IN THE COURT OF APPEALS OF IOWA

No. 9-477 / 08-1104
Filed October 7, 2009

HAROLD LEROY PAGE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

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

Susan Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Almost two decades ago, Harold Page was found guilty of first-degree murder and first-degree robbery in connection with a shooting. This court affirmed the judgment and sentences. *See State v. Page*, No. 88-611 (Iowa Ct. App. Jan. 25, 1988). Page subsequently filed: a state postconviction relief application which was dismissed by the district court, appealed, and dismissed by the Iowa Supreme Court; two federal applications for writs of habeas corpus which were dismissed or denied; and a second state application for postconviction relief. Page now appeals from the district court's denial of his second application. His appellate attorney raises one claim and Page raises several others in a separate pro se brief.

I. Request for Counsel

Page's appellate attorney raises a single issue: whether "[t]he Postconviction Court erred when it appointed a standby attorney for Mr. Page and ignored or denied his repeated requests for full representation by an attorney." Our review of this issue is for an abuse of discretion. *See Furgison v. State*, 217 N.W.2d 613, 615 (Iowa 1974).

As a preliminary matter, Page argues that the district court did not exercise its discretion because it failed to "hold a hearing on [Page's] request [for counsel] or to enter findings of fact in respect to the request." *See Fuhrmann v. State*, 433 N.W.2d 720, 722 (Iowa 1998) (noting that the absence of a written ruling may indicate a failure to exercise discretion). We disagree.

After Page filed his second postconviction relief application, the district court appointed an attorney to represent him. That attorney deemed the petition

frivolous and moved to withdraw. The court granted the motion. Page requested the appointment of another attorney. The district court did not specifically rule on his request but granted Page forty-five days to file any factual or legal support for his postconviction relief petition. The court stated, "If the Plaintiff fails to provide such support, or if the court does not find this support sufficient, this postconviction relief case will be dismissed." Page responded with a request for his file and a renewed request for appointment of counsel. The district court appointed an attorney "solely for the purpose of reviewing Mr. Page's motions and assisting Mr. Page in obtaining the documents he is allowed pursuant to [the postconviction statute]." The court stated it would "delay the dismissal of this matter until Mr. Page has received these materials and been allowed time to respond." Several months later, Page's attorney reported to the court that she had located and provided Page with copies of certain requested documents. She also identified several documents she was unable to retrieve. Based on this record, we conclude the district court exercised its discretion to grant Page limited rather than full representation.

We turn to the question of whether the district court abused its discretion in failing to provide Page with "full" representation. On this question, it is established that a court is not required to appoint counsel for an indigent postconviction applicant, particularly where there is no cognizable claim raised by the applicant. *Wise v. State*, 708 N.W.2d 66, 69 (Iowa 2006). The rule generally is:

> [T]rial judges should inceptionally read the often inartfully drawn application in a light most favorable to the applicant. In the

> event it thus appears a substantial issue of law or fact *may* exist, then counsel should be at once appointed.

Id. at 70 (quoting *Furgison*, 217 N.W.2d at 615–16).

Page contends he acquired newly discovered evidence that, if developed by an attorney, would have created a substantial issue of law or fact. We begin by noting that only one newly discovered evidence claim was raised and decided by the second postconviction court. It was as follows:

> On or about May 13, 2005, the Polk County Clerk of Court wrote Applicant a letter exposing that the clerk possessed and/or has found four video-taped interviews of witnesses to the crime yet these were never produced at Applicant's jury trial.

With respect to this claim, the second postconviction court concluded,

> [E]ven assuming [Page] was denied access to information contained within the witness tapes, he has failed to show that he was prejudiced by failure to have the tapes or that he could not have raised this issue in his initial post-conviction application.

This is the same conclusion reached by the first postconviction court in response to Page's virtually identical assertion in his first application for postconviction relief. Specifically, that court ruled as follows:

> Petitioner also complains about four video tapes. Apparently these tapes contain eye-witnesses' descriptions to police officers. At best these statements are cumulative because these eye witnesses were cross-examined by the defendant about the descriptions they gave to the police officers. Petitioner has offered no evidence to show how that circumstance has prejudiced him.

In short, Page's newly discovered evidence claim based on the missing videotapes was raised and decided in the first postconviction relief action. Therefore, as a matter of law, it could not constitute "a substantial issue of law or fact" which would have warranted "full" representation at the second postconviction relief hearing. *See id.* For this reason, we conclude the district

court did not abuse its discretion in limiting counsel's representation of Page in connection with his second postconviction relief application.

II. Remaining Pro Se Issues

Page raises the following issues in his pro se brief: (A) "the district court erred in dismissing Page's application of its own initiative and in failing to grant relief based on triple due process violations and by its failure to vacate his conviction and order a new trial on the basis of newly discovered evidence" and (B) "ineffective assistance of counsel during first appeal as a right deprived Page of Sixth and Fourteenth Amendment rights to the United States Constitution and a fair appeal."

A. Due Process/Newly Discovered Evidence

(1) Due Process

Page's due process claims are based on the testimony of a key prosecution witness, Raymel Rogers, and another potential witness, Michael Brown, with whom the State reached a plea agreement.

Page first contends that the prosecution presented the testimony of Rogers, knowing it to be false. He points to the State's prosecution of Rogers for his involvement in the shooting and the fact that the prosecutor called Rogers a liar in that trial.

A defendant is denied due process if the State knew or should have known that its case against the defendant consisted of perjured testimony. *Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991). Page's evidence in support of this claim is speculative at best. There is no question that the prosecutor attempted to impugn Rogers's credibility in his trial by citing Rogers's prior

inconsistent statements. However, those statements fall short of demonstrating that the prosecutor knowingly presented false testimony at Page's trial. At worst, the prosecutor presented Rogers's testimony in Page's trial knowing that it was inconsistent with his prior testimony, but the defense in Page's trial was free to highlight those inconsistencies, just as the prosecutor did at Rogers's trial. Notably, the district court's ruling on Page's first postconviction relief application states that "Petitioner Harold Page in his criminal trial had the transcript of the Rogers trial that had previously been conducted. It was available to impeach Rogers . . . ." For this reason, we conclude that this due process claim must fail.

Page next claims the state reached a plea agreement with Michael Brown, based upon the State's determination that Brown was not involved in the robbery/murder for which Page was convicted. Page contends that agreement could have been used to impeach the trial testimony of Rogers, who identified Page as the shooter and placed Brown at the scene. He asserts this "newly discovered evidence" was suppressed by the prosecution.

Page was required to show that the evidence was indeed suppressed. *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). He could not do so, as Brown was listed as a trial witness and could have been called by the defense at the original trial and questioned about the plea agreement. For this reason, we reject this due process claim.

Finally, Page asserts that the State employed "inherently contradictory theories." He again bases this assertion on the differing approaches taken by the prosecution in Rogers's trial and Page's trial. As noted, the prosecution tried Rogers for a crime arising from the same incident that was the basis of Page's

trial. Rogers was acquitted and the prosecution then used Rogers as a key witness against Page. Although the prosecutor expressed skepticism at Rogers's testimony in his own trial, Page did not prove that he was convicted "based on that which [the State] had not only deemed a lie, *but*, in fact, knew it to be a falsehood." For this reason, we reject Page's "inconsistent theory" due process claim.

(2) Newly Discovered Evidence/New Trial

Page points to fifteen depositions that he contends were taken before trial by his standby counsel, outside Page's presence. He asserts that these depositions were newly discovered evidence entitling him to a new trial.

On their face, the depositions were not newly discovered, as Page's own attorney, albeit a standby attorney, was present for them. *See Stevens v. People's Sav. Bank*, 185 Iowa 619, 624, 171 N.W. 130, 132 (1919) ("The relations of a litigant to his attorneys in the litigation are so close and active and the responsibility of an attorney to his client in such a case is so definite and quasi official in its nature that a notice to the attorney should be deemed as the practical equivalent of actual notice to the client."). Accordingly, we reject this newly discovered evidence claim.

Page also cites a list of "other withheld materials." Issues relating to these materials were raised and litigated in prior proceedings. Therefore, they cannot be relitigated in this proceeding. *See* Iowa Code § 822.8 (2005).

Finally, Page asks to have the first postconviction relief ruling vacated. It is axiomatic that he cannot collaterally attack a prior proceeding on appeal from a subsequent proceeding. *See Sanford v. Manternach*, *601 N.W.2d 360, 364*

(Iowa 1999); LeGrand v. State, 540 N.W.2d 667, 669 (Iowa Ct. App. 1995) (stating that petitioner proffered "no legitimate basis for reasserting" a claim previously rejected on direct appeal and noting that the court "cannot readdress the propriety of our prior decision"). Accordingly, we reject this contention.

B. Ineffective Assistance of Counsel

Page takes issue with the district court's colloquy about standby counsel in his original trial and counsel's failure to raise it. This issue was raised and decided in his original appeal. *See State v. Page*, No. 88-611 (Iowa Ct. App. Jan. 25, 1988). Therefore, we will not revisit it.

Page also contends the prosecutor committed misconduct by showing witnesses his photograph before they testified. This issue was litigated in his first postconviction relief action and was a subject of the court's decision, and we will not revisit it.

Page finally contends "the evidence is insufficient to sustain first-degree robbery/murder convictions and district court erred in denying defendant's motion for judgment of acquittal." He asserts that counsel was ineffective in failing to raise a challenge to the sufficiency of the evidence. This is simply a repackaged version of an argument Page raised in a pro se brief appealing the dismissal of his first postconviction relief application. The supreme court dismissed that appeal as frivolous. We conclude Page cannot relitigate this claim under a different heading. *See* Iowa Code § 822.8 (providing that "[a]ny ground finally adjudicated . . . may not be the basis for a subsequent application" unless sufficient cause is found by the court); *Schertz v. State*, 380 N.W.2d 404, 412 (Iowa 1985) ("The general rule is that once convicted, a criminal defendant may

not by a series of postconviction proceedings relitigate those issues that were properly for review on direct appeal or available in an initial postconviction proceeding.").

We affirm the denial of Page's second postconviction relief application.

AFFIRMED.