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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEFFREY V HERSHBERGER,)

Applicant-Appellant,) Filed December 17, 1987 134

vs)

STATE OF IOWA,) 7-391
86-1449

Resister-Appellee.)

Appeal from the Iowa District Court for Monroe County (No. CR1-288-0883), Phillip R Collett, Judge.

Applicant appeals from the district court's summary dismissal of his petition for "habeas corpus" relief, which the court elected to treat as an application for postconviction relief. **AFFIRMED.**

Charles L Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for applicant-appellant.

Thomas J Miller, Attorney General; Lona Hansen, Assistant Attorney General, and Annette J. Scieszinski, County Attorney, for resister-appellee.

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

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The applicant appeals from the district court's summary dismissal of his petition for "habeas corpus" relief, which the court elected to treat as an application for postconviction relief. We affirm.

On January 20, 1984, the applicant, Jeffrey V. Hershberger, entered a guilty plea to a second-degree burglary charge. Hershberger then escaped from the county jail on February 16. On February 23 the district court sentenced him to an indeterminate prison term of up to ten years on the burglary charge. Hershberger was formally charged and sentenced on the escape charge that same day. The district court imposed a prison term of up to five years on the escape conviction to run consecutively with the burglary sentence, stating that consecutive sentencing was mandatory under Iowa Code section 901.8 (1983). The district court then listed other reasons in support of its sentencing decision. Hershberger did not appeal from the guilty plea or the sentences imposed.

On July 3, 1985, Hershberger filed an application for postconviction relief, which the district court denied on September 6 following a hearing wherein Hershberger was represented by counsel. Hershberger did not appeal from the district court's decision. Instead, he filed a petition with the district court on August 21, 1986, seeking "habeas corpus" relief. He requested but did not receive a hearing on this petition. The district court treated the petition as a second application for postconviction relief and then dismissed it as a mere relitigation of his prior postconviction claims. Hershberger appeals from the district court's dismissal of his second application for postconviction relief.

Our scope of review is for the correction of errors at law. Iowa R. App. P 4.

I. Hershberger first contends that the district court erred in refusing to grant his request for an evidentiary hearing to allow him to show that ineffec-

tive assistance claims raised in his application had not been fully and fairly litigated in a prior postconviction proceeding. He argues that his original postconviction hearing on September 6, 1985, lasted only twelve minutes and that his postconviction counsel produced no evidence and only asked a few limited questions of Hershberger.

A review of Hershberger's postconviction relief application filed in 1985 and Hershberger's petition for writ of habeas corpus, which the district court treated as a new application for postconviction relief, discloses that Hershberger raised the identical grounds for relief in both applications.

Postconviction proceedings are intended to provide criminal defendants with an opportunity to raise challenges to their convictions and sentences which could not have been raised in prior proceedings. Iowa Code § 663A.8 (1987); see State v. Wetzel, 192 N.W.2d 762, 764 (Iowa 1971). Postconviction proceedings are not intended to permit a defendant to raise the same issues in repeated proceedings or to raise issues which could have been raised for review in prior proceedings. Id. In order to raise an issue in postconviction proceedings, a defendant must show a sufficient reason for his failure to previously raise issues or for his raising issues which have been raised in prior proceedings. Id. A defendant is not entitled to a hearing on his application for postconviction relief unless he meets a minimum threshold of credibility and where, as in the instant case, defendant's allegations contradict the record, defendant's bare allegations do not overcome the presumption that the record accurately reflects the facts. Foster v. State, 395 N.W.2d 637, 638 (Iowa 1986).

We find the district court did not err in dismissing Hershberger's second postconviction relief application without benefit of an evidentiary hearing. He has failed to show a sufficient reason to relitigate the issues which he raised in his 1985 application. See Wetzel, 192 N.W.2d at 764.

Furthermore, we find Hershberger's allegations in this postconviction relief application are contradicted by the record. Hershberger presents no reason to doubt the truth of the record. See Dryer v. State, 342 N.W.2d 881, 883 (Iowa App. 1983). He alleges he was denied access to legal materials and documents. No transcript existed at the time Hershberger pleaded guilty and requested a transcript; the trial court advised Hershberger that a transcript would be prepared if he appealed the plea and sentence.

A criminal defendant is not entitled to unlimited options to pursue his pro se legal research. If a defendant has either representation by counsel who can pursue defendant's research or access to legal materials himself, the defendant has access to the courts. State v. Simon, 297 N.W.2d 206, 210 (Iowa 1980). The record shows that Hershberger was represented by counsel who met with him, advised him, and discussed the charges with him. Hershberger had read the trial informations and the minutes of testimony and had gone over them with counsel. On the basis of this record, there is no support for Hershberger's allegations that he was denied access to the courts or denied copies of court documents. He is not entitled to relief on this ground.

Hershberger additionally alleges that he received ineffective assistance of counsel in that defense counsel denied him an opportunity to appeal from his pleas and sentences. He did not raise this ground in his 1985 application for postconviction relief in which he was represented by counsel. Because Hershberger did not raise this issue in his 1985 application, he is not entitled to raise it in his second application for postconviction relief absent an allegation of cause for and prejudice from failure to earlier assert the issue. Wetzel, 192 N.W.2d at 764. An examination of the 1985 application indicates that counsel did not refuse to appeal the convictions and sentences; rather, appellate counsel advised Hershberger that Hershberger did not have good grounds for appealing

since he had waived his rights before entering his plea and that Hershberger could be liable to resentencing following a successful appeal. Presumably, Hershberger desired to raise the same issues on appeal which he raised in both postconviction applications. These issues were reviewed by the trial court in the 1985 postconviction proceeding and found to be meritless. On the record before this court, there is nothing which requires a hearing on the appeal issue. Wetzel, 192 N.W.2d at 764. No material issue of fact appears which is sufficient to require the trial court to hold a hearing on Hershberger's 1986 application for postconviction relief. Dryer, 342 N.W.2d at 883.

II. Hershberger's second argument raised in this appeal is that his sentencing court improperly decided to run his escape and burglary sentences consecutively based upon its erroneous belief that consecutive sentencing was mandatory under Iowa Code section 901.8 (1983).

The State concedes the trial court was incorrect in stating that it was required to impose a consecutive sentence on the escape charge under section 901.8. Section 901.8 requires that an escape sentence be consecutive to any sentence which a defendant is serving at the time of the escape. State v. Smith, 300 N.W.2d 90, 93 (Iowa 1981). In this case, Hershberger escaped from the jail before he had been sentenced in the burglary charge. If the defendant is not serving a sentence when he escapes, it is within the trial court's discretion whether to impose the escape sentence consecutively to any other sentences imposed on defendant. Id. at 93. The decision to impose consecutive sentences is within the trial court's broad discretion. See State v. Buck, 275 N.W.2d 194, 197 (Iowa 1979).

We find that the trial court did not abuse its sentencing discretion because it did not rely solely on its interpretation of section 901.8 in making the sentencing decision. The trial court considered Hershberger's circumstances, his chances

for rehabilitation, and the protection of the community in sentencing Hershberger to serve the escape sentence consecutively to the burglary sentence. The court further stated

> Now, the reason I am giving the sentence that I have just imposed is because of the Defendant's prior criminal record, his need for a structured environment, his lack of motivation to live a law-abiding lifestyle, and his lack of verifiable job skills and meaningful employment record

The trial court considered all the foregoing factors in making its sentencing decision, and thus we find it did not abuse its sentencing discretion.

We affirm Hershberger's conviction

AFFIRMED.

Sackett, J , concurs, Oxberger, C J , dissents

I would remand for resentencing on the escape charge The trial court erroneously said section 901 8 of The Code mandates a consecutive sentence. I do not believe a judge is unable to exercise discretion when he or she does not believe they have discretion The defense counsel was also denied allocution because the trial judge announced he did not have any discretion in the sentence.