

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17-1997

DAVID PALMER DEWBERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DECATUR COUNTY
THE HONORABLE JOHN D. LLOYD, JUDGE

APPELLEE'S BRIEF

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Iowa R. Civ. P. 1.904(2) 7, 8

**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

I. Dewberry is Not Actually Innocent of Robbery.

Authorities

Wanatee v. Ault, 120 F.Supp.2d 784 (N.D.Iowa 2000)
Bailey v. Tucker, 621 A.2d 108 (Pa. 1993)
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State v. Walker, 506 N.W.2d 430 (Iowa 1993)
Walters v. State, No. 12-2022, 2014 WL 69589
(Iowa Ct. App. Jan. 9, 2014)
Iowa Code § 822.6
Iowa Code § 711.1
Iowa Code § 711.3 (2013)
Iowa R. Civ. P. 1.904(2)

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

David Palmer Dewberry appeals from the denial of his second application for postconviction relief. He argues that he is actually innocent of the offense.

Course of Proceedings

The State accepts Dewberry's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The court of appeals summarized the facts of Dewberry's conviction as follows:

According to the minutes of evidence, at about 10:45 p.m. on July 16, 2011, Dewberry and Cody Rollins drove to the home of then Congressman Leonard Boswell in Davis City. Rollins stayed in the car while Dewberry, who was armed with a gun and wearing a black ski mask, entered the home. Dewberry put the gun to the head of Boswell's daughter, Cynthia Brown, and demanded money. Boswell came to the aid of Cynthia and engaged in a physical altercation with Dewberry. During the struggle, Dewberry, Boswell, and Cynthia fell down a flight of stairs. Dewberry broke free and ran back up the stairs. He encountered Boswell's wife, Darlene, threatened her with the gun, and again demanded money. Boswell's grandson, Mitchell Brown, heard the incident occurring and got a 12-gauge shotgun. Mitchell pointed the shotgun at Dewberry, who then ran out the front door.

After the Boswells called 911, officers came to the home, including those from the Leon and Lamoni Police Departments. In a field near the home, officers found three black duffel bags, which contained tape, twine, garbage bags, and "a black handgun, which was later determined to be similar to a pellet gun." A witness stated Dewberry was "in possession of a black gun

used for shooting white pellets.” When interviewed by officers, Dewberry admitted “to carrying a ‘fake’ gun into the house, pointing it at the people inside, and demanding money.”

Dewberry v. State, No. 14-1198, 2015 WL 7567514, at *1 (Iowa Ct. App. Nov. 25, 2015).

ARGUMENT

I. Dewberry is Not Actually Innocent of Robbery.

Preservation of Error

In his second application for postconviction relief, Dewberry claims that his trial counsel was ineffective for failure “to call an expert witness to trial to testify to whether or not a BB gun or a pellet gun that he had constitute a dangerous weapon.” PCR App. 02/12/16 ¶ 3; App. 14. He further claimed that he would not have pleaded guilty if his counsel had procured such an expert. PCR App. 02/12/16 ¶ 3; App. 14. The State moved to dismiss Dewberry’s application as *res judicata*, because the court of appeals held that the record supported a factual basis on that element of the charge in an appeal from the denial of his first application for postconviction relief. Motion to Dismiss 05/19/16 ¶¶ 7-8; App. 18-19.

Dewberry resisted the State’s motion, arguing that the court of appeals had decided only that his “subjective” belief about the

capabilities of the gun was sufficient to establish a factual basis—the “legal fact” of the offense. Resistance to Motion to Dismiss 05/28/16 P.9-10; App. 28-29. He argued that in the instant application he was not challenging this “legal fact,” but rather the “scientific fact” that his attorney failed to establish with expert testimony. Resistance to Motion to Dismiss 05/28/16 P.10; App. 29. He argued that he should be afforded the opportunity to show that despite his admission in his plea colloquy, the gun he used to commit the robbery was not capable of inflicting death and that he is “actually and factually” innocent. Resistance to Motion to Dismiss 05/28/16 P.10-11; App. 29-30.

The district court held that Dewberry was not entitled to an opportunity to “prove he was lying or uninformed about his own weapon.” Order Dismissing PCR 09/30/16 P.3; App. 108. It dismissed that claim on the ground that it was foreclosed by his guilty plea and the prior adjudication of his first application for postconviction relief. Order Dismissing PCR 09/30/16 P.3; App. 108. Dewberry filed a motion under Iowa Rule of Civil Procedure 1.904(2). In the motion, Dewberry for the first time developed an “actual innocence” claim under the due process clause of the Iowa Constitution. Rule 1.904(2) Motion 11/07/16 ¶¶ 10-14; App. 113-114.

The district court denied the motion following essentially the same rationale the court of appeals applied in *Walters v. State*, No. 12-2022, 2014 WL 69589, at *3 (Iowa Ct. App. Jan. 9, 2014), and *Schmidt v. State*, No. 15-1408, 2016 WL 4384697, at *1 (Iowa Ct. App. Aug. 17, 2016), *vacated on further review*, 909 N.W.2d 778 (Iowa 2018). On further review in *Schmidt*, this Court held that a guilty plea does not preclude an actual innocence claim. 909 N.W.2d at 790. Although Dewberry did not include an actual innocence claim in his second application for postconviction relief, his resistance to the State's motion to dismiss, argument at the hearing, and rule 1.904(2) motion were minimally sufficient to preserve his claim for appeal.

Standard of Review

This Court did not discuss a standard applicable to review of freestanding actual innocence claims under the Iowa Constitution in *Schmidt*. Review of claims involving the alleged violation of constitutional rights is de novo. *State v. Walker*, 506 N.W.2d 430, 431 (Iowa 1993).

Merits

In order to succeed on an actual innocence claim, a defendant must show, “by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable fact finder could convict the applicant of the crimes for which the sentencing court found the applicant guilty in light of all the evidence.” *Schmidt*, 909 N.W.2d at 797. Dewberry does not argue that clear and convincing evidence supports his actual innocence. Rather, he argues that the district court erred in dismissing his second application for postconviction relief without affording him an opportunity to prove his actual innocence.

Specifically, he argues that an expert should examine the gun that he used to commit the robbery to determine whether it was in fact capable of inflicting death. But no such determination is necessary. Even if an expert determined that Dewberry’s gun was not capable of inflicting death, Dewberry is not innocent. He was convicted of robbery. The code defines robbery as follows:

1. A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

- a. Commits an assault upon another.
- b. Threatens another with or purposely puts another in fear of immediate serious injury.
- c. Threatens to commit immediately any forcible felony.

Iowa Code § 711.1. Dewberry admits that he is guilty of robbery. His argument focuses on the *degree* of the robbery he committed. If the gun was not a dangerous weapon, Dewberry argues that he could not have been convicted of first degree robbery. If that were the case, Dewberry could challenge the factual basis for his guilty plea as he did in his first application for postconviction relief. But Dewberry is not innocent. At the time Dewberry was convicted, the code provided that “[a]ll robbery which is not robbery in the first degree is robbery in the second degree.” Iowa Code § 711.3 (2013). A defendant is not “factually and actually innocent” when he is guilty of a lesser included offense.

One of the small number of states that recognizes a freestanding actual innocence claim based on the due process clause explains that innocence means “total vindication” or “exoneration.” *People v. Barnslater*, 869 N.E.2d 293, 300-01 (Ill. App. 2007) (quoting *People v. Savory*, 722 N.E.2d 220, 225 (Ill. App. 1999)). The Illinois court held that “actual innocence requires that a defendant be free of

liability not only for the crime of conviction, but also of any related offenses.” *Id*; see also *Wanatee v. Ault*, 120 F.Supp.2d 784, 789 (N.D.Iowa 2000) (“there is a public interest in the continued incarceration of a person convicted of murder, where the grounds for habeas release did not go to his actual innocence, but only to a constitutional defect in his representation, which this court concluded resulted in his conviction of a greater offense, as opposed to his pleading guilty to a lesser offense with a lesser sentence”); *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993) (“we require that as an element to a cause of action in trespass against a defense attorney whose dereliction was the sole proximate cause of the defendant's unlawful conviction, the defendant must prove that he is innocent of the crime or any lesser included offense. ... The underlying act for first degree murder and for voluntary manslaughter is the unlawful taking of human life. A person convicted of unlawfully taking a human life may not collect monetary damages for being wrongfully convicted of first degree murder when in fact that person is guilty of a lesser degree of homicide”); *Sangha v. LaBarbera*, 52 Cal.Rptr.3d 640, 647 (Cal. App. 2006) (holding that to be “actually innocent” so as to recover for legal malpractice, a defendant must be free from “any criminal

involvement,” including the commission of a lesser included offense of the crime of conviction). The Iowa Supreme Court said that it is a due process violation to hold a person “who has committed no crime.” *Schmidt*, 909 N.W.2d at 793. Because Dewberry admits that he is guilty of robbery, reversal in light of *Schmidt* is not necessary.

Even if Dewberry does have a cognizable actual innocence claim, summary disposition was still appropriate. Iowa Code section 822.6 authorizes the district court to “grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” As the special concurrence explained in *Schmidt*, summary disposition is still appropriate for an actual innocence claim on postconviction relief when, under a set of facts assumed to be undisputed for purposes of the motion, “a reasonable juror could still conclude the defendant is guilty of the crime.” 909 N.W.2d at 800-01 (Cady, C.J., concurring specially).

Dewberry does not allege that the weapon that he used to commit the robbery was not a dangerous weapon. He admitted it was

when he pleaded guilty and he now alleges that he may have been mistaken. For purposes of summary disposition of Dewberry's application, the State does not dispute that he may have been mistaken. Nevertheless, Dewberry has not shown a genuine issue of material fact. The district court did not err when it granted the State's motion.

CONCLUSION

For the foregoing reasons, the denial of Dewberry's second application for postconviction relief should be affirmed.

REQUEST FOR NONORAL SUBMISSION

Nonoral submission is appropriate for this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,833** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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