

IN THE COURT OF APPEALS OF IOWA

No. 3-1140 / 12-2012
Filed January 9, 2014

BENNIE MAE HARRINGTON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, DeDra L. Schroeder, Judge.

Applicant Bennie Mae Harrington appeals from a ruling denying her request for postconviction relief. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee State.

Considered by Danilson, C.J., Potterfield, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

GOODHUE, S.J.

Applicant Bennie Mae Harrington appeals from a ruling entered September 24, 2012, denying her request for postconviction relief. The applicant's claim lacks specificity, but makes the general claim that the postconviction trial court erred in denying her claim for the relief requested. We affirm the district court.

I. Background Facts and Proceedings

After a bench trial the applicant was convicted of first-degree murder on April 22, 2003. She was sentenced on May 19, 2003. She appealed and her conviction was affirmed. *Procedendo* issued on June 2, 2004. See *State v. Harrington*, No. 03-0824, 2004 WL 360508 (Iowa Ct. App. Feb. 27, 2004). We preserved the applicant's claim of ineffective assistance of counsel for a possible postconviction relief proceeding. The applicant petitioned for postconviction relief, alleging ineffective assistance of counsel, but the request was denied. The applicant appealed, but the postconviction trial court's decision was affirmed. See *Harrington v. State*, No. 05-1351, 2007 WL 1062831 (Iowa Ct. App. Apr. 11, 2007). The current application for postconviction relief was filed April 15, 2011.

II. Error Preservation

The State concedes that error has been preserved by the district court's ruling referencing *State v. Edman*, 444 N.W.2d.103, 106 (Iowa Ct. App. 1989), although the State contends that Harrington has broadened the issue on appeal.

III. Standard of Review

Postconviction relief proceedings are law actions and are ordinarily reviewed for errors of law. *Manning v. State*, 654 N.W.2d 555, 558-59 (Iowa 2002).

IV. Discussion

Iowa Code section 822.3 (2011) provides that all postconviction relief applications, except for applications not relevant to this proceeding, must be filed within three years after the date the conviction is final, or in the event of an appeal, the date the writ of procedendo issued. An exception to the limitations period applies if a ground of fact or law exists that could not have been raised within the applicable time period. Iowa Code § 822.3. Expiration of the three-year statute of limitations is obvious. The applicant seeks relief under the “ground of fact or law that could not have been raised” exception.

The postconviction court stated, “The Court has reviewed the claims made by Ms. Harrington during her testimony in conjunction with reviewing the prior records of these cases and finds that the facts presented by Ms. Harrington were facts known to her at the time of trial in April of 2003” In fact, the thrust of the applicant’s testimony in the postconviction relief hearing was her contention that trial counsel and appellate counsel had not pursued all of the possible defenses based on the information which she had communicated to counsel at the time of trial. Ineffective assistance of trial counsel was the basis of her prior postconviction-relief application and it was denied. Ineffective assistance of postconviction counsel does not constitute a “ground of fact” exception to the three-year statute of limitations. *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa

1994). The applicant has failed to point out any “ground of fact” overlooked by the postconviction court, or otherwise present, that could not have been raised at the time she was tried on the underlying charge.

The applicant in her brief contends the postconviction court used an incorrect standard in determining whether or not postconviction relief should have been granted. The applicant correctly contends that to grant relief, the nexus between the asserted fact and the challenged conclusion need not be of a type that would likely change the outcome of the underlying criminal case, but only must be of the type that has the potential to qualify as material evidence for purposes of a substantial claim. *See Harrington v. State*, 659 N.W.2d 509, 520-21 (Iowa 2003).

The postconviction trial court did not consider the issue of “nexus,” nor was it required to do so. Instead, it correctly found that no “ground of fact” that could not have been raised in the underlying criminal trial was presented to the court. That finding is dispositive. In contrast, in the *Harrington* case, on which the applicant relies, there were undisclosed police reports and recantation evidence discovered after that trial was held and the verdict reached. *See id.* at 517-19. A finding of a “ground of fact” that could not have been raised within the applicable time period caused the existence of a nexus to become an issue in *Harrington*. *See id.* at 521. Even if postconviction counsel were ineffective for failing to present evidence of a “ground of fact,” the petition fails because it was untimely filed.

AFFIRMED.