IN THE COURT OF APPEALS OF IOWA

No. 2-060 / 11-0693
Filed February 15, 2012

NEIL OLIN HIGDON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

An applicant appeals from the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Stephanie Rattenborg of Rattenborg Law Office, Manchester, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee State.

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

VOGEL, P.J.

In April 2009, Neil Higdon pleaded guilty to possession of a controlled substance (methamphetamine) with intent to deliver and was sentenced to twenty-five years in prison. In November 2009, Higdon filed an application for postconviction relief. He asserted his trial counsel was ineffective for misrepresenting the plea agreement to him because he believed he would only spend nine to ten months in prison, the time he had already spent in jail was to "be taken off his sentence and [the] $5000 fine would be suspended." In September 2010, a hearing was scheduled for April 4, 2011.

In August 2010, Higdon was paroled. The hearing was held as scheduled, but Higdon did not personally appear. With Higdon's attorney and the county attorney present, the district court contacted Higdon by telephone. In the reported proceedings, Higdon explained that he was currently in Omaha, Arkansas. When questioned as to why he was not present, Higdon stated he was required to have a travel permit from his parole officer, and had not requested one. When Higdon claimed he did not know about the hearing until the week before it, the following exchange occurred:

> THE COURT: This case was set by trial scheduling order of September 17, 2010. That's roughly nine or ten months ago. So you have known of the pendency of this trial date for the last nine or ten months. If you lost contact with your attorney or you didn't care enough to keep in contact with your attorney, that's your problem, not anyone else's.
>
> MR. HIGDON: Yes, Your Honor.
>
> THE COURT: So you're not here, your witnesses are not here. The case is dismissed as unlitigated.

The district court's written order that followed explained that because Higdon did not personally appear and there were no witnesses, the case was dismissed for failure to prosecute. Higdon appeals.

Higdon first asserts the district court should have permitted him to pursue his postconviction application, testifying by telephone. Generally, we review postconviction relief proceedings for errors at law. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). Higdon states that constitutional claims are reviewed de novo and our review should be de novo. *See id.* (explaining that where a postconviction relief applicant asserts a constitutional claim, such as an ineffective-assistance-of-counsel claim, our review is de novo). However, the State points out that Higdon did not make a constitutional argument before the district court and therefore, he did not preserve one for appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."). More importantly, on appeal Higdon does not cite to either the federal or state constitution and does not make a constitutional argument. Therefore, we do not utilize a de novo review. We review the district court's ruling dismissing the application for post conviction relief for errors at law. *Manning v. State*, 654 N.W.2d 555, 558–59 (Iowa 2002).[1]

[1] The district court dismissed Higdon's application because he failed to present any evidence. While Higdon argues the district court should have permitted him to testify telephonically, he did not request to do so and the district court did not make an evidentiary ruling. *See In re Estate of Rutter*, 633 N.W.2d 740, 745 (Iowa 2001) (reviewing a district court's ruling on the admission of telephonic testimony for an abuse of discretion); *see also State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006) (explaining that sentencing decisions are overall reviewed for correction of errors at law, but in "some

Higdon argues that because "there was no legal reason to deny Higdon the opportunity to participate by telephone," he should have been permitted to telephonically testify. Iowa Code section 624.1 (2009) states, "All issues of fact in ordinary actions shall be tried upon oral evidence taken in open court, except that depositions may be used as provided by law." The phrase "in open court" requires testimony in person, and not telephonically. *In re Estate of Rutter*, 633 N.W.2d 740, 746 (Iowa 2001). Unless the parties agree to telephonic testimony or the legislature has specifically authorized telephonic testimony, a witness is required to testify "in open court" and telephonic testimony is not permitted. *Id.* (explaining the situations in which the legislature authorized telephonic testimony).

Notably, Higdon did not request permission from the court to proceed telephonically, nor was the State given an opportunity to agree to such at the time of the hearing. Consequently, there was no agreement permitting the telephonic testimony. Furthermore, Higdon has not cited any statutory authority that would authorize telephonic testimony. Iowa Code section 822.7 sets forth the types of evidence permitted in postconviction relief actions. It states, "The court may receive proof of affidavits, depositions, oral testimony, or other evidence, and may order the applicant brought before it for the hearing." Iowa Code § 822.7. Where the legislature has authorized telephonic testimony, it specifically states testimony may be given "by telephone." C*f. Rutter*, 633 N.W.2d at 746 (explaining that the legislature specifically authorized telephonic

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circumstances it is necessary to determine whether legal error occurred because the district court abused its discretion").

testimony in certain circumstances (citing Iowa Code § 237.20(1)(d) (allowing testimony by "a tape recorded telephone call" in proceedings before local citizen foster care review boards); Iowa Code § 252K.316(6) (providing for "[s]pecial rules of evidence and procedure" in proceedings under Uniform Interstate Family Support Act, including the allowance of witness testimony "by telephone");and Iowa Code § 598B.111(2) (allowing "an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means" in child custody proceeding subject to Uniform Child Custody Jurisdiction and Enforcement Act))). Section 822.7 does not authorize telephonic testimony.

In support of his argument, Higdon only cites to two published cases that hold "[a]n inmate does not have a constitutional right to be present at a civil trial." *Webb v. State*, 555 N.W.2d 824, 825–26 (Iowa 1996) (finding that an applicant had no due process or statutory rights to personally attend the postconviction hearing); *Myers v. Emke*, 476 N.W.2d 84, 85 (Iowa 1991) (holding "trial courts lack authority to order the removal of an inmate from his place of confinement in order that he may appear and testify in his own behalf in a civil suit unrelated to his confinement").[2] Neither of these cases is applicable under the present circumstances, as both cases were in the context of plaintiff inmates seeking to be brought from prison to the courthouse. *Webb*, 555 N.W.2d at 825–26; *Myers*, 476 N.W.2d at 85; *see Hahn v. State*, 306 N.W.2d 764, 768 (Iowa 1981) ("The personal attendance of these inmates at every postconviction hearing would create problems of cost and security, and would almost certainly encourage the

[2] The State responds with an argument section that does not contain any citation to authority.

filing of repetitive and groundless applications for the purpose of getting 'a day on the outside.'"). The issue in both cases was whether the district court could exclude the inmates from personally appearing when the inmates were afforded other methods of presenting their testimony, namely by deposition or telephonic testimony when agreed to by the parties.

In *Myers*, an inmate filed a civil rights action and sought to be personally present for the trial. 476 N.W.2d at 84–85. The Supreme Court explained that in a civil case, the district court did not have the power to invade the executive department's control to order the inmate's presence, nor did the inmate have a constitutional right to be called as a witness. *Id.* at 85. The supreme court further explained the inmate was represented by counsel and could provide his testimony by deposition. *Id.* (citing Iowa Code § 622.82 (provided that where an inmate is not produced for oral examination, the inmate's "examination must be by a deposition")).

In *Webb*, an inmate filed a postconviction relief action and refused to testify telephonically. 555 N.W.2d at 825. He sought to either provide his testimony in person or by deposition. *Id.* In a postconviction proceeding the district court had discretion to order the applicant personally appear or exclude the applicant from the proceedings, but the applicant did not have a constitutional right to attend the proceedings. *See id.* (citing Iowa Code § 822.7 ("The court . . . may order the applicant brought before it for the hearing.")); *see also Mark v. State*, 370 N.W.2d 609, 611 (Iowa Ct. App. 1985) ("Whether to allow the applicant to personally appear is a matter within the discretion of the trial court.").

The applicant's right to due process "did require 'fundamental fairness' in the proceedings." *Webb*, 555 N.W.2d at 826. It appears that the State agreed to Webb's telephonic testimony and the applicant was given that opportunity, but refused. *Id.* The supreme court found that because he was given an opportunity to present his testimony, the applicant was "accorded the fundamental fairness due to him." *Id.* Further, the supreme court found that the applicant's attorney was not ineffective for failing to take his deposition because the applicant refused to talk with counsel. *Id.* *Webb* did not authorize telephonic testimony for all postconviction relief actions, but rather held an applicant's due process rights are not violated when the applicant is afforded an opportunity to present their testimony, with telephonic testimony being one avenue to present testimony. *See id.* Further, when evidence is admitted through other methods than personal presence, it is the legislature that defines what those methods are. *Rutter*, 633 N.W.2d at 746 (Iowa 2001) (explaining that it is the legislature that authorizes telephone testimony in specified situations and without that authorization, the district court has no authority to permit a witness to telephonically testify); *see also Myers*, 476 N.W.2d at 84–85 (explaining that Iowa Code section 622.82 permitted a plaintiff inmate to provide his testimony by deposition).

Unlike *Myers* and *Webb*, Higdon was not excluded from personally attending the hearing. Higdon was not incarcerated. Rather, he was on parole and there was no evidence he could not personally attend the hearing, as Higdon stated he failed to request a travel permit.[3] Consequently, Higdon could have personally attended the hearing and given his testimony or provided his

[3] It appears he failed to maintain contact with his postconviction relief counsel.

testimony by deposition. *See* Iowa Code § 822.7. Additionally, he could have sought the State's agreement to presenting his testimony telephonically. *Rutter*, 633 N.W.2d at 746 (indicating that testimony may be given telephonically if the parties agree, but if the parties do not agree it is an abuse of discretion to allow telephonic testimony). Yet like *Myers* and *Webb*, Higdon was afforded the opportunity to present his testimony through multiple methods, but did not comply. *See Webb*, 555 N.W.2d at 826 (holding the proceedings were fundamentally fair where the applicant was afforded an opportunity to present his testimony); *Myers*, 476 N.W.2d at 85 (holding a plaintiff inmate could present his testimony by deposition).

Higdon does not cite to any authority supporting his argument that although he was able to personally appear, telephonic testimony was authorized. Furthermore, as noted above, Higdon failed to seek the court's permission or the agreement of the State to proceed telephonically.

The district court did not dismiss this case due to Higdon's failure to personally appear. *See* Iowa R. Civ. P. 1.971 ("A party shall be in default whenever that party does any of the following: . . . Fails to be present for trial."). It was dismissed for Higdon's failure to present *any* evidence. In its written order the district court stated, "Because the petitioner was in the state of Arkansas and testimony by telephone is not permitted under these circumstances, and he had no witnesses available for examination, [the case is] dismissed for failure to prosecute." While it is not required that an applicant testify at the postconviction hearing, it is required that an applicant present evidence. In the present case

Higdon's testimony was essential given that he did not call any other witnesses. *See Webb*, 555 N.W.2d at 826 ("[A] postconviction hearing need not include the applicant's testimony, particularly in the absence of proof that applicant's attendance was necessary."). Because Higdon did not present any evidence, we find the district court did not err in dismissing Higdon's application.

Higdon next asserts that his postconviction relief counsel was ineffective for failing "to advance his claims," "apprise Higdon of the hearing date," and "to make adequate preparations for the hearing—including obtaining the appearance of witnesses." Our review of this claim is de novo. *See Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011) (explaining that while an applicant had a statutory right to postconviction relief counsel rather than a constitutional right, we still apply a de novo review). The record is not adequate for us to address this claim and we must preserve it for possible further postconviction proceedings. *See State v. Johnson*, 784 N.W.2d 192, 197 (Iowa 2010) (discussing that ineffective-assistance-of-counsel claims should usually be preserved for postconviction relief proceedings so that a defendant may develop a more complete record and regardless of our view of the viability of the claim, we must preserve it for postconviction relief proceedings). We affirm.

AFFIRMED.

Doyle, J., specially concurs; Potterfield, J., dissents.

DOYLE, J. (concurring specially)

I concur with the majority's disposition of this appeal, but for reasons other than those stated in the majority opinion. Higdon asserts the district court erred in not affording him the opportunity to give testimony by telephone. However, he made no request to give testimony by telephone prior to or at the hearing. Higdon made no challenge during the hearing to the court's ruling that he could only testify in person. To preserve error, parties are required to alert the district court "to an issue at a time when corrective action can be taken." *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) (quoting *Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000)). Higdon also failed to file a rule 1.904 motion to obtain a ruling on the issue. Iowa R. Civ. P. 1.904; *see also Krogmann*, 804 N.W.2d at 524 ("[W]hen a court fails to rule on a matter, a party must request a ruling by some means."). A motion for enlargement is necessary to preserve error "when the district court fails to resolve an issue, claim, or . . . legal theory properly submitted for adjudication." *See State v. Iowa Dist. Court for Webster County*, 801 N.W.2d 513, 543 (Iowa 2011) (Appel, J. dissenting) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2001)).

The issue of whether Higdon should have been allowed to give testimony by telephone was not raised or determined by the district court. "We may not consider an issue that is raised for the first time on appeal, 'even if it is of constitutional dimension.'" *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (quoting *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985)). Issues must ordinarily be presented to and passed upon by the district court before they may

be raised and adjudicated on appeal. *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000). Higdon thus failed to preserve error for our review, and I would affirm for that reason.

POTTERFIELD, J. (dissenting)

I respectfully dissent from the majority's conclusion that the district court properly dismissed Higdon's case for failure to prosecute. Our case law makes it clear that personal presence of an applicant is not required by law, as the district court here stated, and furthermore that the applicant has no right to be personally present. *See Webb v. State*, 555 N.W.2d 824, 825 (Iowa 1996) (finding in a postconviction proceeding the district court had the discretion to either order the incarcerated applicant to personally appear or to exclude the applicant from the proceedings, but the applicant did not have a constitutional right to attend the proceedings); *Myers v. Emke*, 476 N.W.2d 84, 84–85 (Iowa 1991) (finding the district court lacked authority "to order the removal of an inmate from his place of confinement in order that he may appear and testify in his own behalf in a civil suit unrelated to his confinement"). The majority states that *Webb* and *Myers* have no application to the issue of whether Higdon should have been permitted to testify or otherwise participate telephonically. Yet, both cases stand for the proposition that evidence in a civil case may be admitted through methods other than personal presence. *See Webb*, 555 N.W.2d at 825–26 (finding participation by telephone with advance notice of the hearing is sufficient to satisfy fundamental fairness although an applicant had no due process or statutory rights to personally attend the postconviction hearing); *Myers*, 476 N.W.2d at 85 (holding an inmate's testimony can be obtained by other means, such as deposition).

Higdon was available to participate at the hearing telephonically and represented by counsel who was present personally. The court stated, "The law requires you to give your testimony in person" and dismissed the case, informing Higdon, "unless you can prove your case by personal sworn testimony, I am going to dismiss it." However, these statements did not present a full picture of Higdon's options. The parties could have agreed to allow Higdon to testify telephonically or Higdon could have requested a continuance so that he could be present to testify. While the majority faults Higdon for failing to make the request, I would find the district court abused its discretion in ruling categorically that "[t]he law requires you to give your testimony in person," without allowing Higdon the opportunity to make such a request. There is no question that pursuant to Iowa Code section 822.7 (2009), the district court had the authority to order Higdon to appear personally, but the district court did not make such an order before the postconviction hearing. Nor did the mandatory scheduling order entered in September 2010 require Higdon's personal presence. For the district court to require Higdon's presence at the time of the hearing, knowing Higdon's geographical location made his personal presence impossible, was an abuse of the court's discretion. *See* Iowa Code § 822.7 (vesting the district court with discretion in determining whether an applicant shall personally appear for the hearing); *cf. Mark v. State*, 370 N.W.2d 609, 611 (Iowa Ct. App. 1985) (citing to Iowa Code section 663A.7, now section 822.7, for the proposition that a court could receive "proof of affidavits, depositions, oral testimony, or other evidence, and may order the application brought before it for the hearing," and concluding,

"Whether to allow the applicant to personally appear is a matter within the discretion of the trial court.").

I would reverse and remand for a hearing consistent with these principles.