IN THE COURT OF APPEALS OF IOWA

No. 3-109 / 92-152

FILED
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CLERK SUPREME COURT

WILLIAM HENRY VINCIK,

Appellant,

vs.

STATE OF IOWA,

Appellee.

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Appeal from the Iowa District Court for Linn County, August F. Honsell, Judge.

Vincik appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, Denver D. Dillard, County Attorney, and Scott C. Peterson, Assistant County Attorney, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

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SCHLEGEL, P.J.

The defendant, William Henry Vincik, appeals the district court's denial of his application for postconviction relief. He contends the court erred in refusing to grant postconviction relief on the basis of newly-discovered evidence and erred in not giving a spoliation instruction. He also claims new evidence lends credence to his theory of defense.

On June 26, 1984, Vincik and his wife, Inez, were found shot in their Cedar Rapids home. Inez died, and the bullet wound to Vincik's head required hospitalization and major surgery. The supreme court reversed and remanded Vincik's first conviction for second-degree murder because the State had obtained and used a confession from Vincik before he was medically capable of voluntarily waiving his rights. See State v. Vincik, 398 N.W.2d 788 (Iowa 1987). On remand Vincik was convicted of second-degree murder and sentenced to fifty years. The conviction and sentence were affirmed in State v. Vincik, 436 N.W.2d 350 (Iowa 1989). Vincik challenged his conviction through an application for postconviction relief and was given a hearing in October of 1991.

Vincik claims he has new evidence supporting his position that the trial court erred in not giving a spoliation instruction. While Vincik was hospitalized in June of 1984, Officer Graham fingerprinted him to allow comparison with prints taken from the murder weapon, a

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.45 caliber pistol. Officer Graham's tests on the pistol yielded only a partial print too incomplete for identification, and he discarded the results. In his first trial, Vincik sought a spoliation instruction, arguing that while there might not be enough characteristics on the print for identification, there still might have been enough to exclude him as the shooter. On appeal, the supreme court found the trial court was within its discretion in not giving the instruction. Vincik, 398 N.W.2d at 795. The court concluded the discarded prints "had no evidentiary value whatsoever and would not have been admissible in evidence." Id.

Vincik argues the court's decision in Vincik, 398 N.W.2d 788, does not preclude further consideration of spoliation because during the course of the postconviction hearing new evidence was discovered regarding the sequence of fingerprinting. During the first two trials, Officer Graham testified that he processed the gun first and then went to the hospital to fingerprint Vincik. At the October 1991 hearing, Officer Graham testified that he fingerprinted Vincik before fingerprinting the weapon. Vincik argues that this changed sequence of events provides persuasive new evidence of intentional spoliation.

Vincik also alleges newly-discovered evidence would have supported his defense at trial that his wife was shot by drug dealers. Vincik and his wife personally investigated suspected dealers in Cedar Rapids after their

daughter became involved with drugs. Vincik claimed his wife was shot by unknown intruders in their home who demanded photographs which Inez had taken during the couple's investigation. Vincik claims that names and places on his wife's chronicle of their investigation "have recently come to light in a major federal drug trafficking trial." He argues this lends new credence to his defense.

The district court dismissed, with prejudice, Vincik's application for postconviction relief, and Vincik appeals. We affirm.

Our standard of review in this postconviction relief proceeding is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). Iowa Code section 663A.2(4) (1991) provides that an inmate is entitled to postconviction relief where "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." In order to obtain postconviction relief based upon newly-discovered evidence, the applicant must establish the following four elements by a preponderance of the evidence.

First, the applicant must show that the evidence was not discovered until after judgment. The applicant may not rely on evidence discovered prior to judgment unless he establishes an excuse for not having raised the issue in a motion for a new trial. Rinehart v. State, 234 N.W.2d 649, 656-57 (Iowa 1975); Lawson v. State, 280 N.W.2d 400, 405

(Iowa 1979). Second, the applicant must show that the evidence could not have been discovered earlier in the exercise of due diligence. Third, the newly-discovered evidence must be material to the issue, not merely cumulative or impeaching. Finally, the applicant must show actual prejudice, i.e., that the evidence would probably change the result if a new trial is granted. Lawson, 280 N.W.2d at 405; Sims v. State, 239 N.W.2d 550, 554-55 (Iowa 1976); Polly v. State, 355 N.W.2d 849, 856 (Iowa 1984).

The applicant, Vincik, contends newly-discovered evidence exists which indicates the police intentionally destroyed potentially exculpatory fingerprint evidence in the present case. Vincik makes two separate but related arguments in this regard. First, he argues that Officer Graham's testimony at the postconviction relief hearing shows Officer Graham took the defendant's fingerprints prior to processing the murder weapon for latent prints. Vincik argues this sequence of events raises an inference that Officer Graham compared Vincik's prints to the print found on the gun and destroyed the latent print when Officer Graham discovered that it did not match Vincik's prints.

Secondly, Vincik argues Officer Graham's testimony at the postconviction relief hearing brought out new evidence that the discarded latent print could have been used to eliminate the possibility that Vincik was the person who made the print. Vincik maintains this new evidence would

probably have changed the outcome of his trial, and he contends he is therefore entitled to a new trial. Although Vincik has established the existence of new evidence concerning the sequence of fingerprinting him and testing the murder weapon for latent prints, his argument that the new evidence would probably change the outcome of his trial is unsupported by the record and is without merit.

First of all, the record does not support Vincik's allegation that the latent print from the murder weapon could have been used to eliminate the possibility that Vincik was the person who made the print. A review of Officer Graham's testimony, taken as a whole and in context, reveals the latent print in this case could not have been used to this end. During defense counsel's redirect examination of Officer Graham at the postconviction hearing, the following exchange took place:

> Q: And how would someone else's print get on that weapon if they didn't touch that weapon?
> A: What I am basing my answer on is that the quality of the latent print only had four ridge characteristics. Four ridge characteristics is not enough to positively identify that latent print as being Mr. Vincik's fingerprint, nor is it enough to positively identify anyone else or eliminate anyone else or eliminate Mr. Vincik.

(Emphasis added.)

Furthermore, the fact that the lateht print taken from the murder weapon was entirely useless and, as a result, was inadmissible as evidence in the trial remains unchanged. In State v. Vincik, 398 N.W.2d 788 (Iowa 1987), the court concluded:

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> [O]ne of the prerequisites for the giving of a spoliation instruction is a showing that the missing evidence would have been admissible at trial. The testimony concerning these smudged partial fingerprints shows that they were so incomplete to be useless. They had no evidentiary value whatsoever and would not have been admissible as evidence. The trial court did not abuse its discretion in refusing to give a spoliation instruction.

Id. at 795.

Vincik has failed to prove the newly-discovered evidence regarding the sequence of the fingerprinting could have been used to eliminate the possibility that Vincik made the print. Further, Vincik has failed to demonstrate this newly-discovered evidence could possibly change the outcome of a new trial if one was granted. Therefore, the trial court's denial of postconviction relief with respect to this argument is proper.

Secondly, Vincik contends he has discovered new evidence, not previously known to him, which would have established Vincik's defense at trial that he and his wife (the murder victim) were shot by persons whom Vincik and his wife were investigating in relation to drug trafficking. According to Vincik's application for postconviction relief, this new evidence is:

> handwritten notes of the deceased [Inez Vincik] lists [sic] names and places that have now, since the last conviction of Mr. Vincik, been linked to major drug trafficking figures in the Cedar Rapids, Iowa area. The evidence at both previous trials indicates that Mrs. Inez Vincik had taken upon herself to personally investigate the companions and drug usage of her daughter. A list of names, places, and other statements relating to drug usage was found in the handwriting of the

> deceased. The names and places mentioned have recently come to light in a major federal drug trafficking trial and conviction of several local Cedar Rapids drug dealers. The names mentioned in the deceased's handwriting include Defendants in these drug prosecutions and also at least one name of a key government witness who had been granted immunity . . . ..

Vincik argues this newly-discovered evidence supports his defense that Inez Vincik was killed by persons other than himself and entitles him to a new trial. More specifically, Vincik claims that if the jury had been aware that at least one of the individuals he and his wife were investigating was prosecuted in federal court subsequent to Vincik's trials and appeals, Vincik's version of the facts at trial would have appealed to the jury in a light other than "a lame, desperate attempt to fabricate a defense." We find this argument to be without merit.

Based on our review of the record, it is questionable whether Vincik has even established the existence of the evidence which he claims is newly discovered. Before a defendant can raise any challenge to his conviction based upon newly-discovered evidence, the defendant must establish the existence of that evidence. State v. Todden, 364 N.W.2d 195, 198 (Iowa 1985). However, even if such "facts" have been adequately established, we conclude Vincik has failed to meet the requirement that the newly-discovered evidence avoid being merely cumulative or impeaching. Jones v. Scurr, 316 N.W.2d 905, 907 (Iowa 1982); see also Varney v. State, 475 N.W.2d 646, 649 (Iowa App. 1991).

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The evidence adduced at Vincik's postconviction hearing was nearly identical to that introduced at Vincik's second trial. The "new" evidence introduced was merely cumulative to the evidence introduced at Vincik's second trial which attempted to link certain activities of persons and places with the Vinciks' investigation of drug trafficking and, ultimately, Inez Vincik's death. Furthermore, Vincik has failed to show that the "newly-discovered evidence" would probably change the outcome of his trial if he was afforded a new trial.

Accordingly, we affirm the district court's denial of Vincik's application for postconviction relief.

AFFIRMED.