IN THE COURT OF APPEALS OF IOWA

No. 8-531 / 97-1413

WILLIAM S. DIBLE,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from a district court ruling in his postconviction action granting a summary judgment in favor of the State. **AFFIRMED.**

Mark D. Reed of Reed & Epping, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

MAHAN, J.

This is an appeal by William Dible challenging a district court ruling in his postconviction action granting a summary judgment in favor of the State. We affirm.

William Dible was convicted of first-degree burglary, second-degree burglary, second-degree arson, and first-degree criminal mischief in 1993, in connection with a fire at the home of Sunday Gaskell and the assaults on Gaskell and her daughter. Dible appealed his convictions on the claim of insufficient evidence for the first-degree burglary charge and claimed ineffective assistance of counsel. His conviction was affirmed, and the court denied the ineffective assistance of counsel claim finding there was no conflict of interest, no breach of duty, and no prejudice on behalf of the trial counsel, Robert Stenander.

Dible timely filed an application for postconviction relief. There was extensive discovery and numerous motions, with both the State and Dible filing motions for summary judgment. The district court dismissed Dible's application for postconviction relief by granting the State's motion for summary judgment.

Dible now appeals. He claims the postconviction court erred in granting the State's motion for summary judgment on the postconviction application. Dible claims there was ineffective assistance of counsel, coupled with various issues of material facts, which would have changed the outcome of the trial. Additionally, Dible argues the court erred in not ruling on his motion for summary judgment and, based upon the stated errors, he was denied a fair trial.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards -- such as ineffective assistance of counsel -- we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.* To the extent constitutional issues are implicated on review of summary judgment, we look to the totality of circumstances under a de novo review. *Lumbermens Mut. Cas. Co. v. State Dep't of Revenue & Finance*, 564 N.W.2d 431 (Iowa 1997). Summary judgment is appropriate when no genuine issue of fact exists and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 237(c). In order to evaluate Dible's claims completely, we look at each one individually.

I. State's Summary Judgment. Dible argues the postconviction court erred in granting the State's motion for summary judgment because there were genuine issues of material facts, including ineffective assistance of counsel, prosecutorial misconduct, and judicial misconduct. Looking first to the claims of ineffective assistance of counsel, Robert Stenander represented Dible during the trial and after the guilty verdict Stenander was replaced by Jeffrey Neary for the post-trial motions. Sharon Stevens represented Dible during the direct appeal. Numerous claims of ineffective assistance of trial counsel were rejected on the direct appeal. No claims against Neary and Stevens were made until this postconviction claim. In order to prevail on a claim of ineffective assistance of counsel, Dible must show by a

preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

Section 822.8 of the Iowa Code provides any issue "finally adjudicated" in a prior proceeding may not be raised in an application for postconviction relief. Iowa Code § 822.8 (1997). It is well settled that postconviction relief is not a means of relitigating claims that were or should have been properly presented at trial or direct appeal. Any claim not properly raised at trial or on direct appeal may not be litigated in postconviction unless there is sufficient reason for not properly raising it before. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993). The claim against Stenander was adjudicated on direct appeal and is barred; therefore it is not necessary for us to discuss it. There were no claims against Neary on direct appeal; the claim against Stevens did not arise until this appeal. Dible presents no sufficient reason why the claims against Neary were not brought on direct appeal. Therefore, the claim against Neary is barred.

With respect to the claim against Sharon Stevens, Stevens testified she investigated the record and only brought claims based on merit which were likely to succeed and left out claims which may have confused or clouded the main issues. We see nothing in Stevens' actions which amount to a failure to perform an essential duty, much less any signs of prejudice due to Stevens' actions. Since Dible cannot pass the two part test to prove ineffective assistance of counsel, there remains no genuine issue of material fact. Summary judgment was appropriate on this issue.

Dible argues there is a genuine issue of material fact in the alleged prosecutorial misconduct of Charles Thoman. Dible claims Thoman withheld evidence, used perjured testimony, and perjured himself. In the postconviction review, the court held the claims to be without merit and found as a matter of law there was no prosecutorial misconduct. Under Iowa Code section 822.8, this claim is barred as a previously adjudicated claim. Even if we were to examine the claim, it would be found to be meritless. Dible's claims are based on information Thoman directly refuted in his deposition or relate to collateral matters. A prosecutor's misconduct will not warrant a new trial unless the conduct is "so prejudicial as to deprive the defendant of a fair trial." *State v. Peterson*, 532 N.W.2d 813, 820 (Iowa App. 1995) (quoting *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973)). We find no evidence any actions by Thoman were prejudicial, nor did they create a genuine issue of material fact.

Dible claims the refusal by the trial judge to recuse himself created judicial misconduct, thus creating a genuine issue of material fact for this appeal. Dible argues the trial judge, the Honorable Richard J. Vipond, should have recused himself from the case because he had presided over Dible's previous unrelated conviction and was aware of information that may have biased him against Dible. We believe the postconviction court was correct in rejecting this claim. A judge is disqualified from acting in a case if he or she has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. Iowa Code § 602.1606(1) (1997). Only when the bias or prejudice is personal and not

mere judicial predilection can it constitute a disqualifying factor. *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). There was no showing by Dible that he was prejudiced in anyway, nor any showing Judge Vipond's actions were motivated by any purpose other than judicial fairness. We do not believe Dible has proven any genuine issue of material fact on the claim of judicial misconduct.

Dible did not prove ineffective assistance of counsel, nor did he raise any genuine issue of material fact. Dible's claims centered around collateral issues or difference of opinion in the strategy, but there is no claim that directly refutes the strong evidence he committed the crimes he was convicted of. We agree with the postconviction court in awarding summary judgment to the State.

II. Failure to Rule on Dible's Summary Judgment. Dible argues the court improperly dismissed his application for postconviction relief by failing to rule on his motion for summary judgment. The postconviction ruling stated summary judgment was granted in favor of the State and against Dible. We do not view this as a failure to make a ruling. The State's motion was granted and it can be inferred Dible's motion was denied. We support the court's ruling in favor of the State as there were no factual issues that would have changed the outcome of Dible's trial, and the only questions which remained were legal ones, thus supporting the State's motion for summary judgment.

III. Denial of Fair Trial. Dible argues even if none of the prior claims are sufficient on their own, the cumulative effect of the errors denied him a fair trial. Errors may be looked at for their cumulative effect to determine if they were

sufficient for a reversal. *State v. Burkett*, 357 N.W.2d 632 (Iowa 1984); *State v. Carey*, 165 N.W.2d 27, 36 (Iowa 1969). In this case, Dible has failed to prove his claims have any merit; thus, we conclude defendant has failed to demonstrate errors sufficient to be able to assert their "cumulative effect."

We affirm the summary judgment ruling in favor of the State. Costs of this appeal are assessed to Dible.

AFFIRMED.