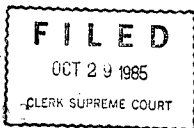


IN THE COURT OF APPEALS OF IOWA



KENNETH B. JOHNSON,

)

Petitioner-Appellant,

)

vs.

)

STATE OF IOWA,

)

Respondent-Appellee.

Filed October 29, 1985

5-474
85-110

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Appeal from the Iowa District Court for Black Hawk County - Robert
E. Mahon, Judge.

Petitioner appeals from the denial of his application for postconviction
relief which asserted newly discovered evidence. **AFFIRMED.**

Charles Harrington, Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Ann DiDonato, Assistant Attorney
General, and Scott Lemke, Assistant County Attorney, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, and Sackett, JJ.

SACKETT, J.

Kenneth Johnson was charged with first degree robbery. The robbery victim reported to police that he had offered a ride to Timmy Sisk and another male. The victim stated that the other man robbed him. The police located Sisk who then stated that Johnson was the other man in the car. The victim subsequently picked Johnson's photograph out of a lineup. At trial, there were some slight inconsistencies in the victim's account of the robbery, but the victim made an in-court identification of Johnson. Sisk testified at trial that Johnson robbed the victim. Johnson, in his defense, testified that he and Sisk had recently had an argument and that Sisk had threatened him. Johnson testified, "[Sisk] said that I will get sent away, they'll be a lot of things he do." Johnson speculated that Sisk was out to get him since Johnson had previously identified Sisk as the person who had broke into a pool hall. Johnson's conviction was affirmed on appeal.

Johnson has filed a petition for postconviction relief alleging discovery of "evidence of material facts, not previously presented or heard, that require vacation, of (his) conviction herein, in the interest of justice, pursuant to section 663A.2(4)." This newly discovered evidence was a statement made by Sisk to Johnson's girlfriend at the food stamp office. Sisk had remarked to her, "You just mad cause I got you boyfriend set up and sent to prison." The petition indicated that this evidence was a declaration by Sisk that he had perjured himself at Johnson's trial and that he had a revenge motive for his perjury. The petition argued that the new evidence is material in light of the other trial testimony presented at trial.

In its denial of postconviction relief, the district court stated that the petition was filed pursuant to Iowa Code section 663A.2(4) which provides that there must exist evidence of material facts, not previously presented and heard,

that requires vacation of the conviction or sentence in the interest of justice. The trial court then stated that it reviewed and applied chapter 663A and Hamann v State, 324 N.W.2d 906 (Iowa 1982) to the evidence presented. The trial court reasoned that the allegation of perjury was duly considered at Johnson's robbery trial and that the evidence submitted at the postconviction hearing was insufficient to establish the allegation of perjury. The court concluded that petitioner failed to establish a ground for relief under Iowa Code section 663A.2(4) and failed to establish any violation as outlined by Hamann.

A postconviction relief action is at law and our review is on assigned error. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

Johnson contends that the trial court erred in characterizing his claim of newly discovered evidence as a claim of prosecutorial suppression of exculpatory evidence. This argument is without merit. The trial court clearly stated that its basis for denying the postconviction relief was: (1) that the perjury evidence had been previously presented and heard, and (2) that the evidence submitted at the postconviction relief hearing was insufficient to establish the allegation of perjury on the part of Sisk.

The elements which if proven by a preponderance of the evidence require a new trial under section 663A.2(4) are:

- (1) the evidence was discovered after judgment,
- (2) the evidence could not have been discovered earlier in the exercise of due diligence,
- (3) it is material to the issue, not merely cumulative or impeaching,
- (4) it would probably change the result if a new trial is granted.

Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 32-33 (Iowa 1979).

The trial court found that Johnson's allegation of perjury and the motive for perjury were known previously and were duly considered at trial. We find

the trial court's findings of fact are supported by substantial evidence and are justified as a matter of law

We affirm the trial court's denial of Johnson's petition for postconviction relief

AFFIRMED