**IN THE COURT OF APPEALS OF IOWA**

No. 8-014 / 07-0529
Filed February 13, 2008

**RICHARD THOMAS STELTZER,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

---

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

Richard Steltzer appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Paul Rosenberg of Rosenberg & Associates P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Bryan Tingle, County Attorney, and Alyssa Kenville, Assistant County Attorney, for appellee State.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**MAHAN, P.J.**

Richard Steltzer appeals the district court decision denying his application for postconviction relief. We affirm.

**I. Background Facts and Prior Proceedings**

On February 9, 1979, Steltzer was convicted of first-degree kidnapping and second-degree sexual abuse. The Iowa Supreme Court summarized the facts of the case in the following manner:

> On the evening of October 21, 1978, passing motorists found the female victim, Lillian, age 21, in a ditch near a country road partially dressed with her hands tied. At trial she testified in detail concerning her abduction by defendant, who was a casual acquaintance. She stated that defendant took her, against her will, in his truck to a cornfield and subjected her to various acts of sexual abuse. He then took her to a nearby recreational area, tied her to a tree and abandoned her there.
>
> Defendant denied the incident and testified that on the afternoon and evening in question he had driven to Lineville, Missouri, looking for truck parts, but returned without talking to anyone when he was unable to locate the man who was to sell him the parts.

*State v. Steltzer*, 288 N.W.2d 557, 558 (Iowa 1980). Both convictions were affirmed on direct appeal. *Id.*

At some point after the criminal trial, the victim instituted child support proceedings against Steltzer, claiming he was the father of her child that was born approximately nine months after the sexual abuse.

In 1993 Steltzer filed an application for postconviction relief (hereinafter "PCR application") requesting that DNA testing be performed on the victim, her child, her boyfriend, and himself, in order to determine the paternity of the child. The State moved to dismiss the application as untimely. The court granted the State's motion to dismiss, stating

> The development of the DNA testing procedure and its general acceptance does not constitute new evidence; it is merely a new way to evaluate the existing evidence. In the absence of new evidence the 3 year statute is applicable. Petitioner's Motion for DNA Testing at State Expense and alternatively at his own expense is accordingly also denied.

*See* Iowa Code § 822.3 (1993) ("All other applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued.").

Steltzer did not appeal this ruling. Instead, he filed a second PCR application requesting the same DNA testing. Once again, the district court denied his application. Our court affirmed this decision on appeal.

On August 2, 2006, Steltzer filed a third application for postconviction relief. When filling out this pro se form application, Steltzer checked the box indicating that the ground for relief was that there were material facts, not previously presented or heard, that required vacation of his conviction in the interest of justice. When asked to describe these facts, Steltzer referred to "DNA results" that he wanted to receive through testing of the victim's "rape kit," the victim's child, the victim's alleged boyfriend, and himself. Steltzer listed "section 81.10" as the authority for this DNA testing. *See* Iowa Code § 81.10 (2007) (describing a procedure whereby individuals can request DNA profiling for previous convictions).

The State responded to this PCR application with a motion to dismiss claiming the application was "without merit absent a motion and subsequent order pursuant to § 81.10 of the Iowa Code establishing the existence of newly discovered evidence in the form of DNA evidence." Steltzer's court-appointed

counsel responded to the motion to dismiss with a motion asking the court to order DNA testing of Steltzer, the victim, and the victim's child pursuant to section 81.10.

After a brief hearing, the district court entered a ruling on the State's motion to dismiss. The court noted that Steltzer had presented no evidence in support of his PCR application; instead, he had "jumped the gun" and filed the PCR application before there had even been a DNA test. Rather than dismiss the PCR application outright, the district court entered a ruling withholding judgment on the PCR application until such time as the section 81.10 motion was resolved. In the meantime, the court directed the State to respond to the section 81.10 motion and specify whether any biological or blood evidence had been collected in this case.

The State filed a resistance to the section 81.10 motion indicating that it knew of no blood testing, biological testing, or other DNA collection performed during the 1978 investigation. The State also indicated that all the exhibits and records for this twenty-seven-year-old trial had been destroyed.

The district court denied the section 81.10 motion. Nine days later, the court issued a separate ruling denying the PCR application because there was "no evidence" upon which it could grant the requested relief.

Steltzer raises two issues on appeal:

> I. THE DISTRICT COURT ERRED IN SUMMARILY DISMISSING RICHARD STELTZER'S PCR ON THE NARROW GROUND THAT DNA TESTING WAS UNAVAILABLE UNDER § 81.10.
>
> II. RICHARD STELTZER'S PCR COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY RESIST THE STATE'S DISMISSAL MOTION.

**II. Standard of Review**

We typically review postconviction relief proceedings on error. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). However, when the applicant asserts claims of a constitutional nature, our review is de novo. *Id.* Thus, we review Steltzer's ineffective assistance of counsel claim de novo. *Id.*

**III. Merits**

**A. Summary Decision**

Stelzer contends the court's "very narrow and strict treatment" and summary disposition of his PCR application was inappropriate. We disagree.

Iowa Code section 822.6 provides that the postconviction court may grant a motion for summary disposition "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits" that there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Summary disposition of a postconviction relief application is not proper if a material issue of fact exists. *See* Iowa Code § 822.6. A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *See Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994).

The only ground for postconviction relief listed in Steltzer's application was that there were "material facts, not previously presented and heard, that require[d] vacation of [his] conviction or sentence in the interest of justice." Although his application does not cite a specific section of the Uniform

Postconviction Procedure Act, his PCR claim clearly rests upon Iowa Code section 822.2(1)(d), which holds that a defendant may seek postconviction relief from his conviction if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

Section 822.2(1)(d) requires the postconviction relief applicant to establish four elements before a new trial will be granted. *See Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). The applicant must show:

> (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted.

*Id.*

Viewing the facts in a light most favorable to Steltzer, *see Davis*, 520 N.W.2d at 321, we agree with the district court's conclusion that Steltzer failed to set forth *any* new facts or evidence showing that there was a genuine issue for trial. Indeed, his PCR application only consisted of allegations that he was not the father of the victim's child. Even if he were able to prove that he was not the father of this child, at most this evidence would merely impeach the victim's paternity claim, a claim that was apparently only made *after* Steltzer was convicted of the crime.[1] Newly-discovered evidence which is merely cumulative or impeaching does not entitle one to a new trial. *Summage*, 579 N.W.2d at 822.

[1] Steltzer never claims she said he was the father of the child during his criminal proceeding. All of his allegations relate to the claim she made in the subsequent civil proceeding.

We also find this alleged evidence would not change the result if he were granted a new trial. The victim specifically identified the defendant, a person she knew prior to the incident, as the person who kidnapped her, tied her hands together, and repeatedly sexually abused her. Evidence that the twenty-one-year-old victim had sexual intercourse with another man in the weeks before or after the incident would have little impact on the ultimate issue of whether Steltzer committed these crimes. Accordingly, we find the district court properly denied Steltzer's PCR application via summary disposition because he failed to provide sufficient evidence to warrant a new trial and failed to generate a genuine issue of material fact issue that would warrant further proceedings.

**B. Ineffective Assistance of Postconviction Counsel**

Steltzer also contends his postconviction counsel for his third PCR application rendered ineffective assistance. To prevail on a claim of ineffective assistance of counsel, Steltzer must show that his attorney's performance fell outside the normal range of competency, and the deficient performance so prejudiced his case as to give rise to a reasonable probability that, but for counsel's alleged errors, the outcome of the proceedings would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). There is a strong presumption counsel performed competently, and Steltzer as claimant has the burden to prove that counsel was ineffective. *Id.* An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Steltzer claims his PCR counsel was ineffective because he did not attempt to amend the PCR application or supplement the record in order to

properly resist the state's dismissal motion. On appeal, Steltzer suggests that his PCR counsel "could have put on evidence that only the rapist could have fathered [the victim's] child." However, Steltzer does not identify any credible evidence to prove this point and such an argument contradicts his claim that the victim's boyfriend is the father of the child. We find this argument meritless.

Steltzer also claims his PCR counsel should have explored the circumstances surrounding the destruction of the rape kit. This argument hinges on two assumptions: (1) the 1978 investigation produced a rape kit and (2) the State destroyed that rape kit. As noted in the State's resistance to the motion for section 81.10 DNA testing, the State knew of no collected DNA evidence and knew of no biological or blood testing in this case. Because there is no evidence that there was ever a rape kit containing biological evidence,[2] we find a competent attorney would not have explored this matter further.

**IV. Conclusion**

Having considered all arguments made on appeal, whether or not specifically addressed in this opinion, we affirm the district court's decision denying Steltzer's third application for postconviction relief. *Id.* We also find he has failed to prove his ineffective assistance claim.

**AFFIRMED.**

[2] Steltzer's two previous postconviction requests for DNA profiling of the victim, her child, her boyfriend, and himself never mentioned a rape kit.