IN THE COURT OF APPEALS OF IOWA

No. 6-233 / 95-0539

FILED
MAY 31 1996
CLERK SUPREME COURT

WILLIAM S. DIBLE,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos and Robert C. Clem, Judges.

Appeal from dismissal of second application for postconviction relief. **REVERSED AND REMANDED.**

William S. Dible, pro se, Anamosa, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Charles N. Thoman and Mark Campbell, Assistant County Attorneys, for appellee.

Considered by Sackett, P.J., and Habhab and Streit, JJ. Huitink and Vogel, JJ., take no part.

STREIT, J.

This is an appeal from the denial of a second application for postconviction relief. The first application was dismissed pursuant to Iowa Rule Civil Procedure 215.1, and the second application was dismissed as untimely under Iowa Code section 822.3. At issue is whether the alleged ineffectiveness of postconviction counsel excuses the untimeliness of the second application. We hold counsel's failure to timely prosecute the postconviction claim does not deprive the applicant of review of his claim, and we reverse.

I. Factual Background. Applicant William Dible pleaded guilty to suborning perjury in March 1989. In July 1990 his probation was revoked, and he was committed to prison to serve a five-year sentence. Dible filed a timely application for postconviction relief in December 1990 alleging ineffective assistance of counsel and newly-discovered evidence. Three attorneys representing him in the postconviction action withdrew or were dismissed at his request. As of May 20, 1991, he was proceeding pro se.

On July 30, 1992, the district court clerk sent Dible a notice informing him his action would be dismissed pursuant to Iowa Rule of Civil Procedure 215.1 if not tried

by January 1, 1993.[1] Upon Dible's request, attorney Robert Sikma was appointed to represent Dible on September 10, 1992.

Dible's action was dismissed pursuant to rule 215.1 on January 25, 1993. In September 1994 Dible filed a pro se motion to reinstate his postconviction action. Dible alleged that due to his incarceration he did not discover his action was dismissed until May or June 1994 and it was dismissed without his permission. Sikma

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[1]Iowa Rule of Civil Procedure 215.1 provides --

> It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.
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> All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year The clerk shall prior to August 15 of each year give notice to counsel of record
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> . . . .
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> and the notice shall state that such case will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte
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> No continuance under this rule shall be by stipulation of parties alone but must be by order of court Where appropriate the order of continuance shall be to a date certain
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> The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

represented Dible at the hearing on the motion to reinstate. On November 14 the court denied Dible's motion finding it was not filed within six months of the dismissal and the court lacked jurisdiction to reinstate.

On November 18, 1994, Dible filed a second application for postconviction relief repeating his allegations of ineffective assistance of trial counsel and newly-discovered evidence. In addition, Dible alleged his postconviction counsel, Sikma, was ineffective for allowing his first postconviction action to be dismissed.

The State filed a motion to dismiss on the basis the second postconviction application was time barred pursuant to Iowa Code section 822.3.[2] Following a hearing at which Sikma represented Dible, the court granted the State's motion to dismiss. Dible filed a rule 179(b) motion to reconsider contending he was not notified of the hearing and Sikma had a conflict of interest. The court denied the motion.

Dible appeals. He argues the ineffective assistance of counsel in his first postconviction action excuses the untimeliness of his second application for postconviction relief.

II. Ineffective Assistance of Counsel. Dible argues his postconviction counsel was ineffective in allowing his postconviction action to be dismissed under rule 215.1

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[2] [A]pplications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

Iowa Code § 822.8 (1993).

and that ineffective assistance excuses the untimeliness of his second postconviction application. The statutory right to postconviction counsel necessarily implies the right to effective counsel. *Dunbar v. State*, 515 N.W.2d 12, 14 (Iowa 1994). In order to prevail on a claim of ineffective assistance, a defendant must show, by a preponderance of the evidence, both that counsel failed to perform an essential duty and prejudice resulted. *State v. Stribley*, 532 N.W.2d 170, 173 (Iowa App. 1995).

Postconviction proceedings are civil proceedings. *Jones v. State*, 479 N.W.2d 265, 269 (Iowa 1991). Once appointed, counsel had a duty to prosecute Dible's postconviction action and prevent it from being dismissed under rule 215.1. *Cf. Lamphere v. State*, 348 N.W.2d 212, 216 (Iowa 1984) (counsel ineffective in allowing appeal to be dismissed without notifying defendant).

At the time counsel was appointed, Dible's postconviction action had been pending over twenty months. Counsel had a duty to ascertain the status of the case, including its rule 215.1 status Whether through mere oversight or a conscious decision that Dible's claim was without merit, counsel allowed it to be dismissed and did not timely move for reinstatement within six months Counsel breached an essential duty, and Dible was prejudiced by the fact a refiling of his postconviction claim would be rendered untimely

"[T]he legislative intent of section 822.3 was to conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of

repose in our criminal judicial system." *Cornell v. State*, 529 N.W.2d 606, 610 (Iowa App. 1994). The objective of the "escape clause" of section 822.3 is to provide relief from the statute of limitation when an applicant had "no opportunity" to assert the claim before the limitation period expired. *Id.* at 611.

While Dible was clearly aware of his present postconviction claims before the statute of limitations lapsed, he effectively had "no opportunity" to timely raise the claims because of the failure of his counsel to prosecute or obtain a rule 215.1 continuance. The laudatory purposes of section 822.3 are not subverted by ensuring a postconviction applicant receives judicial review of his claim despite his attorney's failure to properly prosecute it.

We reverse the dismissal of Dible's second postconviction action and remand it to the district court for reinstatement and further proceedings. The district court is directed to appoint counsel other than Sikma to represent Dible in the proceedings. In finding Dible's postconviction counsel was ineffective in allowing the action to be dismissed, we express no opinion on the underlying merits of Dible's claims.

REVERSED AND REMANDED.