

**IN THE COURT OF APPEALS OF IOWA**

No. 1-855 / 11-0090  
Filed December 7, 2011

**CHARLES P. FOSTER,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,  
Judge.

A postconviction relief applicant contends the district court erred in proceeding without him on a portion of the hearing on his application.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant  
Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter,  
Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ. Tabor,  
J., takes no part.

**VAITHESWARAN, P.J.**

Charles Foster appeals the denial of his application for postconviction relief. He contends the district court abused its discretion in proceeding without him on a portion of the hearing on his application.

***I. Background Proceedings***

The State charged Foster with first-degree murder in connection with the stabbing of a Des Moines man. Foster entered an *Alford* plea<sup>1</sup> to one count of voluntary manslaughter, one count of willful injury causing serious injury, three counts of willful injury causing bodily injury, and one count of going armed with intent.

Foster's direct appeal from his judgment and sentence was dismissed as untimely. He subsequently filed an application for postconviction relief, alleging that his plea was not knowing and voluntary and his trial attorney was ineffective in allowing him to be "charged three times for one offense." Foster asked to be present at the postconviction hearing, and the court granted that request.

Foster testified in person. At the conclusion of the hearing, the State asked that the record remain open to elicit testimony from Foster's trial attorney, who was unavailable to attend the hearing that day. The district court granted the request.

When the hearing was reconvened, Foster could not be reached by telephone and Foster's postconviction attorney agreed that the hearing could

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<sup>1</sup> An *Alford* plea is a variation of a guilty plea where the defendant does not admit participation in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001).

proceed without him. The State called Foster's trial attorney, who testified to her discussions with Foster prior to the plea hearing. Foster's postconviction attorney cross-examined her.

Following the hearing, Foster complained to the district court about his absence. In a responsive ruling, the district court noted that Foster was present at the originally-scheduled hearing and testified in person. The court further found that Foster's absence on the second date was based on a lack of sufficient telephone resources at the institution in which Foster was incarcerated, but Foster was represented by counsel at the reconvened hearing and his attorney "engaged in very thorough cross-examination of the State's witness." The court concluded that Foster had "a full and fair opportunity to testify in person" and he "did not have an absolute right to be present" at the second hearing. The court later denied Foster's postconviction relief on the merits. This appeal followed.

## **II. Analysis**

The sole issue on appeal is whether the district court abused its discretion in proceeding without Foster at the reconvened hearing. See *Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982) (setting forth standard of review). Foster concedes his claim is not of constitutional dimension. See *Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996) (noting that postconviction proceedings are civil actions and that "[a]n inmate does not have a constitutional right to be present at a civil trial"). He simply argues that, had he been present, he could have assisted his postconviction attorney in cross-examining his trial attorney.

As a preliminary matter, the State argues that Foster's postconviction attorney waived error by agreeing Foster did not have to be present at the

reconvened hearing. We elect to bypass this argument and proceed to the substance of the court's ruling on Foster's absence.

We discern no abuse of discretion in that ruling. As the court noted, Foster testified in person on the original date of the hearing, explaining his precise concerns with the plea proceedings. And, his attorney was present to cross-examine the State witness at the reconvened hearing. This case, therefore, is unlike *Watson v. State*, 294 N.W.2d 555, 557 (Iowa 1980), where the applicant was not afforded any "opportunity to present proof." The case is more like *Webb*, 555 N.W.2d at 826. There, the court stated, "Webb does not deny that he received advance notice of the hearing and telephone conference, that he was represented by counsel at the hearing, and that he was given an opportunity to present testimony orally by telephone."

We affirm the district court's decision to proceed with the reconvened postconviction hearing without Foster and we affirm the denial of his application for postconviction relief.

**AFFIRMED.**