IN THE COURT OF APPEALS OF IOWA

No. 0-572 / 98-1798
Filed November 20, 2000

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CLERK SUPREME COURT

DENNIS EDWARD SIEVERT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr., and James R. Havercamp, Judges.

Applicant appeals from the district court's ruling refusing to reinstate his action for postconviction relief. **AFFIRMED.**

Dennis Sievert, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

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

HECHT, J.

Dennis Edward Sievert appeals from a district court ruling denying his motion to reinstate his postconviction relief action. He contends his postconviction counsel was ineffective for failing to give him notice of the dismissal of his case. We affirm.

I. Factual Background and Proceedings. Dennis Sievert was convicted of first-degree murder for the stabbing death of his girlfriend, Virginia Liendo, in October of 1989. He appealed his conviction and this court affirmed, preserving his claims of ineffective assistance of counsel for postconviction relief. *See State v. Sievert,* No. 89-1803 (Iowa App. June 25, 1992). Sievert filed a pro se application for postconviction relief on March 11, 1993, and attorney Kent Simmons was appointed to act as his counsel. The district court dismissed the petition for lack of prosecution pursuant to Iowa Rule of Civil Procedure 215.1. However, the district court later reinstated the petition after finding the action had been dismissed without notice to counsel of record. Simmons filed a motion to withdraw as Sievert's counsel on April 7, 1995. The district court granted Simmons's motion and appointed Thomas Reidel as Sievert's attorney. The record indicates some discovery took place including service of interrogatories and notices of depositions.

On February 7, 1996, Sievert sent the following letter to Reidel:

> I received your letter and although I do not agree with you, I appreciate your willingness to withdraw from my P.C.R. So would you please notify the court that you are withdrawing as my atty. and that you would like a cont. or an [sic] dismissal without prejudice, concerning my hearing on the 23rd of this month. And would you

> please send everything, the trial transcripts my sister brought you and the legal work I sent you, to me here at Fort Madison.

Reidel filed a motion to withdraw on February 13, 1996. After a hearing on the motion on February 19, 1996, the district court denied the motion and set the matter for trial on February 21, 1996. On the morning of February 21, 1996, before the case proceeded to trial, Reidel filed a "Dismissal without Prejudice" dismissing Sievert's postconviction relief action and reserving "the right to reinstate this case pursuant to Iowa Code section 614.10." No other entries appear in the record until July 14, 1998, when Sievert wrote a letter to the Scott County Clerk of Court requesting information regarding his case and asking to have his case reopened. Pursuant to the clerk of court's direction, Sievert filed a motion to reinstate his petition on August 4, 1998. The district court denied this motion on August 25, 1998, finding the time in which the action could have been reinstated under Iowa Code section 614.10 had expired. On appeal, Sievert asserts he was denied effective assistance of postconviction relief counsel when Reidel failed to notify him of the dismissal of his postconviction relief action. Sievert claims he did not have notice his case was dismissed until he received his files from Reidel on July 6, 1998, two years after the case was dismissed.

II. Standard of Review. Generally, we review an appeal from the denial of an application for postconviction relief for errors of law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). However, if the applicant raises constitutional issues, we review "in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made." *Harpster v. State*, 569 N.W.2d 594, 596 (Iowa 1997). This "totality of the circumstances" scope of

review is equivalent to a de novo review. *Wemark v. State,* 602 N.W.2d 810, 814 (Iowa 1999).

III. Merits. Reidel's "Dismissal without Prejudice" reserved Sievert's right to reinstate his claim for postconviction relief under section 614.10, which provides in relevant part:

> If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.

Iowa Code § 614.10 (1991). The motion to reinstate cannot succeed because Sievert filed the motion more than six months after his case was dismissed. He argues his failure to move to reinstate the application in a timely manner was due to ineffective assistance of postconviction counsel for failing to notify him of the dismissal. We do not consider this argument because Sievert has failed to preserve it for our review.

In his motion to reinstate his postconviction relief application, Sievert alleged, "Counsel's actions [in dismissing the case] were due to the Court's denial of his Motion to withdraw and biased feelings toward this Applicant thereby severely prejudicing his postconviction." This is arguably a contention Reidel was ineffective. However, the district court did not address the issue of ineffective assistance of counsel in its ruling, stating only, "the time in which [applicant's petition] might have been reinstated has expired." Our supreme court has stated the "rules and statutes governing the conduct of civil proceedings are applicable to postconviction proceedings." *Nuzum v. State,* 300 N.W.2d 131, 132-33 (Iowa 1981). Under the Iowa Rules of Civil Procedure, a

rule 179(b) motion is essential to the preservation of error when the district court fails to resolve an issue, claim, defense, or legal theory properly submitted for adjudication. *Starling v. State,* 328 N.W.2d 338, 341 (Iowa App. 1982) (citing *Arnold v. Lang,* 259 N.W.2d 749, 753 (Iowa 1977)). Sievert's failure to obtain a ruling from the district court on the ineffective assistance of postconviction counsel claim precludes us from considering it on appeal. We therefore affirm the district court's denial of Sievert's motion to reinstate his postconviction relief application because the motion was untimely.

AFFIRMED.