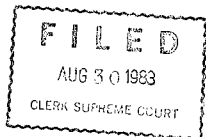


IN THE COURT OF APPEALS OF IOWA



DARRELL E. BIZZETT,	)	Filed August 30, 1983
Petitioner-Appellant,	)	
vs.	)	<u>3-170</u>
CRISPUS C. NIX,	)	2-68538
Respondent-Appellee.	)	

Appeal from Woodbury District Court, James P. Kelley, Judge.

Petitioner appeals from the trial court's dismissal of his application for postconviction relief, contending that the application raised a genuine issue of material fact. AFFIRMED.

Francis C. Hoyt, Jr., State Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Petitioner appeals from the trial court's dismissal of his application for postconviction relief, contending that the application raised a genuine issue of material fact. We affirm.

In 1971, petitioner was convicted of first-degree murder and was sentenced to life in prison. Petitioner's conviction was affirmed on direct appeal in State v. Bizzett, 212 N.W.2d 466 (Iowa 1973), and a subsequent denial of his petition for postconviction relief was also affirmed in Bizzett v. State, 262 N.W.2d 273 (Iowa 1978).

In 1982, petitioner filed the present application for postconviction relief. In it, he contended that one of the instructions given to the jury in his murder trial, which provided that reasonable doubt could arise from the evidence or "from a lack of failure of evidence," permitted the jury to consider his failure to present evidence. This claim was not raised by petitioner on direct appeal, but was raised for the first time in his second application for postconviction relief. Petitioner contended, however, that his trial attorney had rendered ineffective assistance of counsel by failing to object to the instruction, and that his attorney in the previous postconviction proceeding had rendered ineffective assistance by failing to challenge the instruction.

The State moved to dismiss petitioner's application on the ground that the challenged instruction had not been invalidated prior to 1974, and was considered valid at the time of petitioner's trial. The trial court held a hearing in chambers on the State's motion and sustained it. The trial court's order did not state any reasons for the ruling.

Petitioner contends on appeal that the dismissal was incorrect on its merits. He also contends that the trial court erred procedurally by failing to state reasons

for its ruling.

I. Summary Disposition

Iowa Code section 683A.6 provides in pertinent part that the court may grant a motion by either party to dismiss an application for postconviction relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "Whether a genuine issue of material fact exists, so as to preclude summary disposition, 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).

In the present case there is no genuine issue of material fact. Petitioner and respondent are in complete accord concerning the relevant facts before the court. The State concedes that the challenged jury instruction is improper under the current law, and it is undisputed that petitioner's attorneys failed to object to the instruction at trial, or challenge it in petitioner's first application for postconviction relief. It is also undisputed that the challenged instruction was a valid statement of the law at the time of petitioner's original trial. The issue for us to decide is whether the trial court erred in holding that the State was entitled to judgment as a matter of law based upon these uncontested facts.

Petitioner's claim that counsel rendered ineffective assistance by failing to object to the jury instruction on reasonable doubt is without merit. Because the instruction given was a valid statement of the law, counsel cannot have been ineffective for failing to object to it. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980). The fact that the instruction was subsequently invalidated does not vitiate this conclusion since it cannot be said that competent counsel should have foreseen the change.¹ See State v. Ogilvie, 310 N.W.2d 192, 197 (Iowa 1981). A

¹We point out that a due process challenge to this jury instruction had been considered and rejected in State v. Franklin, 163 N.W.2d 437, 441 (Iowa 1968).

failure on counsel's part to know what the law will become in the future does not constitute ineffective assistance. Snethen v. State, 308 N.W.2d 28, 34.

Petitioner's claim that postconviction counsel was ineffective for failing to challenge the instruction is equally without merit. Counsel could not have challenged the instruction in postconviction proceedings unless he could show sufficient reason for petitioner's failure to assert this claim on direct appeal. Armento v. Baughman, 290 N.W.2d 11 (Iowa 1980), Iowa Code section 663A.8. Such a showing could not have been made since trial counsel was not ineffective. Accordingly, postconviction counsel was not ineffective for failing to assert the claim for the first time in the postconviction proceeding.

We finally note that petitioner was not entitled to postconviction relief on his claim that he was denied a fair trial due to the submission of the jury instruction on reasonable doubt. Although that instruction was subsequently invalidated (see State v. McGranaham, 206 N.W.2d 88 (Iowa 1973); State v. Boyken, 217 N.W.2d 218 (Iowa 1974); and State v. Hansen, 225 N.W.2d 343 (Iowa 1975)), nothing in those opinions suggests that the supreme court's pronouncement on the matter is to be applied retroactively. Moreover, even if it were retroactively applicable, relief would still be barred by the rule that petitioner's failure to object to the jury instruction, unless excused due to ineffective assistance of counsel, constituted a waiver of any claim of error. Hinkle v. State, 290 N.W.2d at 35. We have already concluded as a matter of law that trial counsel was not ineffective for failing to pursue an objection.

II. Procedural Errors

Petitioner argues that the trial court's failure to state its reasons for dismissal was violative of his rights under Iowa Code section 663A.7. We do not agree. That section does not require the trial court to state reasons for summary

dismissal. The requirement under section 663A.7 is that the court must "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." Clearly, section 663A.7 only refers to situations in which a full evidentiary hearing is required. Cf. Kyle v. State, 322 N.W.2d 299, 302 (Iowa 1982). Procedures relating to summary dismissal of applications for postconviction relief are governed by section 663A.6, which does not require the trial court to provide a statement of its reasons for dismissal.

Hines asks us to require the court, after a full hearing upon a motion to dismiss, to advise him of its intention to dismiss the application and the reasons for dismissal and to provide him an opportunity to reply to the proposed dismissal. Such a reading of section 663A.6 is misplaced. To require such a procedure would unduly extend the procedural protection already afforded Hines by the hearing on the motion to dismiss. He had and exercised his opportunity in court to argue the validity of his application as it related to the State's motion to dismiss.

Hines v. State, 288 N.W.2d 344, 347 (Iowa 1980). We note that the trial court's grounds for dismissal are adequately detailed in respondent's motion to dismiss, which the trial court sustained in its entirety.

Finding no error in the court below, we affirm the summary dismissal of petitioner's application for postconviction relief.

AFFIRMED.