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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-244 / 93-0944

MICHAEL A. MILLER,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Monroe County, Dan F. Morrison, Judge.

Michael Miller appeals from the dismissal of his application for postconviction relief contending the existence of material issues of fact precluded summary disposition. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., Assistant Attorney General, and Mark E. Kruse, County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Applicant, Michael Miller appeals from the dismissal of his application for postconviction relief contending the existence of material issues of fact precluded summary disposition. We affirm.

Miller was charged with the first-degree murder of his girlfriend, Kim Jellison, on alternate theories of premeditation or participating in the forcible felony of willful injury. At trial Miller claimed he was shooting at a stray dog and accidentally shot his girlfriend. The jury convicted Miller of first-degree murder and he was sentenced to life imprisonment. Miller appealed and was appointed different counsel.

Appellate counsel moved to withdraw pursuant to Rule of Appellate Procedure 104. Counsel acknowledged: (1) the evidence appeared to be sufficient to generate a jury question on the issue of willful injury; (2) the evidence appeared to be sufficient to generate a question of premeditation; and (3) the district court did not err in allowing rule 404(b) evidence of prior violence between Miller and Jellison. Miller objected to his counsel's withdrawal, asserted several grounds for appeal and asked that different counsel be appointed to represent him. The supreme court dismissed the appeal.

Miller filed this application for postconviction relief contending: (1) his conviction was not supported by sufficient evidence of premeditation; (2) the jury

instructions at trial unconstitutionally placed the burden on him; (3) trial counsel was ineffective for failing to seek a continuance when the State added several witnesses shortly before trial; and (4) new evidence showed a person other than Miller may have fired the shot that killed Ms. Jellison. The State filed motions to dismiss and for summary judgment. Miller filed an amended application contending he was denied effective assistance of appellate counsel by the supreme court's refusal to appoint different counsel. He also resisted the State's motions.

The district court found the jury instructions given at Miller's trial did not unconstitutionally shift the burden of proof on malice to Miller. It then concluded:

> In regard to the remaining issues plaintiff raises in his postconviction relief application, these issues fail to provide a basis for relief, as they were waived by not being raised on appeal or were adequately addressed by the ruling on motions by the trial court. The State's brief adequately sets forth relevant authority in relation to these issues.

Miller appeals, contending the district court erred in failing to allow him to present evidence on his postconviction claims.

I.

The State argues Miller waived his right to bring his postconviction relief action. The state asserts the effect of Polly v. State, 355 N.W.2d 849 (Iowa 1984), was to overrule Stanford v. Iowa State Penitentiary, 279 N.W.2d 28 (Iowa 1979) and State v. Boge, 252 N.W.2d 411 (Iowa 1977),

which had held that if a defendant objects to a rule 104 dismissal, a postconviction relief action may be pursued.

We agree with Miller that a rule 104 dismissal which is contested or objected to by the appellant does not prevent issues which could have been presented upon direct appeal from being embraced in a petition for postconviction relief under § 822 (1993). See Munz v. State, 382 N.W.2d 693, 695 (Iowa App. 1985).[1] Munz, which was decided after Polly, also states:

> For this court to bind an appellant to an action taken by his counsel in derogation of his instructions of which this court has knowledge, would be to establish or maintain an unreasonable procedural bar to postconviction relief. If the initial order to dismiss was accurate and the appeal is frivolous, it would take little time to resolve. If there is merit to petitioner's ground, then he or she should not be bound by a dismissal to which a timely objection was made. Therefore, we conclude that the dismissal of the direct appeal poses no bar to [the applicant's] claim for postconviction relief.

Id. (quoting Stanford, 279 N.W.2d at 34).

We now look to whether the district court properly dismissed Miller's application for postconviction relief. Under Iowa law, a postconviction court may dismiss an application for postconviction relief if the record indicates the applicant is not entitled to relief. Iowa Code § 822.6

One of Miller's claims in his postconviction application is there exists evidence of material facts, not

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1. At the time Munz was decided Iowa Code section 822 was found in Iowa Code section 663A.

previously presented or heard, which requires vacation of the conviction in the interest of justice. Specifically, Miller asserts there was evidence of "gunshot residue" on Rodney Hatfield, who was present at the scene of the shooting. Miller claims this is evidence Hatfield, not he, shot the victim.

To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) the evidence could not have been discovered earlier in the exercise of due diligence; (2) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983).

We find the "gunshot residue" evidence was discoverable earlier. In addition, at trial Miller admitted to shooting the victim. At trial, he testified he accidentally shot her while shooting at a stray dog. We find the admission of the "gunshot residue" would not have changed the result of the trial. The postconviction court correctly determined Miller has failed to provide a basis for postconviction relief on this ground.

Next, Miller alleges there was insufficient evidence to support his conviction. Miller argues no reasonable juror would "have convicted on premeditation and malice-aforethought alone." We have reviewed the record and find ample evidence to support Miller's conviction. In

a related issue, Miller argues the instructions submitted to the jury shifted the burden of proof to the defendant and violated his due process rights. We find the postconviction court correctly determined:

> Plaintiff relies on Yates v. Evatt, --- U.S. ---, 111 S. Ct. 1884, 114 L.Ed.2d 432 (1991), for the proposition that instructions given denied him due process by unconstitutionally shifting the burden of proof regarding intent, malice and premeditation. A review of the instructions given in this case, particularly instructions 7, 13, 15, and 17, indicate that the presumptions raised were permissive, not mandatory. This is a crucial distinction. See Yates, footnote 7, and Francis v. Franklin, 442 U.S. 140 (1979) cited therein. Because the presumptions raised were permissive, and not mandatory, plaintiff's allegation that the instructions violated due process is without merit.

See also Schrier v. State, 347 N.W.2d 657, 666-67 (Iowa 1984); State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983); State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980).

II.

Miller's final argument is his trial counsel was ineffective in failing to seek a continuance in response to "the late filings of the State." Miller's trial counsel made similar arguments during the trial. The trial court rejected them stating:

> Defendant complains that he received notice of additional minutes of evidence 14 days before the trial date. While he acknowledges it is well within the 10 day period provided by Rule 18(2) and that he has had a full opportunity to depose those witnesses, he nevertheless claims it is unfair to load additional witnesses on him so close to the trial date. The Court finds defendant's motion is without substance and should overruled.

In addition the trial court stated, "Defendant acknowledged in argument that he had a full opportunity to depose the witnesses and understood the legal theory upon which the State intended to rely."

We find Miller's claim of ineffective assistance of his trial counsel is without merit since this argument was raised by his counsel at trial.

We agree with the postconviction court that no purpose would be served by further proceedings. See Iowa Code § 822.6. We affirm the court's dismissal of Miller's application for postconviction relief.

AFFIRMED.