IN THE COURT OF APPEALS OF IOWA

No. 4-534 / 94-327

FILED
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CLERK SUPREME COURT

JERRY WAYNE KLEISS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Marion County, J. W. Jordan, Judge.

Jerry Wayne Kleiss appeals from the district court's denial of his application for postconviction relief. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr. and Thomas H. Miller, Assistant Attorneys General, and Terry Rachels, County Attorney, for appellee.

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

CADY, J.

This is an appeal by Jerry Wayne Kleiss from the summary dismissal of his application for postconviction relief. On our review, we reverse and remand for further proceedings.

In July 1990, Jerry Wayne Kleiss was facing criminal charges in Marion County, Louisa County, and Lee County, Iowa. Kleiss was believed to have committed a series of burglaries of tools from implement dealers, not only in Iowa, but also in Illinois and Missouri.

In order to consolidate the proceedings, Assistant Attorney General Thomas H. Miller was assigned to prosecute the charges against Kleiss in Iowa. Miller had authority to enter into plea negotiations on behalf of the three counties interested in the prosecution. Kleiss was represented by Martha Mertz. After plea negotiations, Kleiss agreed to waive venue in the Louisa County and Lee County cases and have just one proceeding in Marion County.

Kleiss entered a guilty plea to the Marion County charge of burglary in the second degree. He entered a plea of guilty to theft in the first degree in the Louisa County case, and two other counts against him in Louisa County were dismissed. Kleiss entered a plea of guilty to possession of burglar's tools and to being a habitual offender in the Lee County case. Four counts against him in Lee County were dismissed pursuant to the plea bargain. Kleiss was sentenced based on his guilty pleas.

On February 25, 1991, Kleiss filed a pro se application for postconviction relief. He claimed he received ineffective assistance of counsel due to his counsel's failure to challenge as unconstitutional the search and seize of items from his home. He claimed his guilty plea was involuntary because it was the result of threats and intimidation.

Additionally, Kleiss claimed the plea agreement contained three terms which were not part of the court record: (1) the State would strongly discourage other states from bringing any charges against him; (2) no other Iowa county would pursue any action against him; and (3) State officials would stand silent when his girlfriend, Barbara Dobbs, was to be sentenced. Kleiss claimed the State violated these provisions of the plea agreement by actively encouraging Missouri officials to pursue criminal charges against him. Furthermore, he claimed the State did not stand silent at Dobbs' sentencing.

Attorney Heidi Noonan was appointed to represent Kleiss in his postconviction action. After reviewing Kleiss' claims, she reported to the court that she could find no evidence of ineffective assistance, and thus, could find no basis to apply for postconviction relief which would not be frivolous. At the same time, Noonan filed a motion to withdraw as Kleiss' counsel.

The district court granted Noonan's request to withdraw. The court then notified Kleiss of its intention

to dismiss the application for postconviction relief. Kleiss was given until December 13, 1993 to respond. Kleiss did not file a response, but filed a second pro se application for postconviction relief on September 9, 1993.

In his second application Kleiss stated he received ineffective assistance from attorney Noonan because she failed to recognize he receive ineffective assistance from attorney Mertz due to her failure to make a court record of the terms of the negotiations that resulted in the plea agreement itself. Kleiss claimed two separate violations of the plea agreement. First, he claimed the State violated the plea agreement because it did not discourage other states from filing charges against him. Second, he alleged there were two additional terms to the plea agreement which were not part of the record: (1) he would not be required to provide any information about burglaries other than those to which he pled guilty; and (2) he would not be required to provide any information against Clayton Hustead. Kleiss claimed the State violated these terms by imposing upon him to confess to additional burglaries and to implicate Hustead in those burglaries.

On October 26, 1993, and on November 5, 1993, Kleiss requested the appointment of an attorney to represent him in his second postconviction action. After the withdrawal of attorney Noonan, Kleiss was not represented by an attorney before the district court.

On November 9, 1993, the district court notified Kleiss it intended to dismiss the application for postconviction relief on January 28, 1994, unless further facts became known to the court. The court filed a ruling on both of the applications for postconviction relief on February 2, 1994. No hearing was held in either case. The district court determined there was no merit to Kleiss' claims of ineffective assistance of counsel by attorney Mertz. The court also found there was no ineffective assistance of counsel by attorney Noonan. The court dismissed the two applications for postconviction relief. Kleiss appealed.

A postconviction review proceeding is an action at law and our review is not de novo, but only on errors assigned. Hines v. State, 288 N.W.2d 344, 345 (Iowa 1980).

On appeal, Kleiss contends summary disposition of his claims involving violation of the plea agreement is improper. He claims there are genuine issues of material fact on the question of whether he received ineffective assistance of counsel when he entered his guilty plea and the question of whether the State violated the terms of the plea agreement. He asks to be granted an evidentiary hearing on these issues. The State agrees Kleiss has sufficiently preserved error on these claims.

Iowa Code section 822.6 (1993) (formerly section 663A.6) provides in pertinent part:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for dismissal. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings would otherwise continue. Disposition on the pleadings and record is not proper if a material issue of fact exists.
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> The 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.

Section 822.6 provides not one, but two methods for summary disposition of postconviction relief applications. In the first method, the court may dismiss the application on its own initiative after it indicates to the parties its intentions to dismiss and its reasons for doing so. Brewer v. State, 446 N.W.2d 803, 805 (Iowa 1989).

The second method applies where either party files a motion for summary disposition of the pleadings. The goal of the second method is to provide a method of disposition once the case has been fully developed by both sides, but before the actual trial. Hines, 288 N.W.2d at 346. Where the parties are proceeding by this method, it is error to not set the motion to dismiss for hearing. Id. at 346-347; Chartier v. State, 223 N.W.2d 255, 257 (Iowa 1974).

We determine the court was proceeding by the first method of summary disposition in this case. Neither party filed a motion for summary disposition. After attorney Noonan filed her report to the court, the court on its own initiative sent notice to defendant that it intended to dismiss the suit. Because the first method of summary disposition was used, there was no error in the court's failure to hold a hearing before entering an order dismissing the applications for postconviction relief, if summary disposition was otherwise appropriate in this case.

In considering whether summary disposition was appropriate in this case, we note Iowa Rule of Civil Procedure 237 is applicable. Hines, 288 N.W.2d at 346. Summary disposition of a postconviction relief application is not proper if a material issue of fact exists. Earnest v. State, 508 N.W.2d 630, 632 (Iowa 1993). Whether a genuine issue of fact exists turns on whether reasonable minds could draw different inferences and reach different conclusions from them. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981). Furthermore, summary disposition is appropriate only where one party is entitled to judgment as a matter of law. Brewer, 446 N.W.2d at 805.

Where claims of ineffective assistance of counsel are included in a petition, an evidentiary hearing on the merits is ordinarily required. Munz v. State, 382 N.W.2d 693, 697 (Iowa App. 1985). Such a hearing affords the parties an opportunity to adversarily develop all of the

relevant circumstances and considerations which may be pertinent but are not a part of the criminal trial record. Id.

We determine there is a genuine issue of material fact concerning whether Kleiss received ineffective assistance from attorney Mertz due to her failure to make a court record of all of the terms of the plea agreement. No written plea agreement was submitted to the court. Kleiss has alleged there were additional terms to the plea agreement which were not discussed at the plea hearing.

The supreme court held in Foster v. State, 395 N.W.2d 637, 638 (Iowa 1986), that where a postconviction applicant raises fact issues outside the record, a summary dismissal of the case is improper. We believe a postconviction hearing is necessary in the present case to determine whether there were additional terms to the plea agreement which were not included in the record, and if there were additional terms, whether the State violated the plea agreement. The performance of a plea bargain agreement must be mutual. State v. Hovind, 431 N.W.2d 366, 368 (Iowa 1988).

We determine this case must be reversed and remanded for a hearing on the issues of whether all of the terms of the plea agreement were included in the record and whether the State violated the terms of the plea agreement. When the case is considered on remand, we direct the district

court to also consider Kleiss' request for the appointment of counsel to assist him in his postconviction action.

REVERSED AND REMANDED.