FILED
OCT 21 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOHN ALBERT KNOX, JR.,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Filed October 21, 1980

0-228
2-63610

Appeal from Marshall District Court - George G. Fagg, Judge.

Petitioner appeals dismissal of application for postconviction relief. - Affirmed.

Gale Boliver and Barry S. Kaplan, of Fairall, Fairall, Reeves & Kaplan, Marshalltown, for appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and Donald R. Mason, Marshall Assistant County Attorney, for appellee.

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

PER CURIAM

Petitioner appeals the dismissal of his application for postconviction relief from his conviction of aggravated robbery in violation of section 711.2, The Code 1975. We affirm.

In a jury trial held in September, 1977, petitioner was found guilty of aggravated robbery of the F S Minimart in Marshalltown and was sentenced to a twenty-five year prison term. At trial two clerks working at the F S Minimart at the time of the robbery identified petitioner as one of the robbers. David Duden, another witness at trial, testified to having personal knowledge that petitioner was one of the robbers. After petitioner's conviction, Duden gave petitioner's attorney a statement recanting this trial testimony. Subsequently petitioner filed an application for postconviction relief, claiming that Duden's recantation of his trial testimony entitled petitioner to have his conviction and sentence vacated.

When a hearing was held on petitioner's application in May, 1978, Duden testified that his trial testimony was the truth and that his subsequent recantation to petitioner's attorney was false. After the hearing the postconviction court dismissed petitioner's application for relief.

Our review is limited to correction of errors at law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Parties seeking postconviction relief must establish their allegations by a preponderance of the evidence. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Cleeson v. State, 258 N.W.2d 330, 332 (Iowa 1977); Watts v. State, 257 N.W.2d 70, 71 (Iowa 1977). If the trial court's findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law, the reviewing court will not disturb the judgment. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 31 (Iowa 1979); Benton v. State, 199 N.W.2d 56, 57 (Iowa 1972).

Petitioner contends that Duden's recantation to petitioner's attorney constitutes newly discovered evidence of material facts that requires vacation of petitioner's conviction and sentence. See section 663A.2(4), The Code 1979. We disagree. A petitioner seeking postconviction relief based on newly discovered evidence must establish that the new evidence is not merely impeaching and that it probably would

change the result if a new trial were granted. State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976). Petitioner failed to establish either requirement by a preponderance of the evidence.

Duden's current posture is to confirm the statements he made as witness in petitioner's first trial. In a new trial Duden's reaffirmation of his statements made in the first trial would relegate introduction of the newly discovered evidence -- Duden's recantation made to the petitioner's attorney — to having impeaching value only. Petitioner has not established by the preponderance of the evidence that the newly discovered evidence has more than merely impeaching value. Further, the postconviction court concluded that the existence of Duden's recantation would not change the outcome if a new trial were granted. We have reviewed the evidence based upon which petitioner was convicted, particularly the testimony of the two clerks who were identification witnesses, considered it in light of the impact of the existence of the newly discovered evidence, and believe that the petitioner has failed to show by a preponderance of the evidence that the existence of the newly discovered evidence probably would change the result in a new trial.

AFFIRMED.