IN THE COURT OF APPEALS OF IOWA

No. 2-1055 / 11-1782
Filed March 13, 2013

RANDY FRIEDLEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

A postconviction relief applicant appeals the district court's denial of his motion to rescind the dismissal of his postconviction relief application. **REVERSED AND REMANDED.**

Alfredo Parrish and Andrew Dunn of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mullins, JJ. Potterfield, Tabor, and Bower, JJ. take no part.

VOGEL, P.J.

Randy Friedley's postconviction relief (PCR) application was administratively dismissed under Iowa Rule of Civil Procedure 1.944 on January 1, 2011. Seven months later when Friedley's counsel became aware that the case had been dismissed, he filed a motion to rescind the dismissal, asserting the case had previously been relieved from the operation of rule 1.944 by a district court order of November 24, 2009, and the notice of dismissal did not comply with the rule because it was not sent to him as counsel of record.

After a hearing the district court denied the motion and dismissed the case finding that under the court's order of November 24, 2009, the case had to be tried in 2010, it was not so tried, and thus it should be dismissed. Friedley appeals claiming his PCR counsel was ineffective,[1] the district court abused its discretion in dismissing the case, and the case should not have been administratively dismissed as of January 1, 2011, because the clerk of court failed to comply with rule 1.944.[2] Because we find Friedley's counsel ineffective

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[1] Friedley contends his PCR counsel was ineffective in failing to identify and address a conflict of interest and in failing to prevent the case from being dismissed under rule 1.944. Because we conclude the case must be reversed and remanded as a result of counsel's ineffectiveness in failing to prevent the case from being dismissed, we need not address the conflict of interest claim here. This claim can be addressed, if necessary, by the district court upon remand.

[2] Friedley asserts the clerk of court erred in failing to provide his attorney with the last notice of dismissal under rule 1.944; instead the notice was sent to Friedley, personally. However, as will be explained in this opinion, Friedley and his attorney were provided notice in the district court's November 24, 2009 order that if the case was not tried in 2010, it would be dismissed.

> We have held that, if a continuance is granted on certain terms and those terms are not met, a case subject to rule [1.944] will be dismissed by operation of law whether or not a subsequent "try or dismiss" notice had been sent. The reason is that the effect of the continuance was merely to hold the dismissal in suspension on certain conditions. When those conditions are not met, the dismissal is automatic.

in failing to prevent the case from being dismissed pursuant to rule 1.944, the dismissal order must be reversed and the case remanded for further proceedings.

Rule 1.944 permits dismissal where a party has failed to prosecute the case. *See* Iowa R. Civ. P. 1.944(1) ("It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time."). Several motions had been filed and granted in this case, relieving it of the rule 1.944 deadline over the course of its four and one-half years on file. The final motion to extend the 1.944 deadline came before the district court on November 24, 2009. The court, in granting the motion to extend the deadline, stated:

> [T]his case is set for trial on April 10, 2010, at 1:30 p.m.
>
> IT IS THEREFORE ORDERED:
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> 1. This case is relieved from operation of Iowa Rule of Civil Procedure 1.944 without further hearing.
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> 2. Unless another case has been given priority, the Case Coordinator shall give this trial a first case setting.
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> 3. If another case subject to Rule 1.944 has been given priority, the Case Coordinator shall give this case a second case setting and shall notify Applicant's attorney. Applicant's attorney shall initiate a case scheduling conference within ten (10) days to obtain an alternate first case setting at some time in 2010.
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> 4. If this case is not tried at its original or alternate setting, it will be dismissed at Applicant's cost.

Allied Gas & Chem. Co. v. Federated Mut. Ins. Co., 365 N.W.2d 26, 30–31 (Iowa 1985); *see also Wilimek v. Danker*, 671 N.W.2d 25, 27 (Iowa 2003). Thus, the clerk's failure to send the final notice to counsel did not relieve Friedley from the court's requirement that the case be tried in 2010. No further notice was required prior to dismissal.

Thus, this case was to be tried on April 10, 2010, or tried at an alternate date some time in 2010. Counsel was advised that if it was not tried at the original trial—April 10, 2010—or at the alternate trial in 2010, it would be dismissed.

The State filed a motion to continue the April 10, 2010 trial, asserting it was unavailable that date due to a jury trial in another case. The case was then set for trial on September 23, 2010. Friedley's counsel appeared for trial that day and sought a continuance because Friedley was out of the state caring for his son, who had been involved in a motor vehicle accident. The court ordered counsel to participate in a trial scheduling conference on October 21, 2010, to be initiated by Friedley's attorney. No trial scheduling conference occurred, and the case was dismissed as of January 1, 2011. Friedley's attorney asserted in his motion to rescind the dismissal—which was filed over seven months after the dismissal—that he did not initiate the scheduling conference "because Mr. Friedley had remained in Arizona to help take care of his son and his son's family and he was uncertain as to when he might be able to return to Iowa."

The State resisted the motion to rescind, and the court denied it relying on the November 24, 2009 order. Friedley asserts, among other things, his counsel was ineffective in failing to prosecute the case, obtaining multiple continuances for unstated reasons, failing to seek a continuance to prevent the rule 1.944 dismissal, and failing to seek reinstatement of the case within six months of dismissal under rule 1.944(6). We agree counsel was ineffective in failing to prevent the case from being dismissed and in not seeking reinstatement of the case within six months of its dismissal. As the supreme court found in *Lado v. State*, 804 N.W.2d 248, 253 (Iowa 2011), when a PCR application is dismissed

by operation of rule 1.944 "without any consideration of its merits or meaningful adversarial testing" the applicant is constructively without counsel during his PCR proceeding. It is a "structural error" and "renders the entire postconviction relief proceeding 'presumptively unreliable.'" *Lado*, 804 N.W.2d at 253.

The State asks that *Lado* be overruled or at least limited to its facts, but we find *Lado*'s holding directly applicable and binding on our court. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). Friedley's "statutory right to effective counsel entitles him to have his postconviction relief dismissal reversed and to proceed with his postconviction relief proceeding." *Lado*, 804 N.W.2d at 253.

REVERSED AND REMANDED.