IN THE COURT OF APPEALS OF IOWA

No. 3-666 / 12-0894
Filed September 5, 2013

ELISA MONTGOMERY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Applicant appeals the district court's denial of her request for postconviction relief on drug-related charges. **AFFIRMED.**

Allan M. Richards of Richards Law Firm, Tama, for appellant.

Elisa Montgomery, Mitchellville, appellant pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

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

Senior judge assigned by order pursuant to Iowa Code section 902.9206 (2013).

MILLER, S.J.

I. Background Facts & Proceedings

Elisa Montgomery was charged with ongoing criminal conduct, five counts of prohibited acts, and five counts of possession of a controlled substance with intent to deliver. The State alleged Montgomery had been involved in a scheme to obtain hydrocodone, a Schedule II controlled substance, through false prescriptions and then sell the drug to others.

Montgomery did not appear for a pre-trial conference on July 2, 2009. Her defense counsel stated she told him that she had a note from one of the doctors at Black Hawk-Grundy Mental Health Center "indicating that she had some mental difficulties which would prevent her from attending a court proceeding in the near term." Defense counsel stated, "I would make a professional statement that I do not believe there is any issue with capacity." The district court denied defense counsel's request for a continuance.

The case was scheduled for trial on July 7, 2009. On that day, Montgomery again asked for a continuance. She presented a note dated June 23, 2009, from Dr. Mohammed Afridi, a psychiatrist, which stated, "Miss Montgomery is unable to attend court hearings due to health reasons for the next six weeks." She told the court, "I have some issues. And I'm just not stable enough to do this right now. I'm just not. And I just don't understand—I mean understand things, but I don't. I forget. And then, I don't know, I'm just—I'm just being honest with you." The district court concluded Montgomery had not shown a sufficient record to continue the trial, and denied her motion for a continuance.

Montgomery then decided to enter an *Alford* plea to the charges against her, rather than proceed to trial that day.[1] Prior to entering the guilty plea, Montgomery asked some pertinent questions about what the *Alford* plea entailed and about sentencing. During the plea colloquy, the district court asked her, "I understand that you take medication and that you have some counseling issues and so forth, but are any of the medications you're taking or mental issues that you have got you so confused that you don't understand what we're doing here today," and Montgomery replied, "Not today, no." Toward the end of the guilty plea proceeding, Montgomery asked, "I have a probation hearing on the 23rd. How does this work with all this?" The court and her defense attorney answered her question.

Montgomery subsequently filed a motion in arrest of judgment.[2] She asked to withdraw her guilty plea, stating she did not have the ability to understand what was going on during the plea proceedings. She stated she believed that she would receive probation for twenty-five years. Montgomery testified:

> I went ahead and took the Alford plea. But afterwards, after talking to people and talking to other lawyers and—and talking to the—not prosecutor but probation officers and stuff like that, I felt I made the wrong choice. And I know I made the wrong choice by doing an Alford plea.

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[1] In an *Alford* plea, a defendant consents to a conviction and sentence, even if the defendant is unwilling to admit participation in the acts constituting the crime charged. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

[2] We note Montgomery did not show up for the first scheduled hearing on her motion in arrest of judgment, claiming medical problems prevented her from attending.

The district court denied her motion in arrest of judgment, finding, "It is clear from the transcript that Defendant has a sufficient understanding of the proceedings to merit the Court's finding that she fully understood her rights and that she was entering an Alford plea to the charges." The court concluded "she was not so influenced by prescription medications that she could not understand the proceedings."

The case proceeded to a sentencing hearing. Dr. Afridi testified Montgomery had been diagnosed with depressive disorder with psychotic features, post-traumatic stress disorder, and anxiety disorder. Montgomery stated she had problems remembering things. The district court sentenced her to a total of forty-five years in prison.[3]

Montgomery appealed her convictions, claiming the district court should not have accepted her guilty plea because she was not mentally competent to make a knowing and voluntary plea. She also claimed she received ineffective assistance because defense counsel had not secured a psychiatric evaluation for her.[4] We affirmed her convictions. *State v. Montgomery*, No. 10-0638, 2011 WL 1781853 at *7 (Iowa Ct. App. May 11, 2011).

Montgomery filed an application for postconviction relief, again claiming her guilty pleas should be overturned because she was not mentally competent at the time she entered the pleas. A hearing was held at which Montgomery was permitted to introduce additional evidence concerning her mental health status.

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[3] Montgomery was also given ten years in prison in probation revocation proceedings, which is to be served consecutively to her sentences for these offenses, giving her a total of fifty-five years in prison.

[4] On appeal Montgomery raised an additional claim challenging her sentences.

The district court denied Montgomery's application for postconviction relief. The court first noted that the Iowa Court of Appeals had ruled adversely to Montgomery on similar claims. The court also found there was no merit to her claims that she was not mentally competent to enter a guilty plea. The court found her evidence was contrived and manipulative. Montgomery now appeals the decision of the district court denying her application for postconviction relief.[5]

II. Competency

Montgomery contends she was denied due process because the district court did not conduct a competency hearing under Iowa Code section 812.3 (2007) when questions arose concerning her competence to stand trial. She asserts that her claims that she did not understand the proceedings, and the statement by Dr. Afridi, were sufficient to require the court to hold a competency hearing.

Section 812.3(1) provides:

> If at any stage of a criminal proceeding the defendant or the defendant's attorney, upon application to the court, alleges specific facts showing that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court shall suspend further proceedings and determine if probable cause exists to sustain the allegations. The applicant has the burden of establishing probable cause. The court may on its own motion schedule a hearing to determine probable cause if the defendant or defendant's attorney has failed or refused to make an application under this section and the court finds that there are specific facts showing that a hearing should be held on that question.

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[5] In addition to the brief by her appellate counsel, Montgomery has filed a pro se brief. The pro se brief does not raise any issues in addition to those raised by her counsel, and we therefore do not address her pro se brief separately.

If the district court finds probable cause to believe a defendant suffers from a mental defect preventing the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, the court is to suspend further criminal proceedings and order the defendant to undergo a psychiatric evaluation to determine whether the defendant is suffering from such a mental defect. Iowa Code § 812.3(2).

We addressed this specific issue in Montgomery's direct appeal, as follows:

> The record before us shows a defendant who was able to consult with her attorney (even though they disagreed), had an appreciation of the charges against her, had a rational and factual understanding of the proceedings, and who actively participated in her own defense. It also shows a defendant who had repeatedly delayed the proceedings, but whose co-defendant daughter had just pleaded guilty, and who faced trial that day. In the dialogue with the court, defendant stated she understood the charges and possible penalties. She asked about the schedule for sentencing depending on whether she proceeded to trial or pleaded guilty. When told about the time period between pleading and sentencing, she asked if that would give her an opportunity to get a doctor's statement. She recognized the time period before sentencing encompassed a scheduled probation revocation hearing and asked, "I have a probation hearing on the 23rd. How does this work with all this?" She showed she understood the nature of an *Alford* plea as distinguished from a guilty plea when she agreed a jury would find her guilty, if the jury believed the State's witnesses. Her answers during the plea colloquy were clear and relevant. If the court mentioned something she did not understand, she made the court aware and asked for explanation. When the court asked if the medications she was taking or her mental health issues "have got you so confused that you don't understand what we're doing here today," she replied, "Not today, no."
>
> We conclude the district court did not err in accepting defendant's pleas and in not ordering a competency examination sua sponte.

Montgomery, 2011 WL 1781853, at *4.

In general, a party may not raise in postconviction proceedings, "[a]ny ground finally adjudicated" in prior proceedings. Iowa Code § 822.8. When an issue has been previously rejected in a direct appeal, there is no legitimate basis for reasserting the claim in postconviction proceedings. *LeGrand v. State*, 540 N.W.2d 667, 669 (Iowa Ct. App. 1995). *See also State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971) ("A postconviction proceeding is not intended as a vehicle for relitigation, on the same factual basis, of issues previously adjudicated, and the principle of *res judicata* bars additional litigation on this point."); *Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009) (stating that in postconviction proceedings the relitigation of previously adjudicated issues is barred). We conclude Montgomery's claim that the district court should have ordered a competency hearing under section 812.3 was already been decided adversely to her in her direct appeal. Further litigation on this issue is now barred. *See Wetzel*, 192 N.W.2d at 764.

III. Ineffective Assistance

Montgomery contends she received ineffective assistance from her postconviction counsel at the postconviction hearing. She claimed this attorney did not properly consult with her and did not adequately present her case at the postconviction hearing.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a

fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

We first note that even if we assume Montgomery's postconviction counsel did not meet personally with her prior to the hearing, this does not preclude the possibility that they communicated by telephone, text message, e-mail, or other means. Montgomery also complains that postconviction counsel improperly stated she had pleaded guilty in 2010, when it was in 2009. A review of the transcript shows postconviction counsel stated Montgomery entered her guilty plea in 2009. She additionally complains postconviction counsel focused too much on her mental condition after the plea hearing, instead of before the plea hearing. Postconviction counsel presented the evidence that was available. Montgomery does not assert that other evidence was available about her condition before the plea hearing that was not presented.

Montgomery makes other general statements that she received ineffective assistance of counsel at the postconviction hearing. "When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). An applicant must state the specific ways in which counsel's performance was inadequate, and the applicant must show the result of the

proceeding would have been different if not for these inadequacies. *Id.* Montgomery's general statement that counsel should have done a better job is not sufficient to show she received ineffective assistance of counsel.

We conclude Montgomery has failed to show she received ineffective assistance of counsel.

We affirm the decision of the district court denying Montgomery's application for postconviction relief.

AFFIRMED.