

IN THE COURT OF APPEALS OF IOWA

No. 2-625 / 11-1175
Filed August 8, 2012

JOSEPH HOLMES,
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 decision summarily dismissing his application for postconviction relief. **AFFIRMED.**

Brendon D. Moe of Glazebrook & Moe, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., Mullins, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SCHECHTMAN, S.J.***I. Background Facts and Proceedings.***

Joseph Holmes filed an application for postconviction relief alleging his attorney “never filed a motion to dismiss the charges based upon a violation of my speedy trial rights.”¹ Holmes had been found guilty of four counts of forgery and sentenced to concurrent terms of fifteen years, from which an appeal was previously taken.

The State responded by filing a motion to dismiss the application, arguing the “[i]neffective assistance of counsel claim was raised in the Court of Appeals and addressed by the court” and was accordingly barred by the doctrine of res judicata. A copy of the opinion was attached, *State v. Holmes*, No. 06-0708, 2007 WL 913849, at *3 (Iowa Ct. App. Mar. 28, 2007), which stated: “We conclude Holmes’s right to a speedy trial was not violated. He has not shown he received ineffective assistance of counsel due to counsels’ failure to file a motion to dismiss on speedy trial grounds. We affirm Holmes’s convictions.”

At the hearing on the motion to dismiss, no new grounds were urged, no resistance to it was addressed, no affidavits were filed alleging disputed material facts, nor was there any request to produce or develop evidence. The district court dismissed the application, concluding the “precise matter argued by the defendant has previously been ruled on by the Iowa Court of Appeals.” Holmes

¹ Iowa Rule of Criminal Procedure 2.33(2)(b) provides:

If a defendant indicted for a public offense has not waived the defendant’s right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown. This rule applies to charges initiated by a trial information. Iowa R. Crim. P. 2.5(5).

appeals, now contending the district court erred by failing to afford an evidentiary hearing on the motion to dismiss and to provide him with the opportunity to conduct discovery to collect sufficient evidence to substantiate his claim of ineffective counsel.

II. Analysis.

This postconviction action is a repeat, a sequel, with a similar cast—same scene, same plot, and accordingly, same ending.

This court's opinion in Holmes's original appeal addressed the speedy trial issue in great length with attention to specific dates of filings and occurrences. *See Holmes*, No. 06-0708, 2007 WL 913849, at *1-2. Essentially, we concluded Holmes's indication to the trial court that he planned to plead guilty, with the court setting a date for the plea in response thereto, effectively waived his right to a speedy trial; that Holmes's subsequent request for a trial date amounted to a withdrawal of his guilty plea and started anew the ninety day speedy trial period, in which period Holmes filed a formal waiver of speedy trial. *See id.* at *2 (citing *State v. Warmuth*, 532 N.W.2d 163, 166 (Iowa Ct. App. 1995)). Hence, there was no need or reason for counsel to file a motion to dismiss on the lack of speedy trial grounds.

The applicant cites *Manning v. State*, 654 N.W.2d 555, 558-62 (Iowa 2002), as authority for the court's need to have provided him with an evidentiary hearing to develop and expand his claim that this was a different issue than that presented and ruled on in the previous appeal. *Manning* does recognize an evidentiary hearing is ordinarily required when an ineffective counsel issue is

properly raised. 654 N.W.2d at 562. But unlike *Manning*, the issue in this case was not properly raised as it had already been adjudicated; there was no issue alive to be raised because this court had previously put the same issue to rest and determined it to have had no merit. See *Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986) (“Issues that have been raised, litigated, and adjudicated on direct appeal cannot be relitigated in a postconviction proceeding.”).

The dismissal herein was procured by the filing of a motion to dismiss by the State under the third unnumbered paragraph of Iowa Code section 822.6 (2007),² which is analogous to our summary judgment procedure in the civil arena. The language of section 822.6 is similar to that contained in Iowa Rule of Civil Procedure 1.981 requiring a genuine issue of material fact. There was no such issue. We accordingly affirm the judgment of the district court.

AFFIRMED.

² That provision states:

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.
Iowa Code § 822.6.