IN THE SUPREME COURT OF IOWA

No. 20-0786

JAMES FARNSWORTH II,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CERRO GORDO COUNTY
HONORABLE CHRIS FOY, JUDGE

APPELLANT'S RESISTANCE TO THE STATE'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED NOVEMBER 3, 2021

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QUESTIONS PRESENTED FOR REVIEW

It is not clear whether it is permitted to say anything about the other side's "questions presented for review." Presumably the party seeking review ought to be able to frame their own issues.

However in looking at the framing of the questions by the State, a third question does come to mind.

That would be:

1. Whether the State can raise either of its questions for the first time in an Application for Further Review?

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STATEMENT REGARDING FURTHER REVIEW

In this appeal both sides have now asked the Supreme Court to grant further review of a decision by the Court of Appeals. To some extent, James Farnsworth would have no objection to the Court granting the State's application, so long as the Court grants his application as well.

It is still appropriate to respond to the State's Application.

The State seeks further review of the one part of the Court of Appeals case where the Court found error by his counsel David Roth. That part of the ruling had to do with the bond provision leading to its forfeiture of $50,000 toward victim restitution.

David Roth had little to no experience with serious felony cases in Iowa. Despite that fact, he agreed to represent James Farnsworth in a first degree murder case. He asked for and received a large retainer, which he almost immediately spent, feeding a Ponzi like scheme. After he committed suicide near the end of Farnsworth's direct appeal, it was discovered that he had defrauded clients, his partners, and investors, out of millions of dollars.

One cannot really look at the mishandling of the bond without understanding that it was just one part of incredibly bad representation. That representation resulted in a sentence that gives James Farnsworth a mandatory 35 years in prison.[1]

[1] His sentence of 50 years is subject to a 70% mandatory under 902.12.

The State says the Court of Appeals decision was an extreme outcome. It really was only extreme to the extent that there were large numbers involved. In State v.Letscher, 888 N.W.2d 880 (Iowa 2016), the bond was $2,000. Would the State say that was an extreme outcome?

Perhaps the Court of Appeals in handing down what could be thought of as an extreme outcome was reflecting the fact that the mistake that was made was "extreme".

The State spends most of its time complaining that Farnsworth should not have been able to even bring this complaint in the first place. The State says the claim does not belong in a postconviction. The State says there cannot be ineffective counsel, as there was no right to counsel as to bond matters.

These arguments to avoid the merits of the claim should be rejected for two significant reasons.

First, the forfeiture of the bond really was part of the sentence, in this case. The plan of the district judge in this case was clear from the very beginning. Bond was established in the exact way she required, specifically to provide for payment of $50,000 to the victim's family, upon a conviction.

Second, the State should not be able to raise these technicalities for the first time in an Application for Further Review. These arguments were not raised in its brief to this court.

FACTS

Most of the facts about the bond are from the record. Those facts should be set out in some detail. Upon that review and the State's Application does not really present the entire picture.

1. James Farnsworth was arrested on April 15, 2012 and charged with first degree murder.

2. At his initial appearance, bond was set at $100,000 cash. There was no reference to its being posted in the Defendant's name. App. 7.

3. On April 27, 2012, at the request of his lawyer David Roth, there was a bond review. The subject of victim restitution came up at the hearing. At the hearing the prosecution agreed the $100,000 was a reasonable bond. Hearing Trans. p. 10, lines 8-23.

4. By that date, Judge Colleen Weiland had been assigned to the case. She handled the case from that point on.

5. As a result of the bond hearing, the bond was doubled to $200,000 cash, with a specific provision that $50,000 had to be posted in the Defendant's name. App. 8.[2]

[2] The State in its application discusses the facts starting at page 7. In reciting the modified bond order the State fails to include in its description of the facts that the judge required the $50,000 to be posted in the defendant's name.

6. An appearance bond receipt was filed when the bond was posted on May 15, 2012. It contained this specific language:

> "For my bail bond, I deposit $50,000.00 cash in my own name with the Clerk of District Court for Cerro Gordo County. I understand that if I do not appear on the date and time stated or at any other time ordered by the District Court the bail bond will be forfeited and a warrant may be issued for my arrest. I authorize the Clerk of Court to hold this bail bond until this case is finally resolved. I authorize the Clerk of Court to use this bail bond to pay all fines, surcharges, costs and victim restitution that I may be ordered to pay by the District Court in the final judgment of this matter or any other criminal judgment against me in Cerro Gordo County."

7. With her bond order Judge Weiland had made it clear that she had established the bond the way she did, to provide a large amount of funds for restitution, in the event of a conviction.

8. David Roth told the family that this was improper bond but he did not do anything about it.

9. At the sentencing hearing, the Court said:

> "Restitution is assessed against you in the following amounts: $14,972 as reimbursement to the Crime Victim Assistance program; and $150,000 to the estate or heirs of Ian Decker, pursuant to Iowa Code section 910.3B. I'll enter an order separate from the sentencing order in regard to the bond disposition. Bond was posted for the defendant's release pending trial in this matter. $200,000 in cash was posted. $50,000 of it posted in the defendant's name, and $150,000 in cash but in the name of the surety. Pursuant to Mr. Farnsworth's bond receipt agreement, I intend to forfeit the sums posted in his name for application toward victim

> restitution. I intend to exonerate and release the sums posted by the surety." Sentencing Trans. page 16, line 16 to page 17, line 3.

10. The sentencing order provided the following language.

> "The appearance bond of the Defendant, if any, shall be first applied to the payment of costs then to the payment of the fine, and then to the payment of any outstanding restitution fines and costs owning in this matter and the balance if any refunded to the Defendant." App. 12.

11. Twelve days later on March 20, 2013, the Court entered an "Order for the disposition of bond". In that order, Judge Weiland said:

> "The Court intends to forfeit the $50,000 cash bond posted in the name of James Farnsworth II for application toward victim restitution. At the sentencing hearing, the Court notified the parties that it intended to apply bond first for restitution to the Crime Victim Assistance program. However, Iowa Code section 910.2(1) directs that "victims shall be paid in full..."
> App. 13.

12. The order concluded by saying that in the absence of a written objection by either party, the Court will enter such an order on or after April 2, 2013. App. 13.

13. In fact, on April 4, having not received any objection from anybody, the Court ordered the cash bond posted in the name of James Farnsworth II.

14. Attorney David Roth told the family that this forfeiture was illegal, but neither filed an objection with the Court nor raised any issue regarding the bond on appeal.

Court of Appeals decision

Judge Vaitheswaran wrote the opinion for the Court of Appeals affirming the conviction.

While she affirmed the conviction finding no breech of the duty as to the trial, she did rather strongly agree that David Roth had mishandled the bond. She did not address whether counsel had breached his duty in even seeking a bond review in the first place. She did find that counsel breached his duty by not objecting to the forfeiture. She found that the Court was without authority to forfeit a bond as a part of the sentence.

While she noted that State v. Letscher, 888 N.W. 2d 885 (Iowa 2016) was not decided until 2016, she pointed out that Roth did not need that case to argue that there was just no authority for forfeiting a cash bond the way it was done.

She referred to Iowa Code section 811.8(2) (2015). While she referenced the 2015 code, that particular code provision was the same in 2012.

ARGUMENT

I

THERE IS A RIGHT TO EFFECTIVE COUNSEL WITH REGARD TO THE BOND MATTERS SO THAT INEFFECTIVE COUNSEL AS TO THOSE MATTERS CAN BE RAISED IN A POSTCONVICTION

The State makes arguments in its Application as to why the Court of Appeals should not have addressed the merits of the complaint about the bond, at all.

The State argues that the bond forfeiture was "civil", taking place after sentencing. Since it is "civil" the State asserts that there is no right to counsel. If there is no right to counsel, there can be no right to effective counsel. See heading in State's brief at page 15.

The State also asserts that even if there is such a right, it cannot be raised in a postconviction.

Let us take those one at a time.

First, thinking of what happened as a bond forfeiture occurring after sentencing mischaracterizes what took place in this case. The mishandling by counsel started with establishing the special bond condition in the first place.

Clearly, establishing conditions of bond during the criminal case is a particularly important stage in the criminal process where the Sixth amendment right to counsel would exist.

The facts show that the forfeiture in this case was in fact part of the sentencing itself. The judge set up this forfeiture from the beginning by modifying the bond conditions after Farnsworth's arrest. The only reason to provide that part of the bond should be posted "in the defendant's name" was to create a fund for

restitution to the dead person's family. The language at the sentencing hearing and also in the sentencing order makes clear the judge's intent to forfeit the bond.

The fact that forfeiture order took place after sentencing is really not that much different than what happened in State v. Letscher, 888 N.W. 2d 880 (Iowa 2016). In that case, the cash bond was posted with a standard authorization to apply the bond to court imposed financial obligations. The one thing that was different in Letscher was that in the sentencing order itself it said the bond was forfeited. This is a difference without meaning. That is particularly the case as to the question of whether there was a constitutionally protected duty for counsel to behave reasonably with regard to bond conditions.

The State seeks to have this issue regarding bond turned into an issue regarding restitution. Of course, the bond and restitution in this case were quite related. The conditions of bond were specifically arranged by the sentencing judge so that the money would go to the victim's family even though it was clear that the money was coming from Farnsworth's family and not himself.

The Iowa Supreme Court has found that there is a right to counsel in restitution matters. See State v Dudley, 766 N.W. 2d 606 (Iowa 2009).

The postconviction statute allows for challenges to be brought to the sentence if it is subject to collateral attack upon any grounds of alleged error, formerly available under common law of statutory writ. See 822.2(1). As the bond

provisions and conditions were in fact part of the criminal case and the sentencing, complaints about them can be raised in a postconviction.

II

THE COURT OF APPEALS CORRECTLY DETERMINED THAT DAVID ROTH BREECHED A DUTY IN FAILING TO OBJECT TO THE COURT'S FORFEITURE OF THE BOND POSTED IN THE DEFENDANT'S NAME

Once the State gets past trying to argue that no Court can consider what happened with regard to the bond, the State argues that David Roth was not ineffective in not objecting to the bond. The Court of Appeals correctly decided this issue.

Judge Vaitheswaran relied on two factors. First there was State v. Letscher, 888 N.W.2d 880 (Iowa 2016).

In Letscher the Supreme Court voided a bond forfeiture in Winnebago County, where the cash only bond was $2,000. There was similar language used in that the bond authorization as was used in Farnsworth's case. The language said that by posting of the bond the Defendant essentially agreed that the money can be used to satisfy sentencing obligations.

While the case was from 2016, Farnsworth was sentenced in 2013. Here is what Judge Vaitheswaran said in rejecting the State's argument that Roth could not have anticipated Letscher:

> The operative omission with respect to the bond was counsel's failure to object to the court's application of the cash portion to Farnsworth's restitution obligation. *See State v. Letscher*, 888 N.W.2d 880, 885, 887 (Iowa 2016) ("No statutory sentencing provision exists in Iowa to authorize a court to forfeit bail.... The disposition of pretrial bail money is not an authorized part of sentencing, and therefore, a sentencing court is without statutory authority to forfeit bail as a part of a sentence. Action taken against bail must comply with the statutory terms and conditions."). Although the State correctly notes *Letscher* postdated Farnsworth's posting of his bond and counsel had no duty "to foresee that result," counsel did not require *Letscher* to argue that no statutory authority supported the forfeiture of the cash bond for restitution. Indeed, statutory authority in effect at the time said precisely the opposite:
>
> *7 Upon the filing of the undertaking and the certificate of the officer, or the certificate of the officer alone if money has been deposited instead of bail, *the court or clerk shall immediately order return of the money deposited to the person who deposited the same*, or order an exoneration of the surety.
>
> Iowa Code § 811.8(2) (2015) (emphasis added). We conclude counsel had a duty to object to the district court's expressed intent to apply the cash bond amount to his outstanding restitution obligation. We further conclude Farnsworth was prejudiced by the omission, to the tune of $50,000. We "return the case to the district court for the clerk to disburse the bail money as required by law." *Letscher*, 888 N.W.2d at 886.
>
> Farnsworth v. State, 2021 WL 5106041, at *6–7 (Iowa App., 2021)

It should be noted that while Judge Vaitheswaran cited the 2015 Code provision, that provision was in the Iowa Code in 2012.

III

THE STATE CANNOT AT THIS POINT COMPLAIN THAT FARNSWORTH COULD NOT RAISE THE BOND CLAIM IN POSTCONVICTION OR THAT HE HAD NO RIGHT TO COUNSEL AS TO THE BOND FORFEITURE.

The State complaints about the portion of the Court of Appeals decision granting relief with regard to the lawyer's handling of the cash bond which allowed funds to be forfeited for restitution.

The State raises such issues as whether there is any right to counsel with regard to such bond forfeiture or whether the claim can be presented in a postconviction. (See the State's "Questions Presented" at page 2 of the application.)

In considering those claims it is appropriate to look at how the State framed its objection to Farnsworth's argument about bond in its appeal brief.

The State discussed the bond complaint at pages 44 and 45. The State certainly argued that Farnsworth was not harmed by the bond provision. The State argued that Roth could not have anticipated the Letscher decision in 2016.

But, the State, never argued that there is no right to counsel with regard to bond or the bond forfeiture. The State never argued that there was no ability in a postconviction to raise this issue. The State did not even argue that the forfeiture provision was not part of sentencing.

Given the State's original brief on appeal, the Court should find that the State cannot now raise those issues. The State should not be able to raise these

arguments for the first time in its Application for Further Review. State v. Carroll, 767 N.W.2d 638, 644 (Iowa 2009); State v. Shackford, 952 N.W.2d 141, 147–48 (Iowa, 2020). That principle should apply to both sides in any appeal.

CONCLUSION

Both sides to this appeal have now applied for further review. Farnsworth would certainly be content with the Court granting both of those requests. That would allow the entire representation to be considered by the Supreme Court. However, if the Court is not going to grant his Application for further review, the Court should deny the State's.

The Court of Appeals decision was supported not only by a Supreme Court case that was reasonably close in time to Farnsworth's case, but it was also supported by a state statute. It seems that in 2012-2013 a sentencing court did not have authority to forfeit a bond posted in the defendant's name.

The State now says a few things about the right to counsel and how this claim cannot be presented in a postconviction. Those claims are being raised by the State for the first time on this appeal and should not be considered.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $5.30.

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

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/s/ Philip B. Mears
Signature

__12-9-2021_____
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