FILED
DEC 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CORDELL RUSSELL KIRBY,)
Petitioner-Appellant,) Filed December 30, 1981
vs.)
STATE OF IOWA,) 1-366
Respondent-Appellee.) 2-65853

Appeal from Polk District Court, C. Edwin Moore, Senior Judge.

Petitioner appeals the denial of his application seeking postconviction relief from his 1977 conviction of robbery with aggravation claiming the court failed to make specific findings of fact and conclusions of law regarding newly discovered evidence. AFFIRMED.

Charles L. Harrington and Francis C. Hoyt, Jr., State Appellate Defender's Officer, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Postconviction applicant, Cordell Russell Kirby (hereinafter called defendant), appeals the denial of his application seeking relief from his 1977 conviction of robbery with aggravation claiming the court failed to make specific findings of fact and conclusions of law regarding newly discovered evidence. We affirm.

Defendant was convicted of robbery with aggravation in 1977. This court affirmed defendant's conviction in 1979. In 1980, defendant, pro se, filed an application for postconviction relief. Defendant stated in his petition:

> Petitioner is mindful of the following from the 663A statute...
>
> 663A.2 paragraph(s) 1, 4, 6, states to WIT: The conviction or sentence was in violation of the constitution [sic] of the United States or the Constitution or laws of this state. Petitioner states that his conviction & sentence is in violation of the Constitution of the State of Iowa & the United States Constitution. There exists evidence of material facts not previously presented and heard that require vacation of the conviction or sentence in the interest of justice... Petitioner believes that the fact[s] will show so when properly set forth....
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> ...
>
> NOTE: Petitioner advises the Court he is proceeding pro se with the assistance of a prison jailhouse lawyer.
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> ...
>
> Petitioner thus requests the Court to permit him to file this application with the understanding that it is not properly structured due to the fact petitioner is not a lawyer has no complete record available to him of what occurred in misc/in/chambers hearings & discussions. That at best this application is serving as a skeleton outline of petitioner wishes to include by way of legal proposition, when he has benefit of counsel & has had opportunity to peruse with counsel what the record actually shows.....
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> [1] [sic] Petitioner only has a piecemeal record in his possession at the present time. Examining the record he does not have and anlyzing [sic] petitioner's recollection of events, the following propositions are asserted as areas to be considered under the 663A postulates set forth above.....
>
> [a) petitioner should have been granted a directed verdict;
> b) petitioner feels he was denied effective assistance of counsel;
> c) petitioner feels his Miranda rights were violated;
> d) petitioner feels the identification process was defective;
> e) petitioner feels his rights were violated by the arresting officers; and]
> ...
> [f] Other propositions such as the record indicate & that can be suitably fit with regarding to the authorities petitioner has affixed.....
> Petitioner reserves the right to add or delete propositions after he has had opportunity to speak with counsel and compile all data once a perusal of the records have been completed. Petitioner plans to raise all issues not inconsistent with his authorities affixed, and not inconsistent with what the facts show....

The State answered defendant's petition and included the following denial: "8. That the Respondent denies for lack of knowledge upon which to base a belief the existence of any alleged newly discovered evidence which would entitle the Petitioner to any type of Post Conviction Relief." At the start of the trial, counsel for the State made the following argument: "[We] deny again at this time that there is any evidence to support the petitioner's contention of any ineffective assistance of counsel or any other matters that may be raised throughout his testimony in this matter." During the course of trial, Ms. Steele, defendant's attorney, sought to introduce an affidavit of admisison in which Craig Allen Davis admitted to committing the robbery for which defendant was convicted. The defendant claimed the affadavit could not have been discovered using due diligence because Mr. Davis could not be located before the trial. State's counsel objected to admission of the affadavit. The court responded, saying: "I believe the statute indicates that we can take matters in post conviction by way of affidavits, and that sort of thing, and this is an affidavit that refers to this case or the criminal case; and the Court will take it and study it."

The court filed its findings of fact and conclusions of law on September 25, 1980. The court, focusing on the ineffective assistance of counsel claim, held defendant's counsel was not ineffective. The court then stated "every contention made by Petitioner for postconviction relief has been considered by this Court and found to be without merit. Petitioner failed to meet his burden of proof."

The sole issue posed by defendant on this appeal is whether the trial court erred by failing to make specific findings of fact and conclusions of law relating to petitioner's claim of newly discovered evidence. The State counters this claim by asserting that no issue pertaining to newly discovered evidence was raised in defendant's application for postconviction relief.

In dealing with this issue, we initially note our rejection of defendant's claim that any failure of the district court to strictly adhere to the requirements of section 663A.7 relating to findings of fact and conclusions of law requires reversal. Allen v. State, 217 N.W.2d 528 (Iowa 1974), cited by defendant for this proposition, does not so hold. The reversal in that case was predicated upon the ground that the State had failed to provide the required record of the original criminal proceeding. Given the rather well-established rules of law applicable to newly discovered evidence[1] and the questionable nature of the proof, if any, on the issue in the present case, we are inclined to find that

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[1] See, e.g., State v. Gilroy, ___ N.W.2d ___, ___ (filed Dec. 23, 1981).

a general rejection of the issue is sufficient in the absence of a posttrial motion by defendant under Iowa R. Civ. P. 179(b). Rules and statutes governing the conduct of civil proceedings are applicable to postconviction proceedings. Nuzum v. State, 300 N.W.2d 131, 132-33 (Iowa 1981); § 663A.7, The Code 1981.

The record in the present case does not compel a finding that the issue of newly discovered evidence was presented as a ground for relief. If it was not, it can not serve as a basis for relief on appeal. If it was, it is disposed of by the trial court's finding that "every contention made by petitioner for postconviction relief has been considered . . . and found to be without merit," which, in the absence of a motion under Iowa R. Civ. P. 179(b), is dispositive of the matter. Defendant, on appeal, does not argue the merits of the newly discovered evidence claim. He only attacks the sufficiency of the trial court's findings. For the reasons stated, we find no ground for reversal.

AFFIRMED.