and Jerry Folkers, County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

PER CURIAM

On September 12, 1988, Douglas Lindaman pled guilty to two counts of lascivious acts with a child. This court affirmed defendant's conviction; however, we remanded the case for resentencing. State v. Lindaman, No. 9-452/88-1756 (Iowa App. Nov. 27, 1990). The sentences imposed in the resentencing hearing were affirmed by the Iowa Supreme Court. State v. Lindaman, No. 90-690 (Iowa Feb. 21, 1991).

On March 7, 1991, Lindaman filed a postconviction action. A telephone conference was held on May 2, 1991. The district court denied Lindaman's application and granted the State's motion for summary judgment. Lindaman has appealed.

Postconviction actions are actions at law which are ordinarily reviewed for errors of law. Hahn v. State, 306 N.W.2d 764, 768 (Iowa 1981).

Lindaman argues the postconviction court was not impartial because the court refused to take Lindaman's "litmus test" which consisted of several questions "to assess and measure actual sexual bigotry to sexual orientation issues." Lindaman's assertion that judges must demonstrate an absence of bias is contrary to established law. It is Lindaman who bears the burden to prove a judge is not impartial. State v. Bear, 452 N.W.2d 430, 434-35 (Iowa 1990).

> To constitute prejudice necessitating a different judge, the alleged bias and prejudice must stem

> from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from participation in the case.

Id. at 435. The postconviction court stated it had "no prejudice against the applicant or the State" and the court's "only knowledge of this matter, prior to its assignment, was through the digested appellate opinions on the disciplinary and original sentencing appeals." Lindaman has failed to carry his burden of proof on this issue.

Lindaman next claims his "ego-dystonic homosexuality and the coming out process" resulted in a "confused mental state" at the time of the plea proceeding thus invalidating the guilty plea. Lindaman failed to file a motion in arrest of judgment to challenge the plea proceeding, however. Lindaman asserts he was suffering from "gay abuse syndrome" which prevented him from filing a motion in arrest of judgment. We do not reach the merits of Lindaman's contention because we conclude he has failed to establish by a preponderance of the evidence "sufficient reason" for failing to file a motion in arrest of judgment in the trial court. Iowa Code § 663A.8 (1991); Wenman v. State, 327 N.W.2d 216, 217 (Iowa 1982). Lindaman's present appeal is no more than an attempt to use postconviction relief to circumvent the statutory requirement and remedy of rules 8(2)(d) and 23(3)(a). "[I]ssues of a constitutional magnitude will not be addressed in a

postconviction action if they were not raised first in the trial court." Wenman, 327 N.W.2d at 218.

Lindaman next argues the postconviction court erred in ruling he waived any claim as to the constitutionality of Iowa Code section 709.8, lascivious acts with a child. Lindaman claims the statute is unconstitutional because it fails to recognize homosexual marriages with children. Lindaman did not raise this issue in the trial court. The postconviction court correctly determined this issue was waived. See id.

Lindaman next claims the State engaged in a "Watergate coverup" to suppress exculpatory evidence of an alleged break-in to his home. The record indicates the State was not aware of the alleged break-in until months after Lindaman entered his guilty plea. In fact, the State first heard of this allegation from the defendant. The State cannot cover up evidence which it did not possess, Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 32 (Iowa 1979), nor can the State cover up evidence which was known by the defendant.

Finally, Lindaman makes a claim of judicial misconduct.

> I have been the **RECIPIENT** under a DICKENSON BUREAUCRATIC MACHINE which ignores judicial misconduct. Judge Schechtman's acceptance of [Judge] McCartney's judicial misconduct as 'administrative' is judicial nonsense. It denies reality....There continues to be a McCartney-McKinley conspiracy to influence this litigation.

Lindaman's claim apparently stems from the chief judge's

denial of his requests for a judge outside the district and a different prosecutor. We hold this claim is unsupported in the record.

We have considered all claims raised by Lindaman. We are satisfied no material issue of fact exists. We affirm the summary denial of postconviction relief.

AFFIRMED.