IN THE COURT OF APPEALS OF IOWA

No. 3-630 / 09-0800
Filed October 2, 2013

JERRY MARK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

A postconviction relief applicant appeals the denial of his second application for postconviction relief. **AFFIRMED.**

Eric D. Tindal of Nidey, Wenzel, Erdahl, Tindal & Fisher, Williamsburg, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller and Thomas S. Tauber, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

VAITHESWARAN, P.J.

Jerry Mark, convicted of first-degree murder in 1976, appeals (1) the denial of his motion for DNA testing of certain cigarette butts found at the crime scene and (2) the denial of his second application for postconviction relief without an evidentiary hearing on his challenge to ballistics evidence introduced at trial.

I. Background Proceedings

More than thirty-seven years ago, a jury found Jerry Mark guilty of four counts of first-degree murder in connection with the shooting of his brother, his brother's wife, and the couple's two children. The Iowa Supreme Court affirmed Mark's convictions. *State v*. *Mark*, 286 N.W.2d 396, 414 (Iowa 1979) ("*Mark I*").

Mark filed an application for postconviction relief, challenging the State's failure to disclose exculpatory evidence and requesting additional testing of the bullets used in the crimes. This court affirmed the district court's denial of the application and the request for further testing of the bullets. *Mark v*. *State*, 568 N.W.2d 820, 827 (Iowa Ct. App. 1997) ("*Mark II"*).

Mark petitioned for habeas corpus relief. The district court granted the petition, finding that suppressed evidence deprived Mark of a fair trial. *Mark v. Burger*, No. 97CV4059, 2006 WL 2556577, at *76 (N.D. Iowa Aug. 31, 2006). The court denied Mark's motion to expand the record with DNA profile results from the cigarette butts at the scene. *See Mark v. Ault*, 498 F.3d 775, 787 (8th Cir. 2007) (describing procedural history in district court).

On appeal of that decision, the federal Eighth Circuit Court of Appeals reversed the grant of the habeas corpus petition and concluded the district court

did not abuse its discretion in denying the motion to expand the record with DNA evidence. *Id.* at 789.

Mark returned to state court. He filed a motion for DNA testing of two cigarette butts found at the scene of the crime,[1] and a second application for postconviction relief, challenging the reliability of the bullet evidence introduced at trial. The district court denied Mark's motion for DNA testing and granted the State's motion to dismiss Mark's application for postconviction relief. This appeal followed.

II. Analysis

A. DNA Testing of Cigarette Butts

Mark contends the second postconviction court "erred in refusing to allow Mark to test, at a minimum, the cigarette butt evidence with the latest available testing procedures." Both sides concede the issue is governed by Iowa Code section 81.10, which states:

> A defendant who has been convicted of a felony or aggravated misdemeanor and who has not been required to submit a DNA sample for DNA profiling may make a motion to the court for an order to require that DNA analysis be performed on evidence collected in the case for which the person stands convicted.

Iowa Code § 81.10(1) (2009).[2] The court is to grant the motion "if all of the following apply:

> a. The evidence subject to DNA testing is available and in a condition that will permit analysis.
> b. A sufficient chain of custody has been established for the evidence.

[1] Mark's motion also requested DNA testing on additional items, but this is the only portion of that claim he maintains on appeal.
[2] The text of this provision will change, effective July 1, 2014.

> c. The identity of the person who committed the crime for which the defendant was convicted was a significant issue in the crime for which the defendant was convicted.
>
> d. The evidence subject to DNA analysis is material to, and not merely cumulative or impeaching of, evidence included in the trial record or admitted to at a guilty plea proceeding.
>
> e. DNA analysis of the evidence would raise a reasonable probability that the defendant would not have been convicted if DNA profiling had been available at the time of the conviction and had been conducted prior to the conviction.

Id. § 81.10(7). Focusing on subsection (e), Mark contends "there is a strong question about the reliability of the 'eye witness' evidence" and DNA testing of the "cigarette evidence" with new technology might "call[] into question a substantial portion of the State's theory on" his presence "at the murder scene."

The district court concluded otherwise, stating:

> [T]he absence of Petitioner's DNA on the objects he is asking to be tested will not prove the petitioner was not the person who committed these murders and the presence of an unknown person's DNA on any of these objects or even of a person in some law enforcement data base would not be evidence that the other person committed these murders. With some objects, the DNA material could have been deposited before the murders and with other objects the DNA material could have been deposited after the murders. In no case would the DNA evidence of some other person outweigh the evidence of Petitioner's means, motive, and opportunity to commit the crimes of which he was convicted.
>
> [T]he court finds that whatever the results in DNA testing would be in this case, they are merely impeaching or would not raise a reasonable probability that the defendant would not have been convicted unless the fact finder simply ignored all the other evidence in the case or both.

We discern no error in this ruling. *See State v. Tong*, 805 N.W.2d 599, 601 (Iowa 2011) (reviewing matters of statutory interpretation and application for errors of law). State investigators tracked Mark's moves with precision, creating an exceptionally strong, albeit circumstantial, case in support of the jury's findings of guilt. *See Ault*, 498 F.3d at 784-85; *Mark I*, 286 N.W.2d at 401. As this court and

the federal appeals court stated, additional DNA testing of the cigarette butts would have done little to undermine that case. *See Ault*, 498 F.3d at 789; *Mark II*, 568 N.W.2d at 824.

Like our brethren, we conclude there is no reasonable probability that testing of some of the cigarette butts with more advanced technology would have changed the outcome. Accordingly, we affirm the denial of Mark's motion for DNA testing.

B. Bullet Analysis

In his second postconviction relief application, Mark alleged that a bullet lead analysis performed by an FBI expert at his trial was later found to be "misleading and inappropriate." He sought a new trial based on this information. The State moved to dismiss the application on grounds that it was time-barred. The district court granted the motion, but not on that basis. Proceeding to the merits of Mark's claim, the court cited a letter from the FBI stating the examiner in Mark's trial "properly testified to the results of their examination."[3] The court concluded:

> The FBI's letter constitutes both notice to the court and the applicant that the bullet lead testimony given at his 1976 trial was not faulty which, taken together with the court's denial of the applicant's application for postconviction DNA testing disposes of both of the issues raised by the applicant's resistance to the Respondent's motion to dismiss without the need of any further hearings.

On appeal, Mark contends the court "should have set the matter down for hearing or at a minimum provide[d] the opportunity for [him] to respond." The court did just that.

[3] The court noted that, in another case, the FBI reached a contrary conclusion.

Before dismissing the application, the court scheduled a hearing, which Mark's attorney attended. At the hearing, the judge advised the parties that he had received the FBI letter quoted above. He distributed copies of the letter to counsel and advised Mark's attorney that he did not "have to respond" to the letter that day. He suggested that the parties consider stipulating to the evidence they would introduce on Mark's ballistics claim or, in the alternative, take "some telephone testimony or something like that." The judge stressed that he did not care what Mark's attorney did; he simply wanted to highlight the benefit of "not having piecemeal appeals" on his separate rulings pertaining to the request for DNA evidence and challenge to the ballistics evidence. He recognized Mark's attorney would "have to talk to [Mark]" before deciding how to proceed and stated he would withhold a ruling on the postconviction relief application for approximately 30 days to allow Mark to decide "what kind of record would be suitable." The judge stated that, based on the FBI letter, he would dismiss the postconviction relief application "absent any other record."

Mark's attorney agreed with this procedure and expressed gratitude that the court was "not asking that [he] try to make that decision today." The judge reiterated, "[n]o, [Mark] should see the letter and make his own—draw his own conclusion." At that point, Mark's attorney responded, "maybe we could have some kind of limited pretrial telephone hearing at some point after the court issues its order concerning this DNA issue so we can sort of keep it on the schedule and keep on the same page as to where we're at procedurally." The judge agreed, and stated he would proceed to rule on the DNA motion, would give Mark's attorney time to talk with Mark about that ruling as well as the FBI

letter, "and see where you want to go with it." He ended by saying "we'll do that and then wait to hear from you."

The court ruled on the DNA issue and waited a month. The court received no request for an evidentiary hearing on the ballistics issue. The court dismissed the postconviction relief application only after his thirty-day deadline expired.

Because Mark was afforded an opportunity to request an evidentiary hearing on the merits of his ballistics claim, and failed to do so, we conclude the district court did not err in dismissing the postconviction relief application without an evidentiary hearing. *Cf. Manning v. State*, 654 N.W.2d 555, 559-60 (Iowa 2002) (reversing the summary dismissal of a postconviction relief application where district court ruled on the merits of the application without properly notifying Manning "that he would need to present proof on any issue other than what was alleged in the State's motion to dismiss").

III. Disposition

We affirm the denial of Mark's request for additional DNA testing of the cigarette butts and the dismissal of his second application for postconviction relief.

AFFIRMED.