FILED
DEC 13 1999
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-545 / 97-2115
Filed December 13, 1999

RICHARD J. FREITAS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Applicant appeals from a dismissal of his postconviction relief application prior to an evidentiary hearing. **AFFIRMED.**

Allen M. Richards, Tama, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

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

MILLER, J.

Applicant Richard J. Freitas appeals a decision that dismissed his application for postconviction relief pursuant to the second unnumbered paragraph of Section 822.6 of the Code of Iowa. We affirm.

The following facts could be found from the evidence presented at trial of the underlying criminal charge against Freitas. On the morning of December 7, 1992, a female stopped at a gas station in Cedar Rapids to buy cigarettes and empty trash from her car. As she got back in her car, Freitas threw the car door open, displayed a knife, and forced her over to the passenger side of the car. The female victim offered her purse. Freitas replied that instead he was "going to take [her]." Freitas then ordered her to lie down on the seat, but the victim refused to comply, and struggled with him. He responded by cutting her finger, and stabbing her in the arm, neck, and back. She suffered knife cuts and partial paralysis in her face. The victim escaped from the car. Freitas drove away, but the police apprehended him soon afterwards.

The jury found Freitas guilty of first degree kidnaping. Freitas received a sentence of life imprisonment.

On direct appeal, this court affirmed his conviction. *See State v. Freitas*, No. 93-1934 (Iowa App. Apr. 28, 1995). We rejected his claims of insufficiency of the evidence and error in submitting the sexual abuse alternative of kidnapping. *See id.* No claim of ineffective assistance of counsel was presented. *See id.*

On June 6, 1995, Freitas filed a motion to have counsel appointed to file a postconviction relief petition. On the same day, the district court appointed an attorney. Upon discovery that the attorney had represented Freitas in the criminal proceedings that formed the basis for the postconviction action, the court appointed a second attorney on July 27, 1995. Freitas objected to the second attorney, as it appears the second attorney was a friend of the victim and had been indirectly involved with the trial. The district court then appointed a third attorney on August 4, 1995. After the court granted a request for continuance of the trial, Freitas moved the court for new postconviction relief counsel on July 26, 1996, due to a lack of communication between Freitas and the third attorney.

On January 2, 1997, the court appointed a fourth attorney to represent Freitas. That attorney then conducted an investigation, which included visits with Freitas, and depositions of trial counsel and the Linn County Attorney. On October 5, 1997, the attorney filed a report with the court stating an opinion that there was no merit to Freitas' claims of ineffective assistance of trial counsel, noting that Freitas had not challenged the competency of appellate counsel, and stating a belief that a postconviction hearing would serve no purpose.

The court gave the parties notice on October 8, 1997, of its intention to dismiss the application, and Freitas filed a pro se resistance. Freitas then filed an application for postconviction relief on October 21, 1997. In his application, he set forth several claims of ineffective assistance of trial counsel, and a claim that appellate counsel had

been ineffective for not raising these claims. On November 6, 1997, the district court dismissed the application pursuant to the second unnumbered paragraph of Section 822.6 of the Code of Iowa. Freitas appeals. For the reasons stated herein, we affirm.

Section 822.6 (1997) provides, in relevant part, the following:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for dismissal. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if a material issue of fact exists.

Iowa Code § 822.6 (1997).

Disposition pursuant to this provision is analogous to the summary judgment procedure provided in Iowa R. Civ. P. 237-240. *Ridinger v. State*, 341 N.W.2d 734, 736 (Iowa 1983). Accordingly, summary disposition pursuant to this provision is only appropriate when no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. *See, e.g., Wright v. American Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999) (stating the test for summary judgment under Iowa R. Civ. 237(c)); *Brewer v. State*, 446 N.W.2d 803, 805 (Iowa 1989) (the court may grant summary disposition under section 663A.6 only where a party is entitled to judgment as a matter of law); *Ridinger*, 341 N.W.2d at 736 (summary disposition pursuant to section 663A.6 (the predecessor to section 822.6) is not proper where a material issue of fact exists).

Our review of a grant or denial of summary judgment is for correction of errors at law. Iowa R. App. P. 4; *Wright*, 599 N.W.2d at 670. Freitas' brief is very unclear as to what claim or claims of trial court error he raises on appeal. However, because the trial court granted summary disposition, and because the only two determinations it made in doing so were (1) that no genuine issue of material fact existed, and (2) that the respondent state was entitled to judgment as a matter of law, Freitas' brief must be seen as claiming error in one or both of these two determinations.

Freitas is, however, confronted with a basic problem of error preservation. As set forth in his brief on appeal, his claims of ineffective assistance of trial and appellate counsel are that trial counsel was ineffective in (1) overpresenting the defendant's case and not focusing on securing a plea bargain; (2) not exploring zealously options for less than life imprisonment; and (3) lacking in state court experience. However, none of these claims of ineffective assistance of trial counsel were included in the eight claims of ineffective assistance of trial and appellate counsel that Freitas asserted before the trial court. Accordingly, the present claims are not the ones the trial court reviewed to determine whether or not a genuine issue of material fact existed and whether or not judgment was appropriate as a matter of law.

On appeal we will not address an argument which the district court did not have an opportunity to consider. *Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 64 (Iowa 1999). Neither will we review an issue not presented to the trial court. *In re*

Marriage of Gulsvig, 498 N.W.2d 725, 727 n. 1 (Iowa 1993). It is a basic rule of appellate practice that questions not presented to and not passed on by the trial court cannot be raised or reviewed on appeal. *Shill v. Careage Corp.*, 353 N.W.2d 416, 420 (Iowa 1984). On appeal Freitas asserts and relies on claims of ineffective assistance of counsel wihch are completely different than those which he asserted to the trial court and it considered in determining dismissal of Freitas' application was appropriate. Because questions concerning the present claims of ineffective assistance were not presented to or passed on by the trial court, the trial court cannot have erred concerning them and they cannot be raised or reviewed on appeai. *Shill*, 353 N.W.2d at 420.

Freitas also states that his post conviction attorney should have at least argued for him, rather than reporting to the district court that in his opinion any claim of ineffective assistance was without merit. The court which appointed an attorney for Freitas no doubt expected that attorney to either file an application for post conviction relief or report to the court that in his opinion no grounds for post conviction relief existed. The attorney apparently came to the conclusion that Freitas wished to pursue claims of ineffective assistance of trial counsel, but that such claims were without merit. He appropriately reported his opinion to the court. To the extent this claim by Freitas may be seen as a claim of error by the trial court in granting summary disposition, we find it to be without merit.

Freitas asserts that he "is entitled to [p]resent his argument," that he "seeks the opportunity to present evidence to the district courts." This assertion states no claim of trial court error subject to review on appeal.

AFFIRMED.