IN THE COURT OF APPEALS OF IOWA

No. 3-052 / 12-0177
Filed April 10, 2013

ROBERT S. FINZEL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Finzel appeals the district court's summary dismissal of his application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellant Defender, for appellant.

Robert S. Finzel, Clarinda, pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Ralph Potter, County Attorney, and Brigit M. Barnes, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Robert Finzel appeals the district court's summary dismissal of his application for postconviction relief. He contends his trial counsel's ineffective assistance resulted in his *Alford* plea being neither knowing nor voluntary. An *Alford* plea is a variation of a guilty plea whereby the defendant does not admit participation in the criminal acts, but consents to a finding of guilt and imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). We affirm.

I. Background Facts and Proceedings.

The minutes of testimony provide the following facts. In August 2009, Gabrielle Allen was sitting in her car in the mall parking lot with the window rolled down while she was waiting to go to work. Allen heard a male voice saying "give me your purse, keys, and phone." She looked to see who it was and saw a man standing next to her car holding a black-handled steak knife. He repeated his statement, she complied, and he ran away. Allen exited her car and ran after the man while yelling for help. Allen saw him enter a car with Iowa plate 239 WKW.

Amy Koeller observed a man carrying a purse running through the mall parking lot and entering a car with Iowa plate 239 WKW. Amy heard a woman yelling for her to call the police, so she placed the call.

Officer Steil heard a dispatch of an armed robbery at the mall and dispatch provided the license plate number 239 WKW. Another officer knew the address of the car owner's girlfriend, Torris Loucks. Officer Fairchild located the car in Loucks's apartment building parking lot. During a phone call, the car owner told the police Loucks had his car that day. Another person found Allen's purse on the street and turned it over to the police.

Officers obtained and executed a search warrant for the Loucks apartment. Finzel was located hiding behind a bathroom door. The officers found Allen's missing property in the Loucks apartment and also found a black-handled steak knife in a drying basket in the kitchen. Allen was brought to the area, and she identified her missing property and identified Finzel as the person who took her purse and property.

Robert Finzel also goes by the name Shane Cupps. During Loucks's interview with the police, she gave conflicting stories. She first told police she drove her friend Shane Cupps to the mall and when he returned to the car, he was not carrying anything and he did not throw anything out the window. She dropped Cupps off on a street corner and came home alone. After the police informed Loucks they had recovered Allen's purse, Loucks "then stated 'he did throw something out the window'" and it was a brown medium purse. Loucks stated Shane did not have a knife.

In September 2009, the State charged Finzel with first-degree robbery.[1] In October, Loucks was charged with aiding and abetting the robbery. In December 2009, Finzel and the State signed a memorandum of plea negotiations involving four criminal cases. The State agreed to reduce the robbery charge to second-degree robbery, and Finzel agreed to plead guilty.[2] Finzel also agreed to plead

[1] Robbery includes a person having the intent to commit a theft, and to assist the intended theft's commission or to assist escape from the scene, the person (a) "commits an assault upon another," (2) "threatens another with or purposely puts another in fear of immediate serious injury," or (3) "threatens to commit immediately any forcible felony." Iowa Code § 711.1 (2009). First-degree robbery is: "[W]hile perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon." *Id*. § 711.2.

[2] Robbery in the second degree is: "All robbery which is not robbery in the first degree is robbery in the second degree." Iowa Code § 711.3

guilty to an escape charge, and to stipulate to probation violations in two other cases. The parties agreed to jointly recommend sentences of an indeterminate ten years for second-degree robbery, thirty days in jail for escape, and revocation of both probations and imposition of the previously-suspended sentences, with those sentences served concurrently with the robbery sentence.

At the plea hearing, defense counsel Kaufman informed the court:

> [T]he robbery case will be an *Alford* plea. [Finzel] does not deny taking the purse from the alleged victim in this case. He denies having a knife. But we did do a deposition of the victim, and she testified under oath that it was a knife, You Honor. And also early communications to 911 indicate that there was a knife. And as a result of that, [Finzel] has decided to give an *Alford* plea to a robbery second as opposed to risking a robbery first degree.
>
> In addition . . . because the sentence is mandatory, he would prefer just to be sentenced today, to waive his time for sentencing and the motion in arrest of judgment and to have the presentence investigation followed and just move on, Your Honor.

The court accepted Finzel's pleas and stipulations to probation violations following a full colloquy. During the colloquy, Finzel stated he was satisfied with his trial attorney's services and stated the testimony in the minutes and depositions would establish his guilt if given at trial. Additionally:

> THE COURT: I need to have you tell me what you believe you have to gain or lose by going to trial. In other words, why is it in your best interest to enter into this plea?
>
> FINZEL: Because the ten-year charge is less than the twenty-five I could be getting.[3]
>
> . . . .
>
> THE COURT: And by pleading guilty, you are avoiding the risk of that longer sentence.
>
> FINZEL: Yes.
>
> THE COURT: And because of that, am I correct in understanding that a trial is not what you want in this matter?

[3] Iowa Code section 711.2 provides first-degree robbery is a class "B" felony. Iowa Code section 902.9 provides a "class 'B' felon shall be confined for no more than twenty-five years."

> FINZEL: Yes.
> THE COURT: And you've discussed it with your attorney and made the decision yourself?
> FINZEL: Yes.
> THE COURT: And you're doing this voluntarily in light of what you stand to lose by going to trial and the evidence against you at this point?
> FINZEL: Yes.

Pursuant to Finzel's request, the court proceeded to immediate sentencing and sentenced him in accordance with the plea agreement. He did not appeal.

In October 2010 Finzel filed a pro se application for postconviction relief of his robbery conviction, alleging five grounds for relief. Finzel asserted: (1) his conviction was in violation of the Constitution of the United States and the State of Iowa; (2) the court was without jurisdiction to impose the sentence; (3) his sentence exceeds the maximum authorized by statute; (4) there exists evidence of material facts not presented that would mandate a vacation of the conviction or sentence; and (5) the sentence is subject to collateral attack as it was in error under the current statutory scheme. Finzel's "specific explanation of grounds and allegation of facts"[4] claimed his trial counsel rendered ineffective assistance and coerced him into pleading guilty. Finzel requested he be allowed to withdraw his plea and proceed to a new trial with new counsel. Postconviction counsel was appointed and filed a motion to amend the postconviction petition, asserting:

[4] Finzel's specific allegations of fact stated that due to no knife being involved, defense counsel should have filed a motion in arrest of judgment, arguing the original charge should have been theft in the first, making Finzel's plea less than theft in the first; counsel should have filed a motion to suppress the seized knife; the knife seized in the kitchen has a blade less than five inches and therefore cannot be considered a dangerous weapon; defense counsel should have sought a second psychology evaluation; Loucks's plea to theft in the first shows "prejudice, and/or discrimination, and/or selective judgment against" Finzel; counsel failed to relay other plea offers to the State due to counsel's belief the offer would not be accepted; and counsel should have followed up on the deposition of the victim.

> A. [Finzel's] trial counsel did not depose a potentially favorable witness, Torris Loucks, who . . . would have testified that [he] did not have a knife in his possession. Relatedly, [Finzel's] trial counsel did not adequately discuss the risks and benefits of having Torris Loucks testify at . . . trial. This failure . . . induced [him] to enter an *Alford* plea.
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> B. [Finzel's] trial counsel did not pursue [his] claim that the knife seized by police was not used in the alleged robbery and evidence tending to support that claim, including (1) the alleged victim's testimony that she was never asked to identify any knife seized by police and (2) her description of the knife she saw as being about 4 inches long. This latter description was inconsistent with the definition of a "dangerous weapon" under Iowa Code § 702.7.[5] This failure . . . induced [him] to enter an *Alford* plea.

The postconviction court granted Finzel's motion to amend petition.

The State filed a motion for summary judgment and requested the court take judicial notice of Finzel's and Loucks's criminal files. According to the January 2010 additional minutes of testimony in Loucks's criminal case, while Loucks was in the Dubuque County Jail she discussed the mall robbery with two other inmates. Loucks told one inmate she drove Shane to the mall to steal something and when he ran back to the car, he had a brown bag and a silver knife in his hand. Loucks told another inmate she parked intentionally by Younkers and another person robbed a lady and there was no way the victim could have seen Loucks. Loucks also stated she saw Finzel throw a handbag out the window.

The State also filed defense counsel Kaufman's affidavit:

> 3. As part of my investigation . . . I interviewed a witness by the name of Torris Loucks. I interviewed her along with our public defender investigator Shane Flesher. The State of Iowa had not listed Loucks in its minutes of testimony, and had not yet charged

[5] "Dangerous weapon" specifically is defined to include, *along with numerous other definitions*, "knife having a blade exceeding five inches in length." Iowa Code § 702.7.

> her as a codefendant. I found Loucks to be noncredible. The details of her version of the facts were inconsistent. I informed Robert Finzel that I and Mr. Flesher had found her to be noncredible.
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> 4. On October 7, 2009, I deposed State's witness Gabrielle Allen. Mr. Finzel was present during the deposition. Ms. Allen testified in the deposition that Finzel, while demanding her purse, and cell phone, showed her a serrated steak knife with a four-inch blade. She further testified that he scratched her on the shoulder to get her attention as she sat in her vehicle. She further testified that she had concerns about her safety and that she did what he asked her to do so that she would be unharmed. She further testified that at the time she was worried that he "might stab me or something or cut me." She further testified that the knife was pointed at her "the whole time."
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> 5. I also deposed police officers which [the] State listed in its minutes of testimony. In their depositions the officers testified that during the course of their investigation, they located Finzel in Torris Loucks's apartment. They also located in the same apartment, the items which Allen claimed Finzel took from her.
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> 6. After a thorough review of the facts of the criminal case with Finzel, Finzel decided to resolve the criminal case by entering into a plea agreement which allowed him to submit an *Alford* plea to an amended charge of Robbery in the Second Degree.

PCR counsel resisted summary judgment arguing there are factual disputes regarding whether a "dangerous weapon" was used and whether trial counsel acted effectively as to potential witness Loucks.

A hearing on summary judgment was held in November 2011. The issues argued at the hearing were limited to the two issues in the amended application for postconviction relief. In January 2012 the postconviction court granted the State's motion and dismissed Finzel's application. This appeal followed.

II. Scope and Standards of Review.

Generally, we review postconviction proceedings, including summary dismissals of applications for postconviction relief, for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, applications raising an

ineffective-assistance-of-counsel claim present a constitutional challenge, so we review de novo. *Id*. In determining whether the summary dismissal is warranted, the moving party has 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. Merits.

To establish a claim that counsel in a criminal proceeding rendered ineffective assistance, the applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).

Generally, a defendant's plea waives all defenses and objections which are not intrinsic to the plea. *Id*. In a claim regarding a failure by defense counsel to investigate or file a motion to suppress, a court should "determine whether counsel in the particular case breached a duty in advance of a guilty plea, and whether any such breach rendered the defendant's plea unintelligent or involuntary." *Id*. at 644. In this context, Finzel must show a reasonable probability that, "but for counsel's breach of duty, he would not have pled guilty and would have elected instead to stand trial." *See id*.

> The law contemplates that [defendant] have an uncoerced election to plead not guilty or guilty, after he has had the benefit and advice of competent counsel. The fact that an accused may elect to plead guilty to a lesser offense when he is also charged with a more serious offense does not make his plea coerced.

State v. Speed, 573 N.W.2d 594, 597 (Iowa 1998) (citation omitted).

"Our rules of summary judgment do not permit the nonmovant [Finzel] to rest on conclusory allegations in the pleadings in the face of a properly supported

motion for summary judgment." *See Castro v. State*, 795 N.W.2d 789, 795 (Iowa 2011). Additionally:

> A plea colloquy that covers the specific ground subsequently raised in a postconviction relief application would normally support summary judgment on those grounds. *See Wise v. State*, 708 N.W.2d 66, 71 (Iowa 2006) (indicating that statements made to court in plea colloquy establish a presumption of the true facts on the record).

Id. Where the record directly contradicts the claim a guilty plea was unintelligent and involuntary, "the applicant bears a special burden to establish the record is inaccurate." *Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995).

In dismissing Finzel's application, the district court ruled:

> During the plea colloquy, [Finzel] agreed that the witnesses identified in the minutes of testimony would come in to court, during trial, and testify consistent with the minutes . . . . Those minutes would have included statements from the victim that she was placed in fear as a result of [Finzel's] conduct in accosting her at her motor vehicle and demanding her purse. It matters not whether the threat to her person was made by the display of a dangerous weapon for purposes of the lesser-included offense [second-degree robbery]. Furthermore, [Finzel] was asked if he was satisfied with the assistance of his attorney during the pre-trial phases, and his answer was in the affirmative. He now cannot raise the issue of counsel not following his wishes or not consulting with him during trial preparation. Furthermore, he was present at all of the depositions taken in these proceedings and was fully aware of the testimony that would have been placed before the jury had the matter proceeded to trail. The Court finds that counsel exercised all due diligence in the preparation of pre-trial matters in depositions and vetting out the testimony of the victim. Furthermore, [Finzel,] in entering an *Alford* plea, did not admit to each and every fact as recited in the minutes . . . but indicated there would be substantial likelihood that if the information contained within the minutes was presented to a jury, the likelihood would have been a finding of guilt. By pleading to the lesser-included offense . . . it served [Finzel's] best interests in not facing the more onerous prison term of [twenty-five] years . . . . No prejudice can be found as a result of the entry of the *Alford* plea.
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> [T]he State is correct that [Loucks] was not a "witness" but was instead a co-defendant. Her case had not been reduced to a

> disposition and sentence, and therefore, she would have had a right to exert her Fifth Amendment privilege against self-incrimination. There is no manner by which defense counsel could have forced her to testify in derogation of her Constitutional rights.

Upon our de novo review, we find no error. The case on which Finzel relies to avoid summary judgment, *Manning v. State*, 654 N.W.2d 555 (Iowa 2002), is inapposite. In *Manning*, the "State presented nothing more than pure allegations." 654 N.W.2d at 561–62. Here, the State did not rely on "pure allegations," but rather presented defense counsel's affidavit as well as noticing the minutes in both the Finzel and Loucks criminal files. The Loucks supplemental minutes detail her conversations in jail and in one conversation Loucks stated Finzel had a "silver knife in his hand" during the mall robbery. Also, the defense counsel affidavit establishes counsel interviewed and deposed numerous witnesses before advising Finzel regarding plea negotiations. Finzel provided no affidavit or evidentiary support for his bare assertions, and he failed to carry his "special burden to establish the record is inaccurate." *See Arnold*, 540 N.W.2d at 246. It is impossible to conclude defense counsel acted outside the range of normal competency prior to the plea hearing. The district court did not err in granting summary judgment and in dismissing the pro se application and the amended application.[6]

AFFIRMED.

[6] The district court addressed all the issues Finzel raised, but resolved all but the two in his amended petition in summary fashion. We conclude the court substantially complied with the requirement the district court make specific findings of fact and conclusions of law as to each issue. *See Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006) ("Even if the court does not respond to all of the applicant's *allegations*, the ruling is sufficient if it responds to all the *issues* raised."). The court specifically ruled: "The Court finds that counsel exercised all due diligence in the preparation of pre-trial matters in depositions and vetting out the testimony of the victim."