IN THE COURT OF APPEALS OF IOWA

No. 0-005 / 08-1102
Filed February 24, 2010

HARRIS KOLE EVANS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Appeal from the denial of postconviction relief. **AFFIRMED.**

Jesse A. Macro Jr. of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and Wayne Reisetter, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Harris Evans appeals from the district court's summary disposition and dismissal of his second application for postconviction relief. He contends the court erred in granting the summary disposition (1) based on its conclusion that *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), did not apply retroactively to his application and (2) based on its finding his proffered evidence did not meet the standard for newly-discovered evidence. We affirm.

Background. In 1992 appellant was convicted of two counts of first-degree murder and one count of attempted murder. His convictions and sentences were upheld on direct appeal in 1993. He filed an application for postconviction relief that was denied. That denial was upheld on appeal in 1999. In September of 2006 he filed a second application for postconviction relief, alleging the change in the felony-murder rule announced in *Heemstra* as the basis to overturn his murder convictions. In December of 2007 he filed an amended application, adding an allegation of newly-discovered evidence. The State filed a motion for summary disposition of the application.

The matter was heard in May of 2008. In June, the district court filed its ruling granting the State's motion for summary disposition and dismissing the application. The court determined that the allegation of newly-discovered evidence raised a "ground of fact" that could not have been raised previously, so the application was not barred as untimely. *See* Iowa Code § 822.3 (2007); *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Concerning the change in the felony-murder rule, the court noted that the supreme court stated explicitly

in *Heemstra* that the rule of law announced "shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court." *Heemstra*, 721 N.W.2d at 558. The court concluded *Heemstra* did not apply to this case because "it has no retroactivity." Concerning the newly-discovered evidence claim, the court determined the evidence all was inadmissible hearsay, so could not have changed the result of the trial. In the alternative, the court also concluded much of the evidence would not entitle appellant to relief because it merely brought a witness's credibility into question and simply served to impeach the witness. *See Harrington*, 659 N.W.2d at 516.

Scope and Standards of Review. Postconviction relief actions are law actions generally reviewed for errors at law. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Summary disposition of a postconviction application is authorized "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6. Disposition under this provision is similar to the summary judgment procedure set forth in Iowa Rule of Civil Procedure 1.981(3). *Manning v. State*, 654 N.W.2d 555, 559-60 (Iowa 2002).

Appellant alleges a violation of his constitutional rights; therefore, we review his constitutional claim "'in light of the totality of the circumstances and the record upon which the postconviction court's ruling was made.'" *Holm v. Iowa*

Dist. Ct., 767 N.W.2d 409, 414 (Iowa 2009) (quoting *Risdal v. State*, 573 N.W.2d 261, 263 (Iowa 1998)). This is functionally equivalent to de novo review. *Id.*

Due Process. Appellant contends the district court erred in concluding *Heemstra* did not apply. He contends not all aspects of the *Heemstra* decision are limited by the declaration it is not to be applied retroactively. *See Heemstra*, 721 N.W.2d at 558 ("The rule of law announced in this case . . . shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.").

After appellant had filed his proof brief in this appeal, the supreme court issued its decision in *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009). In it, the court addressed the same constitutional claim of a due process violation in not applying *Heemstra* retroactively. *Goosman*, 764 N.W.2d at 542-45. The *Heemstra* decision was "substantive rather than procedural in nature." *Id.* at 542. The court determined the "ruling in *Heemstra* clearly involved a change in law and not a mere clarification." *Id.* at 545. "As a result, the limitation of retroactivity announced in *Heemstra* . . . did not violate federal due process . . . ." *Id.*

Appellant's constitutional claim is the same as in *Goosman*. We need not restate the detailed analysis from *Goosman* in this decision. On our de novo review, we determine the district court did not err in concluding *Heemstra* did not apply retroactively to appellant's case. *See id*. We affirm the summary disposition of this postconviction action on this ground.

Newly-Discovered Evidence. Appellant also contends the court erred in determining his proffered new evidence did not meet the standards for newly-

discovered evidence. Appellant submitted an affidavit from a jail chaplain concerning the chaplain's contact with a co-defendant and two other individuals and their statements to the chaplain. The district court concluded that all the statements to the chaplain were hearsay and inadmissible. The court further concluded that, even if admissible under an exception to the hearsay rule, the statements of the co-defendant merely served to impeach his credibility.

Iowa Code section 822.2(1)(d) requires an applicant to establish four elements before a new trial will be granted based on newly-discovered evidence. *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. The affidavit from the jail chaplain meets the first two elements. Because the evidence concerning the co-defendant's testimony, if admissible, only served to impeach, it does not support the grant of a new trial. The statements of the other two individuals are inadmissible hearsay. Inadmissible evidence cannot change the result of a new trial. We conclude the district court did not err in denying the postconviction application on this ground.

Because appellant's constitutional due process rights were not violated by the district court's refusal to apply *Heemstra* retroactively, and because his newly-discovered evidence did not justify granting him a new trial, we affirm the district court's dismissal of his postconviction relief application.

AFFIRMED.