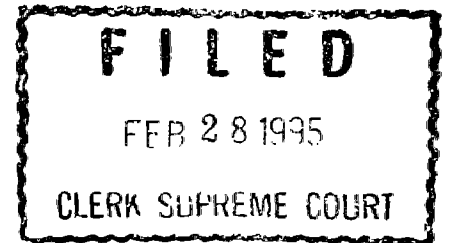


IN THE COURT OF APPEALS OF IOWA

No. 4-540 / 94-0353



WILLIAM J. ALVEY,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

000001

Appeal from the Iowa District Court for Sioux County,
Terry L. Huitink, Judge.

Applicant challenges the order granting the State's
motion for summary judgment and denying his application for
postconviction relief. **AFFIRMED.**

Robert J. Rehan, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,
Jr., and Charles Thoman, Assistant Attorneys General, and
Mark J. Schouten, County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Cady,
JJ. Huitink, J., takes no part.

HABHAB, J.

William J. Alvey filed an application for postconviction relief from his convictions for third-degree sexual abuse and being an habitual felon. He alleged the prosecutor had improper contact with the trial jury prior to the rendering of a verdict. He claimed the prosecutor was observed having lunch with members of the jury and entering the jury room without the presence of defense counsel.

The State filed a motion for summary judgment with affidavits from three members of the jury indicating they did not recall any contact with the prosecutor prior to the rendering of the verdict. Additionally, the State's motion contained an affidavit from the prosecutor indicating he did not have any improper contact with the jury prior to the rendering of the verdict.

Alvey failed to file any supporting affidavits with his resistance to the motion. Alvey instead chose to rely solely on his bald assertions in his answers to interrogatories that four named people witnessed both alleged events.¹ In his resistance to the motion, Alvey's

1. The two interrogatories in question and their answers are as follows:

2. In respect to the allegations set forth in Division 3A, subparagraph one of the Application for Post-Conviction Relief state the names, addresses and positions of all persons who are alleged to have seen Mark J. Schouten, Sioux County Attorney, having lunch with members of the

attorney recounted a conversation he had with one of the alleged witnesses. Alvey's attorney's account of this conversation provided only a very sketchy version of the jury room incident. Although this witness was also to be a witness of the lunch incident, no mention was made of this incident. No supporting affidavit from this witness was provided in support of the resistance.

The court granted the State's motion for summary judgment determining no factual basis supported Alvey's allegations of prosecutorial misconduct. It also specifically found there was no improper conduct between the prosecutor and members of the jury. Alvey now appeals.

jury in this case on September 27, 1988 at approximately 11:00 to 11:30 a.m. and name the specific restaurant where this event was supposed to have happened.

Cheryl DeVries, Don Simonson, Larry Schoemaker, Nancy Schoemaker. I do not know the addresses of the above individuals or the name of the restaurant.

3. In respect to the allegations set forth in Division 3A, subparagraph two of the Application for Post-Conviction Relief state the name and address and position of all persons who are alleged to have seen Mark J. Schouten, Sioux County Attorney, entering the jury room with some type of documents, unaccompanied by defense counsel and leaving the jury room without any documents in his possession.

The four above and probably two more.

Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423.

However, the nonmoving party may not simply rest on its pleadings and allegations once a motion for summary judgment is filed.

When a motion for summary judgment is made and supported as provided in [Iowa R. Civ. P. 237], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Iowa R. Civ. P. 237(e).

We find Alvey has failed to "set forth specific facts showing there is a genuine issue for trial." In support of

its motion, the State provided affidavits from three jurors and the prosecuting attorney. Alvey, on the other hand, has provided almost nothing in response. Up to this point, all Alvey has been able to produce is two bald assertions which Alvey claims were witnessed by four people. No affidavits are provided from any of these alleged witnesses. No specifics of either alleged instance have been provided. Alvey was unable to even provide the name of the restaurant where the alleged lunch incident took place. At most, Alvey only provides hearsay regarding a conversation with one of the alleged witnesses. We deem this insufficient to carry his burden. We affirm the decision of the district court.

AFFIRMED.