IN THE COURT OF APPEALS OF IOWA

No. 1-673 / 10-2109
Filed September 21, 2011

DAVID A. BORGSTEDE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Nancy S. Tabor, Judge.

A postconviction relief applicant contends the district court erred in granting the State's motion for summary judgment. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross J. Barlow, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

On February 21, 2003, the State charged David Borgstede with two counts of second-degree sexual abuse, class "B" felonies, based on allegations he touched the anus of two minor females on numerous occasions between June 2002 and January 2003.

On June 6, 2003, the State filed an amended trial information and offered Borgstede the opportunity to plead guilty to reduced charges of indecent contact with a child (enhanced) and third-degree sexual abuse, with sentences to be served consecutively, *see* Iowa Code §§ 709.1(1), 709.4(1), 709.12, 901A.2(2) (2001), and thereby avoid terms of up to twenty-five years on two class "B" felonies. *See id*. § 902.9(2).

Borgstede appeared for a plea hearing on June 12, 2003, and the court accepted his pleas to the reduced charges following a full colloquy. He did not file a motion in arrest of judgment. On July 17, 2003, Borgstede was sentenced in accordance with the plea agreement receiving two consecutive terms not to exceed ten years. Borgstede did not appeal.

On November 12, 2003, Borgstede filed a *pro se* application for postconviction relief (PCR) claiming, among other things, that he was scared into signing the plea agreement by his lawyer and he felt threatened by one victim's uncle. For reasons that do not appear on the record, nothing further was scheduled with respect to the application until counsel was appointed for Borgstede in January 2009. The State moved for summary judgment on December 2, 2009.

On December 18, 2009, new counsel was appointed upon the death of Borgstede's first PCR attorney. New counsel filed an amendment to the PCR application, asserting the sentence for the enhanced indecent contact conviction constituted cruel and unusual punishment, and resisted the motion for summary judgment. Borgstede claimed his guilty plea was involuntary and that his plea and sentencing counsel was ineffective in allowing him to plead guilty.

A hearing on the motion for summary judgment was held on March 25, 2010. The court granted the State's motion on Borgstede's claim that his guilty plea was involuntary, but denied the motion as to the cruel and unusual punishment claim. That claim was dismissed after further hearing. Borgstede appeals from the summary judgment ruling,[1] arguing issues of fact remain that warrant further development of the record.

> Generally, a criminal defendant waives all defenses and objections to the criminal proceedings by pleading guilty, including claims of ineffective assistance of counsel. One exception to this rule involves irregularities intrinsic to the plea—irregularities that bear on the knowing and voluntary nature of the plea.

Castro v. State, 795 N.W.2d 789, 792 (Iowa 2011) (citations omitted). "[T]he intrinsic-irregularity exception applies to postconviction relief claims of ineffective assistance of counsel predicated on the failure of counsel to perform certain pre-plea tasks that ultimately render the plea involuntary or unknowing." *Id.* The voluntariness requirement "does not mean that an accused acts in the matter of his own free will" because it is unlikely any "accused wants to be charged with a crime" or enter a guilty plea of guilty in any case. *State v. Speed*, 573 N.W.2d

[1] Borgstede has not appealed the ruling concerning his claim of cruel and unusual punishment.

594, 597 (Iowa 1998) (quoting *State v. Lindsey*, 171 N.W.2d 859, 865 (Iowa 1969)). "Lawyers and other professional[s] often persuade clients to act upon advice which is unwillingly or reluctantly accepted." *Id.* (citation omitted).

"We normally review postconviction proceedings for errors at law. This includes summary dismissals of applications for postconviction relief." *Castro*, 795 N.W.2d at 792 (citations omitted). We review ineffective-assistance-of-counsel claims de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

> The standards for summary judgment in postconviction relief actions are analogous to summary judgment in civil proceedings. Under these standards, summary judgment is proper when the record reveals only a conflict over the legal consequences of undisputed facts. The moving party is required to affirmatively establish that the undisputed facts support judgment under the controlling law.

Castro, 795 N.W.2d at 793 (citations omitted). Here, in moving for summary judgment, the State asserted that, contrary to Borgstede's allegations, the plea colloquy established he was not coerced into pleading guilty. The State presented to the postconviction court the transcripts of the plea and sentencing proceedings to support its motion for summary judgment.

> Our rules of summary judgment do not permit the nonmovant to rest on conclusory allegations in the pleadings in the face of a properly supported motion for summary judgment. [ ] A responsive showing must be made that would allow a reasonable fact finder to conclude in favor of the nonmovant on the claim. [ ] In making this showing, the nonmovant is entitled to all reasonable inferences from the summary judgment record. [ ]
>
> A plea colloquy that covers the specific ground subsequently raised in a postconviction relief application would normally support summary judgment on those grounds. *See Wise v. State*, 708 N.W.2d 66, 71 (Iowa 2006) (indicating that statements made to court in plea colloquy establish a presumption of the true facts on the record).

Id. at 795 (citations omitted).

Borgstede resisted the motion for summary judgment citing cases on the standard of review, issue preservation, and cruel and unusual punishment. Borgstede filed no affidavits or factual statements of any kind to support his claim that his attorney coerced his guilty plea and the statements he made during the plea proceedings.

In rejecting Borgstede's voluntariness challenge, the district court found Borgstede was fully informed as to his rights and the consequences of pleading guilty,

> [t]he transcript of the plea proceedings do not support the defendant's contention that he was in any way frightened. It also reveals that he was represented by an attorney with over 25 years of criminal law experience. The applicant indicated that he had no difficulties communicating with his attorney, and he had read the Trial Information and the Minutes of Evidence, that he understood everything in the proceedings, that he understood the English language, that the medication that he was on was to keep him calm and that it assisted him in understanding procedures. He was advised of the possible maximum penalties which he stated he understood. He was advised of the evidence the State would have to prove which he stated he understood. He was asked if he understood that he would be giving up his rights to a jury trial and he stated yes. He was advised of the sexually violent predator issue. During the plea proceeding the judge addressed the defendant with questions and his attorney clarified questions which the defendant in no way indicated that he was scared or misunderstood. The plea proceedings occurred four months after the defendant was initially arrested on this charge, and there was no indication that he in any way was scared or coerced into entering that plea.

Where, as here, the record directly contradicts the claim a guilty plea was unintelligent and involuntary, "the applicant bears a special burden to establish the record is inaccurate." *Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995).

At the postconviction hearing, Borgstede's attorney said "that he has an explanation for those things, and he would like the opportunity to present that

testimony to the Court in his postconviction case." Specifically, Borgstede "would state that he was coerced into doing that by his attorney," which he believed created a factual issue warranting an evidentiary hearing.

Upon our de novo review, we conclude Borgstede failed to satisfy his burden of showing issues of material fact remain for consideration. Although postconviction counsel indicated Borgstede could explain his claim of coercion, he did not come forward with anything more than conclusory allegations, which is insufficient. *See* Iowa R. Civ. P. 1.981(5); *see Castro*, 795 N.W.2d at 795 (noting that when the State's motion for summary judgment asserts the plea colloquy establishes facts contrary to the applicant's claim, applicant's mere allegations are not sufficient to avoid summary judgment: "In this case, evidence that Castro's medication regimen was altered and general background information about the medication he was taking would not, alone, allow a reasonable fact finder to conclude the guilty plea he entered was not voluntary or intelligent.").

The case on which Borgstede relies to avoid summary judgment, *Manning v. State*, 654 N.W.2d 555 (Iowa 2002), is inapposite. In *Manning*, the postconviction applicant was not notified that the merits of his case would be addressed at the hearing nor that he would need to present proof on any issue. *Manning*, 654 N.W.2d at 561. Moreover, the "State presented nothing more than pure allegations in its motion that bore not on the knowing and voluntary nature of Manning's pleas but on whether he failed to preserve his claims and whether he waived his claims by pleading guilty." *Id.* at 561–62. Here, the plea colloquy covered the specific ground now asserted by the applicant and summary judgment could properly be granted. *See Castro*, 795 N.W.2d at 795. Borgstede

failed to carry his "special burden to establish the record is inaccurate." *Arnold*, 540 N.W.2d at 246.

The district court did not err in granting summary judgment.

AFFIRMED.