

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
APPLICATION FOR FURTHER REVIEW**

**R. E. Breckenridge
BRECKENRIDGE LAW, P.C.
345 North Court Street
P.O. Box 616
Ottumwa, Iowa 52501-0616
Telephone: (641) 684-6097
Telecopier: (641) 684-0209
reb@ottumwalaw.net
ATTORNEY FOR APPLICANT-APPELLANT**

QUESTION FOR REVIEW

The Court of Appeals has entered a decision in which there is an important question of changing legal principle, namely that ineffective assistance of postconviction counsel should be an exception to the limitation to commence proceedings established in Iowa Code Section 822.3.

TABLE OF CONTENTS

Page:

Question for Review..... 2

Table of Contents..... 3

Statement supporting further review..... 4

Brief..... 5

Decision of the Court of Appeals..... 12

STATEMENT SUPPORTING FURTHER REVIEW

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. The Court of Appeals, citing available precedent, declined to address this argument stating that it was the “task” of the Iowa Supreme Court to determine if precedent should no longer be followed.

BRIEF IN SUPPORT OF APPLICATION FOR FURTHER REVIEW
(All references are to the Appendix)

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 appealed and his case was referred to the Iowa Court of Appeals. *State v. Allison*, 2012 Iowa App. LEXIS 535 (Ia App. 2012) 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 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)

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) The Court of Appeals

issued their decision on February 22, 2017, finding that allegations of ineffective assistance of post conviction counsel would still needed to be filed within the three year limitation imposed by Iowa Code Section 822.3.

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 are exceptions 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 who’s principles needs 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 McGivern, 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.

Clearly the legislature intended for a defendant to have access to post conviction relief if such relief was warranted. A hearing is afforded and counsel appointed. Yet if the post-conviction attorney is ineffective, the chances that a further application could be filed in time are almost non-existent. In the case at bar, Allison's hearing was delayed while the Court demand a partial payment of filing fees. All the while the three year clock is apparently ticking. As pointed out by former Chief Justice McGivern, why grant the right if no reasonable means to exercise the right is afforded.

The central argument advance by Allison in this appeal is that *Dible* should be overturned on the grounds that an exception to the limitation of Section 822.3 should exist when the applicant can prove ineffective assistance of his post-conviction

counsel. The Court of Appeals declined to address this argument. Instead the Court cited the available precedent and argued that the Supreme Court should be the one to address whether precedent should now be changed. To that end an application for further review is sought.

CONCLUSION

For all of the reasons cited, the Court should find that this matter is appropriate for review and upon such review conclude that ineffective assistance of counsel can be the basis for an exception to the three year limitations of Iowa Code Section 822.3.

Respectfully submitted,

BY: /s/ Robert E. Breckenridge

R. E. Breckenridge AT0001109

BRECKENRIDGE LAW, P. C.

345 North Court Street

P.O. Box 616

Ottumwa, Iowa 52501-0616

Telephone:(641)684-6097

Facsimile:(641)684-0209

reb@ottumwalaw.net

ATTORNEY FOR APPLICANT -
APPELLANT

CERTIFICATE OF SERVICE

The undersigned certifies a copy of this Application for Further Review was served by e-filing on the 13th day of January, 2017, upon the following person:

Clerk of Court
Iowa Supreme Court
111 E. Court Ave

Des Moines, Iowa

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa

/s/ Robert Breckenridge
R. E. Breckenridge

CERTIFICATE OF COMPLIANCE

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this application has been prepared in a proportionally spaced typeface using Times New Roman in 14 font and contains 1428 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4).

/s/ Robert Breckenridge

March 13, 2017

IN THE COURT OF APPEALS OF IOWA

No. 16-0764
Filed February 22, 2017

BRIAN KELLY ALLISON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Keokuk County, Myron Gookin,
Judge.

Brian Allison appeals the summary dismissal of his second application for
postconviction relief. **AFFIRMED.**

Robert E. Breckenridge of Breckenridge Law, P.C., Ottumwa, for
appellant.

Thomas J. Miller, Attorney General, and Kelli Huser, Assistant Attorney
General, for appellee State.

Considered by Danilson, C.J., and Vogel and Vaitheswaran, JJ.

DANILSON, Chief Judge.

This court affirmed Brian Allison's convictions on three counts of third-degree sexual abuse. *State v. Allison*, No. 11-0774, 2012 WL 2819324 (Iowa Ct. App. July 11, 2012). *Procedendo* issued on September 6, 2012.

In his first application for postconviction relief (PCR), Allison claimed trial counsel was ineffective in not adequately investigating whether a juror was biased. That claim was rejected by the district court, which ruling we affirmed on appeal. *Allison v. State*, No. 14-0925, 2015 WL 5278968, at *2 (Iowa Ct. App. Sept. 10, 2015) (finding Allison had failed to carry his burden of proof to show defense counsel breached an essential duty).

On November 5, 2015, Allison filed a second PCR application, claiming both first postconviction counsel and subsequent appellate counsel were ineffective. The State moved to dismiss the application as having been filed more than three years after *procedendo* issued and, therefore, beyond the limitations period of Iowa Code section 822.3 (2015).¹ Allison resisted, filing an amended PCR application in which he also asserted:

b. That there exists evidence of material facts, not previously presented or heard, that requires vacation of the conviction and sentence in the interest of justice. The Applicant has reason to believe that the victim and other witnesses have recanted their testimony thus taking away the factual basis for his conviction.

c. That changes in the law and particularly the admissibility of expert testimony that tends to invade the providence of the jury

¹ Section 822.3 provides PCR 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. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.

and attempting to bolster the credibility of child victims, would result in a change of verdict.

An unreported hearing on the motion to dismiss was held. The PCR court dismissed the action, noting the claim of ineffective assistance of PCR counsel is not a “ground of fact” within the exception to the three-year statute of limitations for postconviction actions. See *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996), abrogated on other grounds by *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003); see also *Whiteside v. State*, No. 15-0534, 2016 WL 4051578, at *3 (Iowa Ct. App. July 27, 2016); *Griggs v. State*, No. 15-0510, 2016 WL 2746051, at *1 (Iowa Ct. App. May 11, 2016); *Bergantzel v. State*, No. 15-1273, 2016 WL 2745065, at *2 (Iowa Ct. App. May 11, 2016); *Everett v. State*, No. 12-1032, 2014 WL 3749338, at *2 (Iowa Ct. App. July 30, 2014). Stating “[t]here is no question this second postconviction action was filed outside the three-year statute of limitations,” the PCR court dismissed the action.

Allison appeals, arguing *Dible* is of “questionable value as precedent” and “needs to be revisited and reexamined.” That task is not ours. See *State v. Miller*, 841 N.W.2d 583, 584 n.1 (Iowa 2014) (“While we reverse the judgment of the district court and vacate the decision of the court of appeals, we acknowledge both courts properly relied on our applicable precedent. Generally, it is the role of the supreme court to decide if case precedent should no longer be followed.”); *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) (“If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”); *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) (“We are not at liberty to overturn Iowa Supreme Court precedent.”).

Allison also contends the PCR court did not address his additional claims in his amended PCR application asserting new facts and law. Even ignoring the fact that Allison's failure to seek a ruling on this claim in the district court waives his right to raise it here,² his vague and unsupported statements are insufficient to avoid a motion to dismiss. He does not even assert the new facts and law "could not have been raised within the applicable time period." See Iowa Code § 822.3. We affirm the dismissal of the untimely PCR application.

AFFIRMED.

² See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("[I]ssues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); see also *LaMasters v. State*, 821 N.W.2d 856, 863-64 (Iowa 2012) (noting Iowa Rule of Civil Procedure 1.904(2) "is one means, but not the only means, for requesting" a ruling on a matter in order to preserve error).



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
16-0764	Allison v. State

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