IN THE COURT OF APPEALS OF IOWA

No. 9-177 / 07-1110
Filed May 6, 2009

STEPHEN C. LEONARD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cherokee County, David A. Lester, Judge.

A defendant appeals the district court's denial of his application for postconviction relief, claiming multiple errors. **AFFIRMED.**

Stephen Leonard, Anamosa, pro se.

Jack Bjornstad of Bjornstad Law Office, Spirit Lake, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett and Mary Tabor, Assistant Attorneys General, Ryan Kolpin, County Attorney, and Douglas L. Phillips, Special Prosecutor for Cherokee County, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Stephen Leonard appeals the district court's denial of his postconviction relief application. He raises several challenges to a guilty plea entered fourteen years ago.

I. Background Facts and Proceedings

In 1995, police applied for a warrant to search Stephen Leonard's residence. Included in the application was a police officer's statement that a confidential informant told him she saw "methamphetamines" at the residence. The record also contains a handwritten statement from the confidential informant making no mention of methamphetamine.

Following the search, which uncovered methamphetamine and marijuana, the State filed an information accusing Leonard of several crimes, including possession of methamphetamine with intent to deliver and possession of less than one ounce of marijuana with intent to deliver, a serious misdemeanor. Supplemental minutes of testimony, filed on the same day as the information, disclosed that a confidential informant told a police officer "there was approximately one gram of crank at Mr. Leonard's residence one week ago."

Less than a week after the information was filed, Leonard signed a "memorandum of plea agreement" agreeing to plead guilty to possession of methamphetamine with intent to deliver and to an amended charge of possession of more than one ounce of marijuana with intent to deliver, a class D felony.

In the intervening weeks, the State and defense counsel had discussions about the confidential informant's identity and her written statement. The written statement was released to defense counsel and given to Leonard, who tore it up.

At a plea taking and bond reduction hearing, Leonard acknowledged a factual basis for the methamphetamine charge, stating, "I possessed in my home methamphetamines." He also acknowledged he possessed them with the intent to deliver. With respect to the marijuana count, the prosecutor sought and obtained approval to amend the original count to possession of more than one ounce of the substance. The district court asked Leonard whether he objected to the amendment. Leonard stated, "No, sir." When the prosecutor reiterated the assertion that the amount of marijuana was more than an ounce and specified how the State calculated the weight, Leonard voiced no objection.

The district court entered judgment and sentence. Several months later, Leonard filed an application for postconviction relief. He contended his attorneys were ineffective in failing to obtain and provide him with a copy of the confidential informant's written statement, causing him to enter a plea without knowledge of the material facts. He also maintained that the State withheld this exculpatory information and the warrant was issued on the basis of faulty information. The district court denied the application, stating that the search warrant documents were only partially based on the confidential informant's written statement and were also based on the oral statements she made to the officer. The court concluded that "the search warrant was properly issued" and "[t]he written plea of guilty was negotiated with Mr. Leonard specifically deciding what he would plead

guilty to." Leonard voluntarily dismissed his appeal from the denial of that application.

The following year, Leonard, acting pro se, deposed the person previously identified as the confidential informant. She initially stated that she did not recall making any oral statements to the police officer about methamphetamine in Leonard's residence. She later denied telling the officers about the methamphetamine in his home.

Based on this deposition, Leonard filed a second application for postconviction relief, alleging that the confidential informant "stated that she never seen [sic] the informant's attachment or gave any of the alleged information attributed to her in this attachment." His second application was filed in 1997 and languished for approximately nine years. In 2006, Leonard's attorney moved to withdraw, citing a conflict of interest. The motion was granted.

The district court scheduled an evidentiary hearing at which Leonard represented himself. The confidential informant testified at the hearing, specifically acknowledging that there may have been things she talked about with police that did not find their way into her handwritten statement. The court denied the second application for postconviction relief on the ground that all the issues raised had previously been litigated. This appeal followed.

II. Analysis

Leonard's appellate attorney raises three grounds for reversal: (1) the search warrant preceding the filing of charges was predicated on false information, rendering his plea unknowing, involuntary, and unintelligent, and trial and postconviction counsel were ineffective in failing to challenge his guilty plea

on that basis, (2) his guilty plea to possession of more than one ounce of marijuana with intent to deliver lacked a factual basis and trial and postconviction counsel were ineffective in failing to raise this issue, and (3) the district court erred in concluding that his grounds for relief were raised and rejected in prior rulings. In a pro se filing, Leonard raises the following additional issues: (4) trial and postconviction counsel were ineffective in failing to challenge defects in the trial information and the court's subject matter jurisdiction, (5) the district court abused its discretion in failing to reappoint counsel or engage him in a colloquy on his waiver of counsel, and (6) it is in the interest of justice to vacate his sentence.

As a preliminary matter, the State argues that Leonard did not preserve error on his ineffective-assistance-of-counsel claims (Claims 1, 2, and 4 above) because he did not raise them on direct appeal from his conviction. The State acknowledges that the law has changed on this point but maintains that "[o]nly claims of ineffective assistance of trial counsel which are brought after July 1, 2004, are excused from this requirement." *See* Iowa Code § 814.7 (2009) (stating ineffective-assistance-of-counsel claims need not be raised on direct appeal to preserve them for postconviction relief proceedings). The Iowa Supreme Court rejected this argument in *Hannan v. State*, 732 N.W.2d 45, 51 (Iowa 2007), holding that the statutory provision dispensing with this requirement applied retroactively. Therefore, we conclude error was preserved.

The State next contends that Leonard waived error on two of his ineffective-assistance-of-counsel claims (Claims 1 and 4) by pleading guilty. *See Speed v. State*, 616 N.W.2d 158, 159 (Iowa 2000) ("It is well established the

entry of a guilty plea . . . waives all defenses and objections which are not intrinsic to the plea itself."). Both claims are based on Leonard's contention that the information supporting the search warrant was false. If this were the sole basis of the claims, we would agree that they were waived. However, Leonard also claims the State deliberately concealed the fact that the informant denied telling police officers about the methamphetamine, the concealment prevented his attorneys from knowledgeably advising him about his guilty plea, and his plea was therefore entered unknowingly. Giving Leonard the benefit of the doubt, we conclude he alleged sufficient facts to preclude a finding that he waived error by pleading guilty. *See State v. LaRue*, 619 N.W.2d 395, 397 (Iowa 2000) (stating claim of ineffective assistance that calls into question voluntariness of guilty plea may be raised after plea); *Zacek v. Brewer*, 241 N.W.2d 41, 46 (Iowa 1976) (noting we "resolve any doubt in favor of the applicant and treat the allegation as one asserting a new legal basis for granting relief" (quoting *Rinehart v. State*, 234 N.W.2d 649, 655 (Iowa 1975)).

We will proceed to the merits of each claim.

Claim 1. The district court concluded that a claim concerning the search warrant was raised and litigated previously. The district court is correct, as the court in its first postconviction ruling addressed the validity of the search warrant and the claim that it was based on false information. At that time, however, the court did not have the benefit of the confidential informant's deposition testimony which, according to Leonard, establishes that the police officer concealed pertinent information. Leonard's slightly nuanced claim based on this new

information was not litigated in the first postconviction relief action. Accordingly, we decline to rest our resolution of this claim on issue preclusion grounds. We proceed to the merits of this claim.

It is clear from the record that Leonard did not allow his attorneys to conduct discovery and attack the search warrant as they wished but instead specified the terms of a plea agreement, stated he wished to plead guilty, and stated he was sick of his lawyers. Because it was Leonard who foreclosed further discovery, he cannot now complain that discovery would have disclosed police concealment or falsification of information. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) ("In assessing claims of ineffective assistance of counsel, a defendant's conduct is examined as well as that of his attorney.").

Additionally, if Leonard's attorneys had made an effort to question the confidential informant before the guilty plea hearing, they likely would not have discovered "deliberate suppression of material evidence rendering the plea involuntary." *Zacek*, 241 N.W.2d at 46. As noted, the informant stated she did not recall telling the police officer about methamphetamine. Although she later gave a less equivocal statement, she conceded at the postconviction relief hearing that she might have told the officer things that were not included in her handwritten statement. This concession means that there is no reasonable probability Leonard's attorneys could have established police falsification or concealment of information relating to the search warrant application. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698, (1984).

Finally, the informant's testimony eliminates any argument that Leonard's "plea was not knowingly, voluntarily and intelligently entered because the State deprived him of the opportunity to make an intelligent choice among alternative courses of action open to him." *Zacek, 241 N.W.2d* at 47. Even if his attorneys had the benefit of her testimony before Leonard pled guilty, that testimony would not have shown that the officer falsified the search warrant application. Therefore, the absence of that testimony did not deprive Leonard of an intelligent choice among alternatives and did not implicate the knowingness of the plea.

For these reasons, we conclude police actions did not deprive trial and postconviction relief counsel "of the opportunity to effectively assist" Leonard. *Id.* at 53–54. We affirm the district court's rejection of Claim 1.

Claim 2. Leonard next claims his guilty plea to the marijuana count lacked a factual basis and counsel was ineffective in failing to challenge it. He specifically argues that there was no factual basis to establish that he possessed more than one ounce of marijuana.

The district court again disposed of this claim on issue preclusion grounds. On our review of prior rulings, we are not convinced the court previously addressed this issue. Therefore, we will proceed to the merits.

"Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty." *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Prejudice is inherent. *Id.* In determining whether a factual basis existed for the guilty plea, the reviewing court considers the entire record before the district court at the guilty plea hearing, "including any statements made by the defendant, facts

related by the prosecutor, the minutes of testimony, and the presentence report." *Id.*

A lab report stated 23.7 grams of marijuana were seized from Leonard's residence. Additionally, two marijuana cigarettes were recovered. At the plea hearing, the prosecutor stated the following:

> For the record, the lab report indicates methamphetamine of 1.28 grams, packaged for sale, and book marijuana in the amount of 23.7 grams, plus marijuana cigarettes, which, according to the defendant, would put them at a total combined weight of more than an ounce.

Neither Leonard nor his attorney objected to this assertion. As the record contains a factual basis, we conclude counsel was not ineffective in failing to challenge this aspect of the plea.

Claim 3. This claim, that the district court erred in finding issue preclusion, has been addressed under the analysis of Claims 1 and 2.

Claim 4. Leonard contends counsel was ineffective in failing to challenge the trial information. This argument is essentially a repackaged version of Claim 1. For the reasons stated in our analysis of that claim, we conclude counsel was not ineffective in failing to file a motion to dismiss the trial information.

Claim 5. As noted, the district court granted counsel's motion to withdraw. The order contained the following additional statement: "The court inquired of Mr. Leonard whether he wished to proceed pro se in this matter or have other counsel appointed, and he requested to be allowed to proceed pro se. The court finds that Mr. Leonard should be permitted to proceed pro se herein."

Leonard argues that the district court abused its discretion in failing to re-appoint postconviction counsel or engage him in a colloquy of his waiver of counsel in this case.

An indigent's right to counsel in a postconviction proceeding is statutory in nature, and is not based upon federal or state constitutional grounds. *Wise v. State*, 708 N.W.2d 66, 69 (Iowa 2006). An attorney need not always be appointed to represent an indigent postconviction applicant, and such a determination rests within the sound discretion of the district court. *Id.*

The record clearly establishes that Leonard wished to represent himself. Additionally, the district court could have easily discerned that Leonard was fully capable of self-representation. For example, his filing seeking dismissal of counsel contained a list of witnesses he wished to have subpoenaed, and deposition transcripts revealed his competence in questioning witnesses. As the prosecutor stated, Leonard "has more hours in the courtroom than I do." Finally, Leonard's second postconviction relief application raised issues that only marginally differed from the issues raised in his unsuccessful first application for postconviction relief, a factor that is relevant in deciding whether new counsel should be appointed. *See Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974) ("[W]hen an applicant has sought relief unsuccessfully in prior applications, where represented by counsel, the court may consider the previous record as reflecting on the need for counsel on a newly filed application.") (quoting ABA Standards, *Post-Conviction Remedies* § 4.4, at 66 (1968)). We conclude trial counsel did not abuse its discretion in declining to appoint Leonard new

postconviction counsel or engage in a colloquy with him concerning his stated intent to represent himself.

Claim 6. Leonard finally asserts he is entitled to have his sentence vacated in the interest of justice. We find no basis for doing so.

AFFIRMED.