IN THE COURT OF APPEALS OF IOWA

No. 2-590 / 10-2038
Filed March 13, 2013

JAMES CARSON EFFLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

James Effler appeals the district court's summary dismissal of his postconviction action. **REVERSED AND REMANDED.**

Nicholas A. Bailey of Bailey Law Firm, P.L.L.C., Mitchellville, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John Sarcone, County Attorney, and Jeffrey Noble, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Mullins and Bower, JJ.

BOWER, J.

James Effler appeals from the district court's summary dismissal of his application for postconviction relief. Effler argues the district court erred in granting the State's motion for summary judgment and dismissing his application for postconviction relief, because there was "at least one" genuine issue of material fact in his application alleging that: (1) his trial counsel was ineffective in failing to raise Iowa constitutional challenges in the motion to suppress statements made by Effler during a police interrogation, (2) his appellate counsel was ineffective in failing to raise and argue Effler's mandatory life sentence for the offense of kidnapping in the first degree constituted cruel and unusual punishment as applied to his case, and (3) his postconviction counsel was ineffective in failing to raise the issue of ineffective assistance of trial counsel for failing to advise Effler of the consequences of proceeding to immediate sentencing and failing to file a motion for new trial.

Upon our review, we find Effler has failed to prove his claim of ineffective assistance of postconviction counsel. However, as Effler was not given an opportunity to fully develop his claims of ineffective assistance of trial and appellate counsel, the district court should not have summarily dismissed his application for postconviction relief. We reverse the grant of summary judgment and remand this matter for further proceedings.

I. Background Facts and Proceedings.

Effler was arrested following a horrific incident that occurred in October 2005 at the Des Moines Central Library. Our supreme court's July 17, 2009

ruling on further review in Effler's direct appeal, *State v. Effler*, 769 N.W.2d 880, 884-85 (Iowa 2009), contains a factual background regarding the incident, which we reiterate in part:

> On the morning of October 4, 2005, Melissa Martin was babysitting J.M., a two-year-old girl, for the first time. Martin took J.M. to the Des Moines Central Library. Martin stood at a fifteen-minute internet station, and J.M. stood beside her leg. A few minutes later, Martin noticed J.M. was no longer there and began calling out her name. One of the librarians began a search for the child and remembered seeing Effler handing a toy to a toddler girl. The librarian suggested checking the men's bathroom. Martin and the librarian rushed over to the men's bathroom. The librarian tried to open it with her key, but it was locked from inside. They started pounding on the door calling the child's name. They heard two "bloodcurdling" screams followed by silence. The librarian asked her staff to call the maintenance man, who pried the lock open with a screwdriver. Inside the bathroom, they found a shirtless Effler kneeling next to J.M., who was completely naked. Martin picked up J.M. and ran out. Staff members slammed the door shut, preventing Effler from escaping. Two men held the door shut until the police arrived. The police wrestled Effler to the floor, handcuffed him, and took him to the Des Moines Police Station.
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> At the police station, a detective interviewed Effler in a small interview room. The detective videotaped the entire interview. The relevant part of the custodial investigation involving Effler's *Miranda* rights contained the following exchanges between the detective and Effler:
>
> > DETECTIVE: Okay. I'll tell you what, did they tell you what your rights were, James? Do they call you Jim, James?
> >
> > EFFLER: James.
> >
> > DETECTIVE: James.
> >
> > EFFLER: They said that I am only being booked for ahh intoxic public right now.
> >
> > DETECTIVE: Oh.
> >
> > EFFLER: Is that true?
> >
> > DETECTIVE: I don't—I don't know that you are not actually booked even yet. I mean there is no booking been done.
> >
> > EFFLER: So I am being released?
> >
> > DETECTIVE: Well if they book you for intox then you got to you know you are not gonna get released.
> >
> > EFFLER: That would be overnight.

DETECTIVE: Usually it's overnight judges usually let you out in the morning I suppose, huh.

EFFLER: Yeah.

DETECTIVE: You know what your rights are?

EFFLER: You have the right to remain silent and anything you say can used . . .

DETECTIVE: Mm Mmm. Used against you?

EFFLER: Yes.

DETECTIVE: Um, you have the right to a lawyer, talk to a lawyer for advice before I ask any questions and with you before—during questioning if you wish. If you can't afford one, one will be appointed to you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the stop right to stop answering at any time until you talk to a lawyer. And I will give you a copy of this in writing. I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing.

EFFLER: I do want a court-appointed lawyer.

DETECTIVE: Okay.

EFFLER: If I go to jail.

DETECTIVE: No, let me finish this and then we'll talk, okay? Okay, I got one more sentence. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. So if you want to talk to me . . .

EFFLER: Say, sir . . .

DETECTIVE: Yes sir.

EFFLER: Can we go outside where I can smoke a cigarette, please?

DETECTIVE: Can you hold on for a little bit?

. . . .

DETECTIVE: Okay. Okay. Here's all those things I talked to you about the right to remain silent and all that, you remember? Well you know most of them. Do you want to read this, James?

EFFLER: I already know them.

DETECTIVE: Okay, if you want to talk to me sign there and we will go get a smoke and then we'll talk in a minute.

Effler then signed a waiver of his *Miranda* rights, and the two left the room so Effler could smoke a cigarette. When they returned, the detective asked Effler some questions, and Effler

> confessed to taking J.M. to the bathroom and locking the door. He described how he took off her clothes, licked and rubbed her genitals, masturbated, and tried to put his penis inside her vagina.

The State charged Effler with kidnapping in the first degree, sexual abuse in the second degree, and failure to register as a sex offender.[1] Prior to trial, Effler filed a motion to suppress his confession on the ground the State violated his Fifth Amendment right to counsel. The district court denied the motion, finding Effler's request for counsel was "conditioned upon his going to jail." Following a trial, the jury found Effler guilty of kidnapping in the first degree. Effler was sentenced to life imprisonment without the possibility of parole.

Effler appealed, claiming the district court erred in denying his motion to suppress because his incriminating statements were made after his unequivocal request for counsel. Effler also claimed he received ineffective assistance of counsel due to his trial counsel's failure to challenge the statements under the Iowa Constitution. This court reversed, concluding the State violated Effler's Fifth Amendment right to counsel, and as a result did not address the issue of ineffective assistance of counsel.

The supreme court granted further review. The supreme court was equally divided on the issue of whether Effler's motion to suppress should have

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[1] Effler had a 2002 conviction for sexual assault in Texas.

been granted;[2] accordingly, the decision of the district court was affirmed by operation of Iowa Code section 602.4107 (2005).[3]

In November 2009, Effler filed a pro se application for postconviction relief. In May 2010, Effler's counsel filed an amended application, alleging ineffective assistance of counsel for (1) trial counsel's failure to raise Iowa constitutional challenges in the motion to suppress statements made by Effler during the police interrogation and (2) appellate counsel's failure to argue Effler's mandatory life sentence constituted a cruel and unusual punishment. In June 2010, the State filed a motion for summary judgment. Following a reported hearing on the State's motion for summary judgment, the district court issued a "Ruling and Order on Respondent's Motion for Summary Judgment" in November 2010 dismissing Effler's postconviction relief application.

Effler now appeals.

II. Standard of Review.

We review the summary dismissal of an application for postconviction relief for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, when claims raise constitutional infirmities, including allegations of ineffective assistance of counsel, we conduct a de novo review. *Id.* In determining whether the summary dismissal is warranted, the moving party has

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[2] Chief Justice Ternus and Justices Cady and Streit would vacate this court's decision and affirm the district court judgment; Justices Wiggins, Hecht, and Appel would affirm this court's decision and reverse the district court judgment; Justice Baker took no part.
[3] Iowa Code section 602.4107 provides: "When the supreme court is equally divided in opinion, the judgment of the court below shall stand affirmed, but the decision of the supreme court is of no further force or authority."

the burden of proving the material facts are undisputed, and we examine the facts in the light most favorable to the nonmoving party. *Id.*

III. Summary Disposition.

Effler contends "[a]s there existed at least one issue of material fact, and those issues were not finally adjudicated on appeal, summary disposition was inappropriate in this case." Iowa Code section 822.6 provides two methods for terminating postconviction relief procedures without trial. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). The first method permits court initiation of the summary disposition process.[4] The portion of section 822.6 that is pertinent to this case is the second method which contemplates the initiation of summary disposition proceedings upon the motion of either party.[5] *Id.* This method of summary disposition incorporates the procedural rules applicable to motions for summary judgment in Iowa Rule of Civil Procedure 1.981 and requires adherence to those rules, regardless of which party initiates the proceedings. *Manning*, 654 N.W.2d at 560.

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[4] That portion of Iowa Code section 822.6 provides:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for dismissal. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if a material issue of fact exists.

[5] That portion of Iowa Code section 822.6 provides:

> The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

A. Final Adjudication. As a preliminary matter, we turn to whether Effler's claim of ineffective assistance of counsel for failing to argue Iowa constitutional grounds was adjudicated on appeal. The State contends Effler's claim "has already been adversely decided to the defendant and that decision bars relitigation of this claim [under] the doctrine of res judicata." We disagree.

Effler raised two issues on direct appeal: (1) "the district court erred in denying his motion to suppress incriminating statements made during an interrogation after he had requested counsel," and (2) "he was denied effective assistance of counsel when his attorney failed to challenge the statements under the Iowa Constitution." *Effler*, 769 N.W.2d at 882. This court addressed the first issue and concluded the State violated Effler's Fifth Amendment right to counsel but did not reach the issue of ineffective assistance of counsel.

On further review, the supreme court also addressed the first issue and determined "the justices are equally divided on the issue of whether the motion to suppress should have been granted." *Id*. Under an equally divided court, the conviction of the district court was affirmed by operation of law. *Id*.; *see* Iowa Code § 602.4107. In regard to the second issue of ineffective assistance of counsel, the court acknowledged that three members of the court "would decline to find that counsel was ineffective." *Id*. at 897 (Appel, J., specially concurring) ("It appears that there are three members of this six-member court who would decline to find that counsel was ineffective."). However, pursuant to Iowa Code section 602.4107, beyond the finding that the six-member court was equally divided (and the judgment of the district court shall therefore stand affirmed), "the

decision of the supreme court is of no further force or authority." Accordingly, we conclude the court did not make a final adjudication of the issue of ineffective assistance of counsel, and that claim is not barred by res judicata principles in this postconviction proceeding.

B. Genuine Issue of Material Fact. Summary judgment is appropriate if "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011). An issue of material fact occurs when the dispute involves facts that might affect the outcome of the suit under the applicable law. *Wallace v. Des Moines Indep. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008). Such issue is "genuine" when the evidence allows a reasonable jury to return a verdict for the nonmoving party. *Id.* The burden of showing the nonexistence of a material fact is on the moving party, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.*

Effler's application for postconviction relief raised claims of ineffective assistance of counsel based on trial counsel's failure to raise Iowa constitutional challenges in the motion to suppress statements made by Effler during the police interrogation and appellate counsel's failure to argue Effler's mandatory life sentence constituted a cruel and unusual punishment. In its motion for summary judgment and at hearing, the State alleged summary judgment was appropriate on these claims because (1) trial counsel's failure to argue Iowa constitutional grounds in the motion to suppress "was raised, address, and resolved on

appeal,"[6] and (2) *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009), upon which Effler relied for his cruel and unusual punishment claim, post-dated Effler's conviction, and moreover, Effler's "actions in kidnapping and sexually assaulting a toddler in a public library can hardly be called an act of 'lesser culpability.'"

Effler resisted the State's motion, arguing the issue of whether Effler's trial counsel was ineffective in failing to argue Iowa constitutional grounds "is a genuine issue of material fact" and "was raised on appeal but was not finally adjudicated." Effler further acknowledged *State v. Bruegger* post-dated his conviction, but alleged "this does not prohibit Effler from asserting a claim of ineffective assistance of appellate counsel at a post-conviction relief proceeding," and "[t]here is no record available for the Court to determine the reasons why appellate counsel did not raise a cruel and unusual argument and whether or not that decision amounted to ineffective assistance of counsel."

In resisting the State's motion, Effler did not reach the merits of these issues. The record contains no statements of disputed or undisputed facts, no memorandums of authorities, or anything resembling summary judgment filings aside from Effler's resistance to the State's motion for summary judgment, which was limited to legal arguments in regard to whether summary judgment was appropriate. *See* Iowa Code § 822.6. Effler was not given the opportunity to take depositions or submit interrogatories, although such requests had been made. No evidentiary hearing took place for Effler to present proof on the issues raised in his application.

[6] As we have already determined this issue was not adjudicated on appeal, we turn to whether a genuine issue of material fact exists to preclude summary judgment.

The district court granted summary judgment, however, and dismissed Effler's application, finding trial counsel did not fall "below that standard necessary to provide effective assistance of counsel" to Effler for failing to pursue Iowa constitutional grounds in the motion to suppress. The court further found Effler "was not prejudiced by any failure to raise the issue" of cruel and unusual punishment based upon the sentence imposed.

Our supreme court has expressed a preference that ineffective assistance of counsel claims in postconviction relief proceedings, even if deemed improbable by the district court, be addressed in an evidentiary hearing. *Manning*, 654 N.W.2d at 562; *see also State v. Oberhart*, 789 N.W.2d 161, 163 (Iowa 2010) (acknowledging the court must preserve ineffective assistance of counsel claims for postconviction relief proceedings to establish a sufficient record to decide the claim "regardless of the court's view of the potential viability of the claim"). The *Manning* court stated that postconviction applications premised upon claims of ineffective assistance of counsel "ordinarily" proceed to a full evidentiary hearing. 654 N.W.2d at 562. This allows the applicant to present any proof he may have. *Id.* Upon our review, we conclude Effler was not afforded the protection intended by Iowa Code section 822.6. This method of summary disposition is to be used only after "*the case has been fully developed by both sides*." *Id.* at 559. Here, Effler was not given an opportunity to fully develop his claims, and the district court should not have summarily dismissed Effler's application. Accordingly, we reverse the district court's grant of summary judgment and remand for further proceedings on this issue.

IV. Ineffective Assistance of Postconviction Counsel.

Effler also argues his trial counsel was ineffective in failing to properly advise him "of the consequences of proceeding immediately to sentencing following the guilty verdict and failing to file a motion for new trial." Effler did not raise this claim on direct appeal or in his postconviction application. Effler contends his appellate and postconviction counsel were ineffective in failing to raise the claim. "We have found the ineffective assistance of appellate counsel to constitute a sufficient reason for failing to raise the issue of ineffective assistance of trial counsel on direct appeal." *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

To prevail on his claim of ineffective assistance of counsel, Effler must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fannon*, 799 N.W.2d 515, 519 (Iowa 2011). Effler must prove both elements by a preponderance of the evidence, and the claim fails if either element is lacking. *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011).

To prove counsel failed to perform an essential duty, Effler must show counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We are to begin "with the presumption counsel performed competently and measure counsel's performance objectively, by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances." *Id.* (quotation marks omitted).

To establish prejudice, Effler must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Palmer*, 791 N.W.2d 840, 850 (Iowa 2010) (quoting *Strickland*, 466 U.S. at 694). To establish a reasonable probability that the result would have been different, Effler "need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *Id.* (quotation marks omitted).

Here, to prove postconviction counsel's deficient performance resulted in prejudice, Effler must show his ineffective-assistance-of-trial-counsel claim would have prevailed if it had been raised on direct appeal or in his postconviction application. That is, Effler must show by a preponderance of the evidence that a motion for new trial would have been granted and he would have been acquitted based on the facts found by the district court.

A review of the facts of this case, as set forth by our supreme court and viewed in a light most favorable to Effler, show that Effler, an adult male, removed a two-year-old child to a locked bathroom and subjected her to sexual abuse. We find no basis to find the result of these proceedings would have been different had trial counsel filed a motion for new trial. Overwhelming evidence supports Effler's conviction. Because no prejudice exists from trial counsel's alleged failure, there is no need to review postconviction counsel's alleged error. *Ledezma*, 626 N.W.2d at 145 ("If we find [the defendant] does not establish a sufficient ineffective assistance claim against his trial counsel, we need not

address his ineffective assistance of appellate counsel claim.”). Effler has failed to prove this claim of ineffective assistance of counsel.[7]

V. Conclusion.

Upon our review we find Effler has failed to prove his claim of ineffective assistance of postconviction counsel. However, as Effler was not given an opportunity to fully develop his claims of ineffective assistance of trial and appellate counsel, concerning the filing of a motion to suppress and alleging his sentence amounted to cruel and unusual punishment, the district court should not have summarily dismissed his application for postconviction relief. We reverse the grant of summary judgment and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Mullins, J. concurs; Vogel, P.J., dissents in part.

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[7] Effler further contends his postconviction counsel was ineffective in failing to have the district court “admit any transcripts or portions of the criminal case file” in the postconviction proceeding. Effler alleges “[i]t is impossible to adequately develop the record in the postconviction proceeding without the court admitting or taking judicial notice of the criminal court file and the trial transcripts from the criminal trial.” In light of our findings on the issue of the summary dismissal of Effler’s application, we need not address this contention.

VOGEL, P.J. (dissenting in part, concurring in part)

I agree with the majority's decision that "[o]verwhelming evidence supports Effler's conviction," and therefore, Effler cannot prove prejudice as a result of trial counsel's alleged failures. However, I would affirm the district court's summary dismissal of his postconviction relief application, which alleged his trial counsel was ineffective in failing to move to suppress his statements under the Iowa Constitution and his appellate counsel was ineffective in failing to argue his sentence was cruel and unusual.

The first claim—trial counsel's failure to argue the Iowa Constitution supports the suppression of his statements—was raised on direct appeal. The conviction was affirmed by operation of law, and the supreme court did not specifically preserve the ineffective-assistance-of-trial-counsel claim for postconviction relief purposes. Justice Streit's opinion rejected the claim finding Effler was not denied the effective assistance of counsel when his attorney failed to challenge his statements under the Iowa Constitution. *Effler*, 769 N.W.2d at 890.

Controlling Iowa precedent from the Iowa Supreme Court in *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997), establishes that the Iowa Constitution does not require law enforcement to ask clarifying questions when faced with an equivocal request to consult with counsel. No opinion in the direct appeal found Effler's counsel ineffective for failing to raise the claim under the Iowa Constitution. While Justice Appel indicated in his special concurrence in *Effler* that he regards "*Morgan* as wobbly precedent that may not survive a direct

attack," *Effler*, 769 N.W.2d at 897, it is still precedent that both the district court and our court must follow. *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.").

The majority concludes a remand is necessary for this postconviction application to come on for a full trial, but I find no factual issue here that needs to be addressed with a full evidentiary hearing. Effler only asserts "there exists *at least one* issue of material fact" without ever identifying what that one fact is. The interpretation of the Iowa Constitution's due process clause is not a factual inquiry but is an issue of law alone that can properly be address in a summary judgment motion. *See Junkins v. Branstad*, 448 N.W.2d 480, 482 (Iowa 1989) (holding that an issue of constitutional analysis presents a question of law for the courts that is appropriately resolved on summary judgment). Therefore, pursuant to *Morgan*, I would affirm the district court's summary dismissal of Effler's ineffective-assistance-of-trial-counsel claim because he cannot prove he was prejudiced by counsel's failure to argue for the suppression of his statements under the Iowa Constitution. As the district court stated, "The assertion of the Defendant's rights by trial counsel in the motion to suppress heard by the trial court would have been reviewed under the same standards had the Iowa constitutional rights been likewise asserted."

Next, Effler's claim that appellate counsel was ineffective for failing to argue his sentence amounted to cruel and unusual punishment also lacks a

material factual issue to justify a full evidentiary hearing.[8] The district court was correct in summarily dismissing the case. The district court found that even if it is assumed counsel's performance was deficient, Effler cannot prove he suffered prejudice because his crime was not a crime of lesser culpability that was severely punished under a broadly defined statute. *See Bruegger*, 773 N.W.2d at 884. Even if his appellate counsel had made such a claim, it would have been rejected. No amount of discovery or an evidentiary hearing would change this outcome. Iowa Code section 822.6 provides that the court may dismiss a postconviction relief application when it is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. Effler was permitted to respond to the State's summary judgment motion, and a hearing was held on that motion. Because Effler has failed to articulate what the material factual issue is at the district court level or on appeal, I would affirm the district court's dismissal of this claim.

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[8] This ineffective-assistance claim is only raised against appellate counsel as the Iowa Supreme Court decision recognizing an as-applied, cruel-and-unusual-punishment claim can be made on direct appeal postdated Effler's conviction. *See State v. Bruegger*, 773 N.W.2d at 862.