IN THE COURT OF APPEALS OF IOWA

No. 8-828 / 08-0027
Filed October 29, 2008

DAMION ARMOND RUTUES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hansen, Judge.

Postconviction relief petitioner appeals the district court's grant of the State's motion for summary judgment. **AFFIRMED**.

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

In December 2004, Damion Rutues was charged with eleven counts of sexually abusing children. In September 2005, pursuant to a plea agreement, Rutues entered an *Alford* plea to three counts of lascivious acts with a child. *See North Carolina v. Alford*, 400 U.S. 25, 32-38, 91 S. Ct. 160, 164-68, 27 L. Ed. 2d 162, 168-72 (1970) (holding sentencing allowed where accused is unwilling to admit guilt but is willing to waive trial and accept sentence). In October 2005, Rutues filed a motion in arrest of judgment and a motion to withdraw guilty plea. At the subsequent hearing, Rutues's mother testified that she had been told by another person that a third person had coerced the victim children's testimony against Rutues. The court denied the motions and sentenced Rutues to three, consecutive five-year terms of imprisonment. In August 2006, Rutues's direct appeal was dismissed as frivolous. Rutues sought postconviction relief and, in December 2007, the district court granted the State's motion for summary disposition of Rutues's application. We affirm.

I. Ineffective Assistance of Counsel Regarding Motions.

Rutues argues trial counsel was ineffective by failing to adequately investigate, appropriately file, and present evidence supporting his motion in arrest of judgment and motion to withdraw guilty plea. We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). To establish ineffective assistance of counsel, a claimant must demonstrate by a preponderance of the evidence "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *State v.*

Straw, 709 N.W.2d 128, 133 (Iowa 2006). We may affirm the district court's rejection of an ineffective assistance-of-counsel claim if either element is lacking. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Summary disposition of a postconviction relief application is analogous to the summary judgment procedure contained in the Iowa Rules of Civil Procedure. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). "Whether a genuine issue of material fact exists, so as to preclude summary disposition, turns on whether reasonable minds could draw different inferences and reach different conclusions from them." *Boge v. State*, 309 N.W.2d 428, 430 (Iowa 1981).

In support of his post-plea motions, Rutues presented testimony about new evidence that allegedly changed his view about the strength of the State's case. At the postconviction stage and here, Rutues argues counsel failed to perform an essential duty when he failed to provide the court with authority from other jurisdictions discussing the withdrawal of an *Alford* plea.

In Iowa, a plea of guilty is a waiver of all defenses or objections that are not intrinsic to the plea itself. *State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998). A defendant's claim that newly-discovered evidence allows a plea to be withdrawn "fails to distinguish between a defendant's tactical rationale for pleading guilty and a defendant's understanding of what a plea means and his or her choice to voluntarily enter the plea." *Id*. Factors affecting the defendant's assessment of the evidence against him, but not affecting the knowing and voluntary nature of the plea, are not intrinsic to the plea. *Id*. Here, Rutues argues the newly-discovered evidence affects his analysis of the State's

evidence and led him to try to withdraw his plea. Consequently, Rutues's claim falls squarely under the category of matters not intrinsic to the plea itself and is appropriate for summary disposition.

We have reviewed the cases Rutues alleges should have been argued by his trial counsel and do not find a breach of an essential duty. First, the cases are from other jurisdictions and, therefore, are not controlling. Second, the cases use a "manifest injustice" test as the standard for plea withdrawal due to new evidence and none of the cases discuss Iowa's tests of "intrinsic to the plea" and "knowing and voluntary." Third, we agree with the postconviction trial court: "No authority has been presented in support of the proposition that the requirements for a conventional guilty plea and an *Alford* plea differ in terms of the voluntariness requirement." Fourth, the Iowa Supreme Court has instructed: "An *Alford* plea is a variation of a guilty plea. In effect, the pleas are the same as the defendant is agreeing to the imposition of a criminal sentence for the crime charged." *State v. Burgess*, 639 N.W.2d 564, 567 (Iowa 2001). Though an *Alford* defendant does not admit guilt, he "may voluntarily, knowingly, and understandingly consent to the imposition of a sentence." *Id*. n.1.

We also note all pleas, including *Alford* pleas, must be supported by a factual basis. *See State v. Schminkey,* 597 N.W.2d 785, 788 (Iowa 1999). Therefore, an *Alford* plea is conditioned on the court's ability to find factual support for every element of the offense in the record from sources other than the defendant. *See id*.

We conclude counsel did not breach an essential duty by failing to present cases from other jurisdictions which fail to discuss the key Iowa considerations concerning plea withdrawal. Accordingly, the district court's summary disposition is affirmed.

Since no duty was breached, we need not consider Rutues's claim of prejudice. *See Greene*, 592 N.W.2d at 29.

II. New Evidence and Iowa Code Section 822.2(1)(d).

Rutues argues he is entitled to postconviction relief and vacation of his plea under Iowa Code section 822.2(1)(d) (2007) (allowing relief where "there exists evidence of material facts, not previously presented and heard"). We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.4. *See Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). The summary disposition standard is the same as detailed above.

We cannot improve upon the district court's language summarily dismissing Rutues's claim.

> First, case law interpreting section 822.2(1)(d) has done so only in the context of a defendant who has previously gone to trial and is seeking a new trial on the basis of newly-discovered evidence. *See Jones v. Scurr*, 316 N.W.2d 905 (Iowa 1982). No case law interprets section 822.2(1)(d) to allow a defendant making any sort of a plea to vacate the plea based on newly-discovered evidence. An interpretation of section 822.2(1)(d) which allows the grant of a new trial, but not the withdrawal of a guilty plea, squares clearly with the Iowa Supreme Court's position in *Speed* that a plea cannot be challenged based on newly-discovered evidence. *See State v. Speed*, 573 N.W.2d 594 (Iowa 1998). Lastly, the presiding judge considered the evidence presented by [Rutues], and concluded

that, even if the evidence presented was pursued to its logical conclusion, the evidence would not entitle [Rutues] to vacate his plea.

AFFIRMED.