IN THE COURT OF APPEALS OF IOWA

No. 7-901 / 07-0212
Filed December 28, 2007

KEITH ROBERT BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Keith Robert Brown appeals the district court decision denying his motion for attorney fees related to his postconviction relief application. **AFFIRMED.**

Michael E. Motto of Bush, Motto, Creen, Koury & Halligan, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Michael J. Walton, County Attorney, for appellee State.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Keith Robert Brown appeals the district court decision denying his motion for attorney fees related to his postconviction relief application. We affirm.

I. Background Facts and Prior Proceedings

In 1999 Brown was convicted of second-degree murder, first-degree kidnapping, willful injury, and conspiracy to commit willful injury for his role in the death of Virgil Engelkens. This conviction was affirmed on appeal.

In 2001 Brown, with help from his parents, paid a private attorney $25,000 to handle his postconviction relief action. The district court denied his petition for postconviction relief, but our court reversed the district court and remanded for a new trial. In so ruling, we chose not to address Brown's claims of prosecutorial misconduct, but found his trial counsel was ineffective for failing to object to inadmissible evidence and for failing to request a specific jury instruction. After a second jury trial in June 2005, Brown was once again convicted of the counts listed above.

Brown filed a pro se "Motion to Recover Attorney Fees & Costs" pertaining to the $25,000 he had paid to his postconviction relief counsel. In this motion, Brown claimed he was entitled to recover all of his attorney fees and costs, plus interest, "pursuant to Iowa Code §§ 625.1, 625.5 and 625.21 (2005), but not limited thereto, ..."

In a brief ruling denying Brown's motion, the court stated:

> The Court notes that the applicant was successful on his appeal herein and costs were assessed against the respondent pursuant to a bill of costs filed December 27, 2004. Attorney fees are not costs as defined in Sections 625.1 and 625.5, Iowa Code (2005). The applicant has provided the Court no authority for his claim for

> recovery of attorney fees. The Court concludes that the motion should be denied.

This ruling is the subject of the present appeal.

II. Standard of Review

We review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Analysis

On appeal, Brown abandons his claim for attorney fees under Iowa Code chapter 625. He admits "there is no statutory or contractual authority specifically authorizing attorney fees in the current case" and that chapter 625 "is not applicable" to his claims made on appeal.[1] Instead, he raises two new arguments, both of which rely on allegations of prosecutorial misconduct in the first criminal trial. The first argument is that the court should have used its equitable powers to grant his requested relief pursuant to a "rare" common law exception set forth in *Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co. of Des Moines*, *Inc.*, 510 N.W.2d 153, 158 (Iowa 1993).[2] The second argument is that the court should have granted his request as "a matter of public policy" for his successful pursuit of the postconviction application.

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[1] We therefore affirm on this issue. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.").

[2] *Hockenberg* states, in pertinent part,

> A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. Courts have recognized a rare exception to this general rule, however, "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

510 N.W.2d at 158 (quoting *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141, 154 (1975)).

Our error preservation rules require that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998); *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). We will not consider an error raised for the first time on appeal, even if it is of a constitutional dimension. *Patchette v. State*, 374 N.W.2d 397, 401 (Iowa 1985).

Brown's motion before the district court did not contain either of these two arguments and set forth no common law basis for relief. We reject Brown's argument that he preserved error on these claims when he set forth the code sections for his statutory claim and then included the phrase "but not limited thereto." A party may not preserve every conceivable issue for appellate review simply by indicating its desire to do so. Such an exception would swallow the rules of error preservation. Accordingly, we will not address these claims for the first time on appeal. *See Metz*, 581 N.W.2d at 600.

We affirm the ruling of the district court.

AFFIRMED.