FILED
MAY 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT EDD LONEY,)
Petitioner-Appellant,)
vs.)
STATE OF IOWA,)
Respondent-Appellee.)

205

8-544
87-1502

Appeal from the Iowa District Court for Scott County (72722), C.H. Pelton, Judge.

Defendant appeals the summary dismissal of his second postconviction petition after a jury found him guilty of first-degree murder. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and B. John Burns, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard J. Bennett, Assistant Attorney General, for respondent-appellee.

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

SCHLEGEL, J.

296

Defendant Robert Edd Loney appeals the summary dismissal of his second postconviction petition after a jury found him guilty of first-degree murder. He contends that his application raises a genuine issue of material fact based on evidence not available to him at the time he first filed for postconviction relief and that summary judgment under Iowa Code section 663A.6 is not proper if a material issue of fact exists. We reverse.

On August 25, 1967, a jury found Loney guilty of first-degree murder. He was sentenced to a term of life imprisonment. The conviction was affirmed on appeal. State v. Loney, 163 N.W.2d 378, 383 (Iowa 1968). Loney has since filed numerous petitions asking for postconviction relief, all of which have been denied or dismissed by state and federal courts.

Loney's current petition for postconviction relief is based on Iowa Code section 663A.2(4) (1987), which requires "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." In his application, Loney alleged that the decision not to testify at his criminal trial in 1967 was based on his belief that the State would impeach his testimony by means of admissions he made to Novie Brammer, a cellmate, concerning the murder. Loney contends that he did not know at the time of his trial that

police had "planted" Brammer to elicit incriminating statements from him, and that he did not discover this information until 1981, when he acquired police reports during the discovery stage of his 1981 federal habeas corpus action. Loney further argues that had he known of these circumstances, he could have moved to suppress any threatening testimony by the cellmate under Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1119, 12 L.Ed.2d 246 (1964), and could have testified freely on his own behalf. The State of Iowa moved for summary judgment and the district court granted the motion.

Under Iowa Code section 663A.6 (1987), the district court "may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Summary disposition under section 663A.6 is not proper if a material issue of fact exists. State v. Ridinger, 341 N.W.2d 734, 736 (Iowa 1983). Where reasonable minds can draw different inferences, a material issue of fact exists. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981).

Under the allegations, viewed in the light most favorable to Loney, see State v. Boge, 252 N.W.2d 411, 414

(Iowa 1977), we hold that Loney should have been given the opportunity to present whatever proof he may have to support his claim, and that the trial court erred in denying him this opportunity based on "insufficient grounds". We see little distinction between this case and the case of Watson v. State, 294 N.W.2d 555, 557 (Iowa 1980), in which our supreme court similarly considered a trial court's order summarily dismissing an application for postconviction relief under section 663A.2(4):

> [W]e do not believe that it can be found that this ground [663A.2(4)] is insufficient to warrant relief because the pertinent allegations are neither clearly disproved by the record of the original proceeding, nor do they fail to justify relief as a matter of law. Watson's assertion [that certain testimony given in the subsequent trial of his confederate would support this ground for relief], even if deemed improbable by trial court, requires that Watson be allowed to present to the court whatever proof he may have to support his claim. His plea to trial court for the chance to present evidence...went unheeded. Whether Watson can prove this ground by establishing the requisite elements set forth in State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976), we do not know, nor is that relevant at this juncture. We are only saying that the opportunity to present proof ought to have been given in this case.

In the case at bar, there is nothing in the record suggesting that Loney had prior access to the police reports, or that his allegations were in any way contradicted by the record. Contrary to the postconviction court's ruling, we believe that genuine issues of material fact exist which prohibit summary disposition, and this case must be reversed and remanded for resolution on its merits.

REVERSED AND REMANDED.