IN THE COURT OF APPEALS OF IOWA

No. 0-352 / 99-1681
Filed June 14, 2000

CHRISTINA DAWN HUBER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
JUN 1 4 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Patrick J. Madden, Judge.

Applicant appeals the dismissal of her postconviction relief application on summary judgment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellant Defender, for appellant.

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General, William E. Davis, County Attorney, and Kelly Raines, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Applicant Christina Dawn Huber appeals the grant of summary judgment to the State on her postconviction relief application. She contends genuine issues of material fact existed with regard to her allegations of ineffective assistance of counsel. Finding no fact issues, we affirm.

On October 16, 1998, Huber appeared in court pursuant to a plea bargain to enter a guilty plea to the charge of possession with intent to deliver a controlled substance. As part of the deal, four other drug charges against her would be dismissed. The district court accepted the plea. On November 9, 1998, she was sentenced to a term of incarceration not to exceed twenty-five years. The district court suspended this sentence, placed her on probation for four years, and required her to reside at a residential correctional facility. Huber never filed a direct appeal. Two weeks after sentencing, she absconded. She was subsequently apprehended and her probation was revoked. She was then incarcerated to serve her formerly suspended sentence.

On March 22, 1999, Huber filed an application for postconviction relief. Primary among Huber's allegations was the denial of effective assistance of trial counsel. Specifically, she asserted his failure to inform her of her appeal rights, his inducement of her to accept the plea bargain, and the court's and counsel's failure to adequately explain the consequences of pleading guilty. On September 20, 1999, the State moved for summary judgment. Huber resisted. Following a hearing, the court granted the State's motion.

Huber appeals. She contends the truth of her allegations of ineffectiveness against trial counsel is a material fact issue, precluding summary

judgment. She claims the State's motion and supporting documentation only addressed her claim that the court failed to adequately advise her of her rights or the consequences of the plea, not her claims against trial counsel.

I. Scope and Standard of Review. Ordinarily, we review postconviction relief actions for errors of law. *Collins v. State,* 588 N.W.2d 399, 401 (Iowa 1998). However, if a constitutional right is involved, such as the right to effective assistance of counsel, we review de novo. *See id.*

Iowa Code section 822.6 provides for a procedure in postconviction proceedings analogous to summary judgment. Summary disposition of a postconviction relief application is not proper if a material issue of fact exists. *See* Iowa Code § 822.6 (1997); *Earnest v. State,* 508 N.W.2d 630, 632 (Iowa 1993). A material issue of fact exists if reasonable minds could draw different inferences and reach different conclusions from the facts. *State v. Dryer,* 342 N.W.2d 881, 883 (Iowa App. 1983) (citations omitted). However, summary disposition is permissible in situations where a petitioner's allegations are directly contradicted by the record, unless the petitioner has raised a legitimate question concerning the credibility of that record. *Id.* (citation omitted).

II. Preservation of Error. The State contends Huber did not preserve her claims for postconviction relief because she filed neither a motion in arrest of judgment nor a direct appeal. Any claim not raised on direct appeal may not be litigated in postconviction unless there was sufficient cause for not raising it earlier and actual prejudice resulted from the alleged error. *State v. Osborn,* 573 N.W.2d 917, 921 (Iowa 1998) (citations omitted); *see also* Iowa Code § 822.8. None of the issues Huber raises in her postconviction action were asserted in a

direct appeal. These issues cannot properly be raised now unless she demonstrates "sufficient cause."

Huber's allegations of ineffective assistance of trial counsel, in the form of trial counsel's failure to advise her of appeal rights or file an appeal, may establish sufficient cause for failing to raise these arguments earlier. *See Earnest*, 508 N.W.2d at 632 ("When a claim of ineffective assistance of counsel is made, we have allowed an exception to the general rule of error preservation.") (quoting *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982)). However, before we can excuse Huber's failure to file a direct appeal, we must first find that an issue of material fact remains on her claims precluding summary disposition. *See Earnest*, 508 N.W.2d at 632 (citation omitted).

III. Absence of Material Fact Issues. Huber alleged she was denied effective assistance in several respects. We conclude summary judgment was appropriate because the record directly contradicts Huber's allegations in her postconviction relief application. *See Victor v. State*, 339 N.W.2d 617, 619 (Iowa App. 1983). There is no requirement that a postconviction applicant be allowed a hearing on allegations which directly contradict the record, unless a minimum threshold of credibility is met. *Foster v. State*, 395 N.W.2d 637, 638 (Iowa 1986). In this circumstance, the applicant bears a "special burden" to establish the record is inaccurate. *Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995). Bare allegations do not overcome the presumption that the record truly reflects the facts. *Foster*, 395 N.W.2d at 638. Since Huber makes no showing to the contrary, we give credence to the record. We affirm the grant of summary judgment.

In her postconviction relief application, Huber alleged trial counsel never explained her appeal rights. However, the record shows the district court informed her of the right to file a motion in arrest of judgment and to appeal. This circumstance results in an absence of fact issues on this allegation. *See Earnest,* 508 N.W.2d at 633 (finding absence of fact issue on defendant's claim trial counsel was ineffective for failing to advise him of restitution amounts where defendant was informed of restitution provisions of plea agreement in open court during plea proceedings). We also fail to see how Huber could have been prejudiced by counsel's failure to inform her of the right to appeal, when the trial court did so. See *Victor,* 339 N.W.2d at 620 (finding no prejudice from trial counsel's failure to inform defendant of need to file motion in arrest of judgment where trial court did so inform defendant).

Huber also alleged her counsel failed to adequately explain the consequences of pleading guilty. She claims she did not understand she was pleading to an offense which could yield a twenty-five-year prison sentence. Again, the record directly contradicts these assertions. At the plea proceeding the court informed Huber as follows:

> THE COURT: This offense is a class "B" felony, Ms. Huber which means that if you plead guilty to this offense or if you are convicted of it, you could be incarcerated for not to exceed 25 years, and in addition, there would be a fine of at least $5,000 [ ], and maybe the fine could be as high as $100,000[ ]. In addition, if you are incarcerated, you have to serve at least one-third of the sentence before you're eligible for parole. *Do you understand the penalties that may be imposed if you plead guilty to this?*
>
> THE DEFENDANT: *Yes.*

(emphasis added). There is no fact issue as to whether Huber was correctly informed of the maximum period of incarceration.

Huber also alleged she did not understand the consequences if she failed to complete probation, including the potential for the twenty-five-year suspended sentence to be imposed. Again, the sentencing record indicates otherwise:

> THE COURT: Now, I'm not going to place you in prison today. I'm going to give you the opportunity to show yourself and this community that you can straighten your life out, that you can get treatment, and as a condition of this probation you're going to have to complete the Residential Correctional Facility program. If you fail to do that or not follow the other terms of probation in this case, you're going to be brought back to court. You will then have to serve the term of incarceration that I set out today. *Do you understand me?*
>
> THE DEFENDANT: *Yeah.*

(emphasis added). Shortly after that discussion, the district court imposed the twenty-five year sentence and suspended it. The court placed Huber on probation for four years and again informed her:

> THE COURT: . . . Specific terms of probation include, one, that you shall remain housed in the Scott County Jail until such time as bed space is available for you at the Residential Correctional Facility program. Then you shall complete the program, and your failure to complete that program will be deemed a violation of your probation. . . . Do you understand these terms, ma'am?
>
> THE DEFENDANT: Yes, I do.

Because the record directly contradicts Huber's allegation, the State was entitled to summary judgment on this issue. *See Earnest,* 508 N.W.2d at 632 (declining to reach merits of claim of ineffective assistance because defendant failed to carry burden of showing that a material factual issue existed; record of plea and sentencing proceedings precluded a finding that defendant was not fully informed and cognizant of the plea agreement, despite his allegations to the contrary).

Huber also contends counsel did not discuss the evidence or the possibility of going to trial. However, at the plea proceeding the court explained the elements of the offense, the proof needed, and the factual basis for her plea.

The court detailed the rights Huber gave up by pleading guilty, including the right to jury trial. The court also made inquiries of trial counsel:

> THE COURT: Mr. Dircks, do you know any reason why I should not accept the plea?
>
> MR. DIRCKS: No, your Honor.
>
> THE COURT: Do you know of any defenses, other than general denial, which could affect the outcome of the case?
>
> MR. DIRCKS: No, your Honor.
>
> THE COURT: I take it you have fully investigated the charge and circumstances of your client's involvement and discussed your opinions with her?
>
> MR. DIRCKS: Yes. We have discussed it at length—what could happen at trial and what her possible defenses would be at trial.
>
> THE COURT: Well, and beyond possible defenses, the nature of her involvement and how that would fit into the elements to be proven by the State?
>
> MR. DIRCKS: That has also been discussed, in relation to it being a common scheme.

Again, the record provides a direct contradiction of Huber's allegations and without more, entitles the State to summary judgment on the issue.

Huber also contends the residual effects of her cocaine use were so great she did not understand the proceedings. However, at the outset of the guilty plea, the court informed Huber it would ask her certain questions to ensure her mind was clear and she could comprehend the proceeding. Huber was asked if there were any reason why she might not comprehend what was happening, if she was under a doctor's care, and if she was on any prescription medications. Based on her answers, there did not appear to be a problem. No issue of material fact exists on this allegation.

Huber maintained trial counsel induced her to plead guilty by telling her she would go to prison if she did not take the plea bargain. Similar arguments have been rejected where the defendant voiced no concern about coercion by

counsel during the plea proceeding. *See, e.g., State v. Boge*, 252 N.W.2d 411, 413-14 (Iowa 1977); *Dryer*, 342 N.W.2d at 884-85. Defendant's assertions of inducement by her own counsel are again best answered by reviewing a portion of the plea transcript:

> THE COURT: Are you satisfied with the legal advice and the counsel that Mr. Dircks [trial counsel] has given you?
> THE DEFENDANT: Yes.
> . . .
> THE COURT: Are you pleading guilty because anybody's threatened you or promised you something which is forcing you to plead guilty?
> THE DEFENDANT: No.

Without evidence undermining the credibility of this record, the colloquy above reflects the true state of facts. The allegations of coercion and ineffectiveness must also be viewed against the record which shows Huber was the beneficiary of a plea bargain involving the dismissal of four other charges. There is no evidence in the record to show defense counsel was not acting in Huber's interests at all times.

The allegations contained in the application were directly contradicted by the record. Accordingly, we affirm the trial court's grant of summary judgment to the State.

AFFIRMED.