

IN THE IOWA SUPREME COURT

No. 16-0764

KEOKUK COUNTY NO: PCLA039832

BRIAN KELLY ALLISON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

**APPEAL FROM THE DISTRICT COURT
IN AND FOR KEOKUK COUNTY
THE HONORABLE MYRON GOOKIN
JUDGE OF THE EIGHTH JUDICIAL DISTRICT**

**APPLICANT-APPELLANT'S
FINAL BRIEF AND ARGUMENT**

**R. E. Breckenridge
BRECKENRIDGE LAW P.C.
345 North Court Street
Ottumwa, IA 52501-0616
Tel: (641) 684-6097
Fax: (641) 684-0209
reb@ottumwalaw.net
ATTORNEY FOR APPLICANT-APPELLANT**

PROOF OF SERVICE

On the 13th of December, 2016, I, the undersigned person, did serve the within Appendix on all parties to this appeal by e-filing said document with the Clerk thus giving copy to the respective counsel for said parties and mailing by U.S. Mail the following party to-wit:

Brian Allison #6476085
Iowa Medical and Classification Center
2700 Coral Ridge Avenue
Coralville, IA 52241

/s/ Robert Breckenridge
R. E. Breckenridge

CERTIFICATION OF FILING

I, R. E. Breckenridge, attorney for the Applicant-Appellant, hereby certify that I did file the within Final Brief and Argument with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319, by e-filing said document in accordance with Chapter 16 Rules.

By: /s/ Robert Breckenridge

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 1913 words, excluding the parts of the brief exempted by the rule. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type face requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 12 in Times New Roman font 14.

By: /s/ Robert Breckenridge

December 13, 2016

TABLE OF CONTENTS

Table of Cases and Authorities.....	iii
Statement of Issues presented for Review.....	iv
Statement of the Case.....	1
Nature of the Case.....	1
Statement of Relevant Facts.....	1
Argument.....	4
I. The Trial Court erred in dismissing the claims of ineffective assistance of post-conviction counsel.....	4
II. The Trial Court erred in dismissing additional claims that were exceptions to the filing limitations.....	7
Conclusion.....	9
Oral Argument Request.....	9

TABLE OF AUTHORITIES

<i>Castro v. State</i> , 795 N.W.2d 789, 792 (Iowa 2011).....	4
<i>Harrington v. State</i> , 659 N.W.2d 509, 519 (Iowa 2003).....	4,5
<i>Manning v. State</i> , 654 N.W.2d 555, 560 (Iowa 2002).....	4,7
<i>Dible v. State</i> , 557 N.W.2d 881 (Iowa 1996).....	5
<i>Lopez-Penalosa v. State</i> , 804 N.W.2d 537, 540-541 (IA Ct. App. 2011)..	4
Iowa Code Section 822.3.....	2-8
Iowa Code Section 822.7.....	8

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The trial court erred in dismissing the claims of ineffective assistance of post-conviction counsel.

Castro v. State, 795 N.W.2d 789, 792 (Iowa 2011)

Harrington v. State, 659 N.W.2d 509, 519 (Iowa 2003)

Manning v. State, 654 N.W.2d 555, 560 (Iowa 2002)

Dible v. State, 557 N.W.2d 881 (Iowa 1996)

Lopez-Penalosa v. State, 804 N.W.2d 537, 540-541 (IA Ct. App. 2011)

Iowa Code Section 822.3

II. The trial court erred in dismissing additional claims that were exceptions to the time limitations of Iowa Code Section 822.3.

Manning v. State, 654 N.W.2d 555, 560 (Iowa 2002)

Iowa Code Section 822.3

Iowa Code Section 822.7

ROUTING STATEMENT

This matter qualifies for transfer to the Iowa Court of Appeals under Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case: This matter is an appeal from the trial court's ruling granting the State's Motion to Dismiss in a post-conviction matter filed by the Applicant-Appellant.

Statement of Facts: On May 18, 2011, the Applicant-Appellant, hereinafter, Allison, was convicted of three counts of Sexual Abuse in the 3rd Degree. (P. 1) Allison was sentenced to three 10 years sentences ordered to run consecutively. (P. 1) Allison appealed and his case was referred to the Iowa Court of Appeals. *State v. Allison*, 2012 Iowa App. LEXIS 535 (Ia App. 2012) Allison claimed that the trial court erred in denying his motion for new trial and that his trial defense counsel was ineffective. *Id.* The Iowa Court of Appeals affirmed the conviction and sentence. *Id.* Procedendo was issued on September 6, 2012. (Docket)

Allison filed his first application for post-conviction relief on March 6, 2013. (P. 1) The issue raised was that trial counsel was ineffective in failing to properly investigate the bias of one of the jurors. Hearing was held and testimony presented from Allison and his son. (P. 3) The testimony presented the issue that Allison observed a sitting juror appear to wave and acknowledge Allison's ex-wife, the mother of the victim. (P. 3) The trial defense counsel was informed of this development but that he took no steps to investigate or attempt to correct the problem.

(P. 4) The trial judge found that neither Allison nor his son knew the name of the alleged juror nor could they present evidence on any relationship between the juror and the victim's mother and thus could not prove prejudice. *See Allison v. State*, 2015 Iowa App. LEXIS 806. This ruling was appealed and was presented to the Iowa Court of Appeals who concluded that it was Allison's burden to show prejudice and since he did not prove bias he could not prove prejudice. *Id.*

On November 5, 2015, Allison filed his second application for post-conviction relief. (P. 2) This pro se application alleged ineffective assistance of both post-conviction counsel and the subsequent appellate counsel. (P. 3-5) Initially the trial court required Allison to pay a portion of his filing fees before his application could proceed and the proceedings were suspended briefly. (P. 7, 9) On December 17, 2015, Allison's application was permitted to proceeding after the payment of fees. (P. 11)

On December 18, 2015, the State filed a Motion to Dismiss alleging that the second post-conviction application was untimely as it was not filed within the three year filing period required under Iowa Code Section 822.3 (P. 13-16) On December 21, 2015, the undersigned Counsel was appointed to replace another attorney but was never copied in on either the State's Motion or the appointment order. (P. 17) The undersigned counsel appeared on February 18, 2016. (Appearance)

On March 11, 2016, Allison, through counsel, filed a resistance to the Motion

to Dismiss as well as an Application to Amend the Petition with Amended Petition attached. (P. 19) The Amended Petition reasserted the grounds of ineffective assistance of post-conviction counsel originally presented by Allison as well and two additional grounds: (1) that there exists evidence of material facts, not previously presented or discoverable *i.e.* that the victim has recanted her testimony thus taking away the factual basis for the conviction; and, (2) that changes in the law, particularly in the admissibility of expert testimony going to the credibility of victims, had occurred which would have excluded testimony that was central to his conviction. (P. 20-22)

Hearing was held on March 18, 2016, on the State's Motion to Dismiss. The case was heard without the presence of the Applicant and without record. (P. 24) The trial court made no findings of facts and rendered no conclusions of law. (P. 24) Instead the trial court appeared to adopt the authorities cited by the State in its Motion to Dismiss and concluded that Allison's application was barred by the three-year statute of limitations set forth in Iowa Code Section 822.3. (P. 24)

Notice of Appeal was filed on May 6, 2016. (P. 26) On these facts this matter comes for appeal.

ARGUMENT

I. The trial court erred in dismissing the claims of ineffective assistance of post conviction counsel.

Nature of the Claim: The Applicant-Appellant argues that ineffective assistance on the part of post-conviction counsel is critical to his ability to exercise his rights to post-conviction relief and does in fact qualify as an exception to the 3 year statute of limitations imposed by Iowa Code Section 822.3.

Preservation of Error: This argument was timely raised by the Applicant-Appellant in his Application for Post Conviction Relief and by a timely notice of appeal.

Standard of Review: Post-conviction proceedings, including summary dismissal of the applications are generally reviewed for errors of law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). *See also Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

In determining whether summary disposition is warranted, the moving party has the burden of establishing the material facts are undisputed and the facts are examined in the light most favorable to the nonmoving party. *Lopez-Penalosa v. State*, 804 N.W.2d 537, 540-541 (Iowa Ct. App. 2011). Upon the filing of a motion to dismiss the rules of summary judgment apply. *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002).

Argument: The basis for granting the State’s Motion to Dismiss is the trial court’s conclusion that the application clearly falls outside the three year statute of limitations set forth in Iowa Code Section 822.3. The trial court acknowledges that there is an exception to the statute of limitations but concludes that the “core basis” of the Application does not meet the exceptions set forth in the code section. (P. 24)

The trial court presents no findings of fact and cites no specific authority for its ruling but references only the “authorities cited by Respondent in its motion.” (P. 24) If one reviews the State’s motion the trial court is apparently talking about the case of *Dible v. State*, 557 N.W.2d 881 (Iowa 1996). *Dible* is a case with questionable value as precedent and whose principles need to be revisited and reexamined. Not only was this case later abrogated on other grounds by *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), but it was a split decision with four dissents.

Dible dealt with an Applicant who filed a post-conviction petition for relief that was dismissed for failure to prosecute. The failure to properly present the application for decision rested with the post-conviction attorney. The Applicant subsequently filed another application for post-conviction relief citing the ineffective assistance of post-conviction counsel. The Iowa Supreme Court held that since the later application fell outside the 3 year period for filing, the application was time barred. The majority concluded that ineffective assistance of counsel claim against a post-conviction

attorney did not meet the exceptions under Iowa Code Section 822.3 and was therefore time barred.

The dissent, authored by then Chief Justice McGiverin, concluded that such a narrow interpretation of Iowa Code Section 822.3 effectively denied Dible any opportunity have his claims heard. Chief Justice and three other Justices concluded that such a bright line rule as the majority was attempting to establish led to an unfair result.

In the case at bar we have the same dilemma. In Allison's first application he set forth the grounds for relief stating that his trial counsel was ineffective in failing to take action when a juror showed obvious bias in the case. The post-conviction judge was presented with evidence from two different people that a female juror demonstrated bias during the trial proceedings. The trial judge concluded that this testimony was insufficient because the witnesses could not identify the juror by name or demonstrate the extent of the relationship and thus could not show bias.

Allison in this post-conviction application complains that the failures cited by the trial court are the direct result of post-conviction counsel's failures to provide effective representation. Specifically Allison complains that his attorney failed to do even a cursory investigation to locate the juror in question. Given his incarceration, Allison was in no position to conduct an investigation and had to rely on his attorney

which he asserts failed in this fundamental duty.

The Applicant-Appellant would assert that his first claim, timely filed, was never given a proper opportunity to be heard because his counsel failed to perform essential duties. To deny him relief now merely because he is two months shy of the three year limit is unjust and not what was contemplated under Iowa Chapter 822.

II. The trial court erred in dismissing the additional claims that were exceptions to the time limitations of Iowa Code Section 822.3

Nature of Claim: On March 11, 2016, Allison filed an Amended Petition for Post-Conviction Relief which asserted two grounds for relief not barred by the 3 year statute of limitations imposed by Iowa Code Section 822.3

Preservation of Error: This argument was timely raised by the Applicant-Appellant in his Amended Application for Post Conviction Relief and by a timely notice of appeal.

Standard of Review: The standard has been adequately set forth above and is adopted herein. In summary, to grant a Motion to Dismiss in this context there can be no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002).

Argument: In the amended petition, the Allison asserts through counsel that he has newly discovered evidence and that there has been a change in the law that would

have affected the admissibility of some of the evidence offered against him. The State never objected to the amendment of the petition nor addressed the claims by Allison. The addition of these uncontested grounds for relief should have prevented a summary disposition of his petition. The Court did not address the amended claims other than to say that Allison's "core claim" (*i.e.* ineffectiveness of post-conviction counsel) was barred by the time restrictions of Iowa Code Section 822.3. (P. 24)

Allison's assertions that he has grounds which are not time barred are at this point uncontested. He is entitled to conduct the necessary preparation to present these items to the court on their merits. Iowa Code § 822.7 provides for a trial on the merits of a post-conviction relief application. It also provides that: (1) a record of the proceedings shall be made and preserved; (2) all rules and statutes applicable in civil proceedings including pretrial and discovery procedures are available to the parties; (3) the court may receive proof of affidavits, depositions, oral testimony, or other evidence; and (4) the court may order the applicant brought before it for the hearing. Additionally, 822.7 requires that after the hearing, the court shall make specific findings of fact and conclusions of law relating to each issue presented and then enter an appropriate order.

In the case at bar the court neither permitted the necessary preparation permitted under the statute nor did the trial court make specific findings of fact and conclusions

of law as to each claim as required under the statute. The issues raised by Allison in the Amended Petition had no opportunity to be investigated, or presented for evidentiary hearing.

CONCLUSION

For the reasons set forth above the Appellant is entitled to an evidentiary hearing on the merits of his claim. The trial court's ruling granting the State's Motion to Dismiss should be set aside and the case returned to the trial court to permit it to proceed to evidentiary hearing.

ORAL ARGUMENT

The Appellant request oral argument in the above-entitled matter.

Respectfully Submitted,

/s/ Robert E. Breckenridge

R. E. Breckenridge

BRECKENRIDGE LAW P.C.

345 North Court Street

Ottumwa, IA 52501-0616

Tel: (641) 684-6097

Fax: (641) 684-0209

reb@ottumwalaw.net

ATTORNEY FOR APPLICANT-APPELLANT