IN THE COURT OF APPEALS OF IOWA

No. 8-1005 / 05-0988
Filed March 11, 2009

JUSTIN AUMAN KEENE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley, Judge.

Justin Keene appeals from the summary denial of his third application for postconviction relief. **REVERSED AND REMANDED.**

Dawn Wilson, Cedar Rapids, and Jean J. Curtis, Guttenberg, for appellant.

Justin Keene, pro se.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, Ralph Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

In 1998, Justin Keene pled guilty and was sentenced to criminal transmission of HIV and dissemination of obscene material to a minor. He subsequently filed direct appeals, a habeas corpus action, and three postconviction relief applications. This appeal is from the district court's summary denial of Keene's third postconviction relief application.

The procedural history of that application is as follows. After it was filed, the State filed a resistance, requesting summary denial of the application on the basis that "the grounds raised by [Keene] have previously been raised and resolved." The State served the resistance on Keene by United States mail at the Iowa State Penitentiary. On the same day the resistance was mailed to Keene, the district court signed an order denying the application based on "res judicata." Keene filed a motion to reconsider. The motion was denied and this appeal followed.

Keene preliminarily asserts that he was not granted a hearing on his third application for postconviction relief. This argument is dispositive.

The State's resistance was essentially a motion for summary disposition of Keene's third postconviction relief application. *See* Iowa Code § 822.6 (2005); *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). That type of disposition is permissible, but not before a postconviction relief applicant has been afforded an opportunity to respond. *See Brown v. State*, 589 N.W.2d 273, 275 (Iowa Ct. App. 1998) ("[W]here a motion to dismiss an application for postconviction relief has been filed, proper service has been made on the nonmoving party, *and the nonmoving party has been afforded under [the summary judgment rule] an*

adequate time to respond and fails to do so, the court may summarily dismiss the application as a matter of default judgment." (emphasis added)). Keene was not afforded that opportunity, as the State's motion was decided on the same day it was served. While he is not automatically entitled to a hearing on the State's motion and may not be entitled to an evidentiary hearing, he is entitled to respond to the State's filing and to have his response considered before a ruling is issued. *Id.; see also Manning*, 654 N.W.2d at 562 (remanding for evidentiary hearing on merits of the claims). Accordingly, we reverse the district court's summary denial of Keene's third postconviction relief application and remand for further proceedings.

REVERSED AND REMANDED.