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MAR 24 1981 330

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

EARL EMERY,

)

Plaintiff-Appellant,

)

Filed March 24, 1981

vs.

)

STATE OF IOWA,

)

1-001

Defendant-Appellee.

)

2-62606

Appeal from Polk District Court - Dale S. Missildine, Judge.

Postconviction relief applicant appeals from trial court's dismissal of his application seeking postconviction relief from his 1974 conviction of robbery with aggravation asserting 1) that the postconviction court erred in ruling that the confession of another person for the crime for which defendant was convicted, after the statute of limitations had run, did not constitute newly discovered credible evidence sufficient to overturn defendant's conviction and 2) that the court erred in dismissing his application without notice of his intent to do so. REMANDED WITH DIRECTIONS.

Bruce Washburn of Cedar Rapids, Iowa, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa; and Roxann M. Ryan, Assistant Attorney General; for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Postconviction relief applicant, Earl Emery, appeals from trial court's dismissal of his application seeking postconviction relief from his 1974 conviction of robbery with aggravation. He asserts 1) that the postconviction court erred in ruling that the confession of another person for the crime for which Emery was convicted, after the statute of limitations had run, did not constitute newly discovered credible evidence sufficient to overturn Emery's conviction and 2) that the court erred in dismissing his application without notice of his intent to do so. We remand this case for enlargement of trial court's findings of fact and conclusions of law.

On June 24, 1974, Emery was convicted of robbery with aggravation and sentenced to a term not to exceed 25 years. He began serving the sentence on July 1, 1974, and is currently in the penitentiary. His direct appeal of that conviction was dismissed by the supreme court in State v. Emery, 230 N.W.2d 521 (Iowa 1975). On February 10, 1978, Emery filed his application for postconviction relief citing as newly discovered evidence the confession of another person to the crime for which he was convicted. At the evidentiary hearing on his application, Emery testified that while serving his sentence at the penitentiary, an inmate, Knapp, indicated sometime in 1976 to Emery that another inmate, Fields, might have committed the robbery for which Emery was convicted, and that Fields subsequently admitted having committed the crime to Emery. Inmates Knapp and Fields confirmed this account in their testimony. Fields first testified to telling Emery in 1976 of his complicity in the crime, but then stated that the correct time was early in 1977. Fields testified in considerable detail about allegedly committing the robbery in question along with one Leland Davis, who subsequently died of a drug overdose. Fields also testified that he wrote to the Polk County Attorney in "early 1977," possibly in February of 1977; on cross-examination he said he wrote the letter in the early part of 1976. The letter was actually written in July of 1977, after Fields talked to Emery. Fields further testified that the Polk County attorney had informed him the statute of limitations had run and that no action could be taken against him. On September 19, 1979, the postconviction court filed its findings and conclusions, dismissing Emery's application. No notice of intent to dismiss was given to Emery prior to this dismissal. Emery timely filed his notice of appeal on October 10, 1978.

L Scope of Review. Review of postconviction rulings under section 663A.9, The Code 1979, is generally on error and not de novo. Hines v. State, 288 N.W.2d 344,

345 (Iowa 1980). We will not disturb trial court's judgment if the findings of fact in support of its judgment denying postconviction relief are supported by substantial evidence and are justified as a matter of law. Stanford v. Iowa State Reformatory, 279 N.W.2d 28, 30 (Iowa 1979).

II. Denial of Motion for New Trial. Petitioner contends that trial court applied an erroneous concept of law in finding that the confession of another person to the crime for which petitioner was convicted, after the statute of limitations had run, did not constitute newly discovered evidence requiring vacation of his conviction and granting of a new trial. He therefore urges that we find trial court abused its discretion and reverse trial court's dismissal of his application for postconviction relief. For a different reason, we remand this case to trial court for enlargement of trial court's findings of fact and conclusions of law.

Trial court is vested with broad discretion in ruling on a motion for new trial on the grounds of newly discovered evidence. State v. Kramer, 231 N.W.2d 874, 881 (Iowa 1975). Such motions, being unfavored, are closely scrutinized and granted sparingly. State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979). Trial court does not abuse its discretion in denying a motion for new trial if the court does not find credible evidence to support the motion. Walden v. State, 310 So. 2d 426, 427 (Fla. App. 1975). A confession alone therefore does not warrant granting a motion for a new trial; the evidence must be credible. State v. Rincones, 209 Kan. 176, 180, 495 P.2d 1019, 1023 (1972).

Petitioner's burden, in seeking a new trial on the basis of newly discovered evidence, is to show 1) that the evidence could not have been discovered earlier in the exercise of due diligence, 2) that the evidence is material, not merely cumulative or impeaching, and 3) that the evidence would probably change the result if relief were granted. State v. Sims, 239 N.W.2d 550, 555 (Iowa 1976).

In ruling on petitioner's motion for new trial, the court held:

...that the evidence produced at the postconviction hearing held May 11, 1978, in Polk County, Iowa, containing confession of another person to the crime for which petitioner was convicted after the statute of limitations for prosecution of said crime had run, do [sic] not constitute newly discovered credible evidence such as to warrant an order setting aside conviction of petitioner and sentencing.

Assuming without deciding that trial court ruled as a matter of law that the confession of another person after the statute of limitations had expired did not constitute newly

discovered evidence under Sims, 239 N.W.2d at 555, we need not address the question of whether trial court erred in so ruling. We find, instead, that trial court's findings of fact are inadequate from which to determine the basis for trial court's conclusion that the evidence was not credible. See Rincones, 209 Kan. at 180, 495 P. 2d at 1023, where the court on review agreed with trial court's conclusion that a confession was "... gravely lacking in credibility. It contained not only contradictions and inconsistencies with undisputed physical facts disclosed at trial but inherent improbabilities as well. Much of the dovetailing in with the prosecution's evidence which the confession did embody had patently unconvincing aspects." Unlike the record before us, these inconsistencies were detailed in the court's findings of fact. Id. at 179, 495 at 1022-23.

In addition, we find trial court here made no findings under Sims. In State v. Farley, 226 N.W.2d 1 (Iowa 1975), the court held that trial court's findings under any of the grounds for a new trial, "... if correct, would be independently sufficient to sustain the trial court's ruling. Each ground is based on an exercise of trial court discretion. We have no reason to interfere with that exercise of discretion under the record here." 226 N.W.2d at 4. There, trial court made findings under two elements of the Sims test. Here, since trial court made no findings under Sims, we are unable to determine that court's assessment of where petitioner failed in his burden of proof.

We conclude trial court's findings are inadequate for us to determine whether trial court abused its discretion in denying petitioner's application for postconviction relief. We thus remand this case for development of an adequate record of trial court's findings of fact and conclusions of law on petitioner's application for postconviction relief.

III. Dismissal Without Notice. Petitioner also contends that trial court erred in dismissing his application for postconviction relief without notice of its intent to do so. Petitioner argues that section 663A.6, The Code 1979, is mandatory in requiring notice, even where an adjudicatory hearing has been held and that the holding in Rheuport v. State, 238 N.W.2d 770, 776 (Iowa 1976), therefore should be re-examined. We disagree.

Petitioner has made no more than a bald assertion that the statute should be construed as mandatorily requiring notice of intent to dismiss in situations where an adjudicatory hearing has been held. See Iowa R. App. P. 14(a)(8). We see no reason at this time to re-examine Rheuport's holding. Further, by analogy, we note that in Hines the State filed a motion to dismiss the postconviction relief application; this motion was resisted in writing by the applicant, set for hearing, orally argued by the parties, and

then sustained by the court. 288 N.W.2d at 345. On appeal the supreme court held that a postconviction relief applicant was not entitled under section 663A.6, The Code 1977, to notice of intention to dismiss and further opportunity to reply to a proposed dismissal where a hearing on the motion to dismiss had been held. Id. at 347. The court stated:

Hines asks us to require the court, after a full hearing on 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.

Id.

We conclude no error occurred on this issue.

REMANDED WITH DIRECTIONS.

All judges concur except Donielson, J., and Carter, J., who dissent.

DONIELSON, J. (dissenting)

I cannot concur in the majority's decision to remand this case to the trial court for enlargement of that court's findings of fact and conclusions of law. Under State v. Sims, 239 N.W.2d 550 (Iowa 1976), a postconviction relief petitioner seeking a new trial on the grounds of newly discovered evidence must establish, among other things, that the newly discovered evidence would probably change the result if a new trial were to be granted. Id. at 554. I do not share the majority's conclusion that the trial court was determining, as a matter of law, that a confession of another person after the running of the statute of limitations is insufficient to support the granting of a new trial. Rather, the trial court was making this determination as a factual finding involving the record in this particular case. As so characterized, the trial court's order is a finding that the evidence of another inmate's confession was not credible and that such evidence would not change the outcome of petitioner's trial on the robbery with aggravation charges. The trial court was therefore justified in dismissing the petition for postconviction relief and should be affirmed.

Moreover, I do not consider it a matter of serious concern that the trial court did not specifically identify the factors that led it to conclude that the evidence presented at the hearing was not credible. The court may have been impressed by the variations between Fields' account of the crime and the facts as discussed by the supreme court when it dismissed Emery's direct appeal in State v. Emery, 230 N.W.2d 521, 522-23 (Iowa 1975); other influencing considerations may have been the fact that Fields had little to lose in confessing after the statute had run and the fact that Emery presented no evidence to corroborate Fields' testimony. At any rate, I see no need to isolate the considerations underlying the court's finding on the credibility question; it is sufficient in my view that an experienced trial court judge, having had the opportunity to personally observe the demeanor of the witnesses on the stand, found that the testimony of those witnesses lacked credibility. I therefore see no need to remand this case and would affirm the trial court's dismissal of the petition.

Carter, J., joins in this dissent.