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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ALBERT ZUNIGA LARA, JR., )

Petitioner-Appellant, )

vs )

STATE OF IOWA, )

Respondent-Appellee. )

Filed March 31, 1986

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5-628
84-1928

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Appeal from the Iowa District Court for Dubuque County (14230) - T. H Nelson, Judge.

Petitioner alleges the trial court erred in dismissing his postconviction relief application without a hearing. **REVERSED AND REMANDED.**

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann DiDonato, Assistant Attorney General, for respondent-appellee.

Heard by Schlegel, P.J., Hayden, and Sackett, JJ., but considered en banc.

Petitioner alleges the trial court erred in dismissing his postconviction relief application without a hearing. We remand for a hearing on the merits.

Petitioner was charged by trial information on June 6, 1980, with first-degree murder. His attempt to plead guilty without representation was denied and the trial court ordered him to undergo psychiatric evaluations. The trial court then set a competency hearing for June 26, 1980, but on June 20th defense counsel requested the appointment of a psychologist. The trial court instead ordered an evaluation for the limited purpose of determining competence under Iowa Code section 812.3.

The record shows that an arraignment was held on June 26, 1980, however it is unclear whether petitioner was present. On that day the trial court determined the petitioner to be competent and set a pretrial date for July 7, 1980. There is no transcript of the June 26th hearing, only the trial court's order: One day after the pretrial conference, defense counsel filed a notice of diminished capacity. Counsel then requested, and was granted, money to investigate the relevant facts to his defense.

On August 8, 1980, petitioner told the trial court that he no longer wanted to be represented and that he wished to plead guilty to first-degree murder. Petitioner's attorney was taken by surprise when contacted about his client's desires. He had understood from talking with petitioner the previous afternoon, that petitioner had agreed to proceed with the diminished capacity defense. Although petitioner asked to not be represented at this August 8th appearance, the trial court requested that his defense counsel at least remain as stand-by counsel during the plea proceedings. Petitioner was then placed under oath and was questioned by the trial court. Petitioner was examined orally by the trial court as to, among other things, his understanding of English, the proceedings

he was involved in, and the nature of his insanity defense. As to his understanding of his insanity defense, petitioner replied, "[O]h I understand it, yeah. He (defense counsel) doesn't think I do but I do." Despite his defense counsel's contrary recommendations, both to petitioner and the trial court, the guilty plea was accepted. Petitioner waived his right to a presentence investigation and was sentenced to life imprisonment. Defense counsel indicated at this proceeding that he had obtained confidential information that apparently supported his defense of diminished capacity.

The trial court also informed petitioner about the need to file a motion in arrest of judgment, but Lara also waived that right, again against his counsel's advice.

In September 1983, petitioner filed an application for postconviction relief. Counsel was appointed for him and a substituted petition was filed on March 29, 1984. The substituted petition alleged basically that petitioner's pretrial solitary confinement prompted his confession and plea to first-degree murder. Postconviction counsel also filed a request for production of documents which contained both specific and general request for documents relating to petitioner's pretrial detention and waiver of rights. In addition to requests for production, petitioner's postconviction counsel filed a request for admissions pertaining to petitioner's pretrial lock-up status. Despite a motion to compel, it appears the State did not respond to these requests.

On July 5, 1984, petitioner filed another amended application for postconviction relief, alleging that he was coerced into pleading guilty by his trial counsel, and that he did not understand the consequences of not filing a motion in arrest of judgment. In furtherance of the allegations raised in the application for postconviction relief, petitioner's counsel requested leave to employ an expert psychological consultant pursuant to Iowa Code section 815.7. This request

was set for hearing on October 19, 1984. But on that day the trial court continued the request until it could consider the State's motion to dismiss due to petitioner's failure to file a motion in arrest of judgment. The State's motion to dismiss was set for hearing on November 21, 1984, at which time both parties took part in an unrecorded argument in the judge's chambers. On November 27, 1984, the trial court issued an order dismissing petitioner's postconviction action because of a failure to file a motion in arrest of judgment.

Petitioner appeals this dismissal. He alleges on appeal that the trial court erred in its dismissal when it was fully aware that the State had not complied with discovery that went directly to petitioner's claim of incompetency.

Postconviction relief actions under chapter 663A are law actions which ordinarily are reviewed only on error. Wenman v. State, 327 N.W.2d 216, 217 (Iowa 1982). We review only those matters which were properly raised and preserved below. Id.

The State relies heavily upon Wenman, supra, in its argument that petitioner is barred from challenging his guilty plea in the absence of a sufficient reason for failing to file a motion in arrest of judgment. Wenman, at 217, 218. We conclude, however, that factually Wenman is distinguishable from the case at bar. The supreme court in Wenman said:

> Wenman asserts no reasons at all for his failure to file a motion in arrest of judgment in the trial court. Applicant's present appeal is no more than an attempt to use postconviction relief to circumvent the statutory requirement and remedy of rules 8(2)(d) and 23(3)(a) to file a motion in arrest of judgment to challenge the adequacy of the guilty plea. State v. Lucas, 323 N.W.2d 228, 229-31 (Iowa 1982) (failure to file motion in arrest of judgment precludes procedural attacks on guilty plea). This we cannot allow. See Horn v. Haugh, 209 N.W.2d 119, 121 (Iowa 1973). The trial court never had an opportunity to correct the errors Wenman now alleges. Even issues of a constitutional magnitude will not be addressed in a postconviction action if they were not raised first in the trial court. Fryer v. State, 325 N.W.2d 400, 405 (Iowa 1982).

Id. at 217, 218.

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By contrast, the record in this case clearly shows that petitioner has asserted all along that the reason for his failure to file a motion in arrest of judgment is his alleged incompetency. And, contrary to the State's argument, it is not at all clear that petitioner knowingly and voluntarily pleaded guilty. It should be added that petitioner also waived his presentence investigation, thus creating the unusual situation where the petitioner pleaded guilty, judgment was entered, his rights concerning appeal were given, and he was sentenced, all within a very brief period of time.

The trial court, after an unreported hearing in the judge's chambers, issued an order dismissing petitioner's application "for the reason urged by the State." The State urged, in its motion to dismiss, the same reason and principle discussed above in the Wenman opinion. Its conclusion, therefore, was that Iowa Code section 663.8 thus barred petitioner's request for postconviction relief.

By virtue of its adoption of the State's argument and motion, the trial court also did not allow petitioner a hearing on the sole issue alleged to be relevant to why a motion in arrest of judgment was not filed. Petitioner has always contended that his alleged competency was never adequately determined during the pretrial proceedings. The record shows the State never responded to his discovery motions and his motions to compel were never ruled on by the trial court.

It is fundamental that if a defendant is incompetent he would be in no position to avoid a waiver of his motion in arrest of judgment. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). It is clear from the record that there is a question as to whether petitioner was incompetent at the time of his plea and sentence. It was improper for the court to dismiss an application for postconviction relief where a material issue of fact exists. Iowa Code § 663A.6; State

v. Dryer, 342 N.W.2d 881, 883 (Iowa App. 1983). In deciding whether a material issue exists, the evidence will be viewed in the light most favorable to the petitioner. State v. Boge, 252 N.W.2d 411, 414 (Iowa 1977). Viewing the record in the light most favorable to petitioner, it is evident that the trial court should have held an evidentiary hearing on the issue of petitioner's alleged incompetency. The trial court erred when it decided instead to dismiss the application. We therefore reverse the trial court's order of dismissal and remand to the lower court for a hearing on petitioner's application.

**REVERSED AND REMANDED.**

All judges concur except Donielson, J., who dissents.

**DONIELSON, J.** (dissenting)



I respectfully dissent. The majority contends this is a case of dismissal where there is a genuine issue of material fact as to petitioner's competency to plead guilty by viewing the evidence in the light most favorable to petitioner under section 663A.6.

I believe the majority used the wrong legal standard. The defendant filed a petition seeking postconviction relief. A court-initiated dismissal order was filed on April 6, 1984. On September 6, the State resisted the petition of the defendant. On October 19, the State moved to dismiss but this motion should be characterized as a pleading. See State v. Dryer, 342 N.W.2d 881, 882-83 (Iowa Ct. App. 1983) (State's filing of motion to dismiss did not trigger hearing provisions in paragraph 3 of § 663A.6 because State entered a pleading to a court-initiated dismissal.). Nevertheless, a hearing was held on November 21, 1984. Thus, this proceeding is not under section 663A.6, but rather it is under section 663A.8. This places the burden on petitioner to prove by a preponderence of the evidence, before reaching the merits of the controversy, that a sufficient reason exists for not raising the ground asserted in a motion in arrest of judgment. See Wenman v. State, 327 N.W.2d 216, 217-18 (Iowa 1982); See also Polly v. State, 355 N.W.2d 849, 856-57 (Iowa 1984); Rinehart v. State, 234 N.W.2d 649, 657 (Iowa 1975). By using the appropriate legal test, I cannot find that petitioner has met his burden.

Petitioner must show sufficient cause for not filing a motion in arrest of judgment. Petitioner's mental competency has already been satisfactorily addressed. Therefore, sufficient cause does not exist. The trial court did not accept petitioner's plea at arraignment. The trial court ordered petitioner to undergo psychiatric evaluations. The trial court endeavored to determine petitioner's competency, and after thorough evaluation, expert testimony on

both sides of the issue, and a colloquy with the petitioner regarding the plea, concluded petitioner knowingly, voluntarily and intelligently pled guilty. The trial court properly determined petitioner was competent before accepting the plea. See Boge, 252 N.W.2d at 414. Even though petitioner may have introduced more evidence than the petitioner in Wenman, I cannot find he met his burden of proof. Therefore, I would affirm this court's ruling.