**IN THE COURT OF APPEALS OF IOWA**

No. 0-200 / 08-1157
Filed April 8, 2010

**THOMAS BENNETT,**
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Thomas Bennett appeals from the denial of his second application for postconviction relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey Kirk Noble, Assistant County Attorney, for appellee State.

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

**DOYLE, J.**

Thomas Bennett appeals from the denial of his second application for postconviction relief. He contends the district court erred in denying his application on the issues of newly discovered exculpatory evidence and non-retroactivity of *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). Bennett argues that a codefendant's October 2007 affidavit, which contradicts the codefendant's prior statements concerning Bennett's involvement in the murder, entitles him to a new trial. He also argues that *Heemstra* should apply retroactively to his case under the theories of equal protection and separation of powers.[1]

***I. Background Facts and Proceedings*.**

A jury convicted Bennett of first-degree murder in 1999, and the court sentenced him to life in prison. On direct appeal, this court affirmed the conviction and sentence. *State v. Bennett*, No. 99-0726 (Iowa Ct. App. Nov. 8, 2000). Bennett subsequently filed a postconviction relief application contending, among other things, that his counsel was ineffective. The application was dismissed as untimely.

On August 23, 2007, Bennett filed his second application for postconviction relief alleging his conviction and sentence was in violation of the Constitution of the United States or the Constitution or laws of Iowa. He specifically argued his federal due process rights were violated when the Iowa Supreme Court ruled that its *Heemstra* decision was not to be applied

[1] *Heemstra* holds that where the act causing willful injury is the same act that caused the victim's death, the former merges with murder and cannot serve as a predicate felony for felony-murder purposes. *Heemstra,* 721 N.W.2d at 558.

retroactively.[2] *See Heemstra*, 721 N.W.2d at 558 ("The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes 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."). Later, Bennett's counsel filed an amended application on Bennett's behalf adding the claim of newly discovered evidence. In his brief to the postconviction court, Bennett further asserted non-retroactivity of *Heemstra* violated his equal protection rights under the United States Constitution. The State responded, arguing among other things that Bennett's claims were barred by the statute of limitations.

The district court addressed each ground raised by Bennett and denied relief. Bennett appeals.

***II. 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). Bennett alleges a violation of his constitutional rights; therefore we review his constitutional claims "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*.

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[2] *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009), held that the limitation of retroactivity announced in *Heemstra* to cases on direct appeal where the issue has been preserved did not violate federal due process. The *Goosman* decision was filed after Bennett filed his application and after the postconviction court entered its ruling, but before Bennett filed his appellate brief. He therefore makes no due process claim before this court.

***III. Discussion*.**

***A. Newly Discovered Evidence Issue*.**

Bennett requested vacation of his conviction under Iowa Code section 822.2(1)(d) (2007), which provides relief may be granted when: "There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Iowa Code section 822.3 requires an application for postconviction relief be filed within three years from the date of procedendo in the event of an appeal. Bennett's application was filed more than three and a half years after the limitations period expired. Thus, Bennett's present action is time barred unless an exception applies. To avoid the problem, Bennett relies on that part of section 822.3 providing that the three-year statute of limitations "does not apply to a ground of fact or law that could not have been raised within the applicable time period." Bennett's claim is founded upon an October 15, 2007 affidavit by codefendant John M. Molloy in which Molloy recants his previous statements implicating Bennett's involvement in the murder. If Molloy's affidavit does not meet the test for newly discovered evidence, Bennett's claim is barred by the statute of limitations.

To prevail on his newly discovered evidence issue, Bennett was required to show:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

*Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003) (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)). After discussing factors one and two, the postconviction court found as a matter of law that Molloy's affidavit "with a new version of the crime is not newly discovered evidence." We agree.

The postconviction court summed up the matter succinctly as follows:

> The evidence Bennett points to as "newly discovered" is the statement of John Molloy put in the form of an affidavit in October 2007. Molloy's involvement in the murder was known at the time of Bennett's trial. Molloy, Bennett and Vang all told various versions of what happened on the date Mr. Spradau was killed. Bennett knew that Molloy had admitted to the police that he (Molloy) was the shooter. Molloy was never called as a witness in Bennett's trial. Molloy was tried and convicted before Bennett went to trial. Bennett knew of Molloy's involvement in the murder, and knew that Molloy could exonerate him. Bennett asserts that Molloy would have exercised his Fifth Amendment right against self-incrimination if he had been called as a witness.

Because Bennett never called Molloy to testify at Bennett's trial, it is speculative as to whether or not Molloy would have exercised his Fifth Amendment right against self-incrimination. Nevertheless, even if a codefendant is called as a witness and exercises his or her Fifth Amendment right that does not make that codefendant's later exculpatory statements newly discovered evidence. *Jones*, 479 N.W.2d at 274 ("[T]he mere fact that [the witness] earlier claimed his fifth amendment privilege against self-incrimination does not mean that his later surrender of that privilege rises to the level of newly discovered evidence."); *Jones v. Scurr*, 316 N.W.2d 905, 910 (Iowa 1982) ("[E]xculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence . . . ."). It is clear Bennett knew of the general nature of Molloy's testimony at the time of Bennett's trial. The fact that Molloy may have made his

testimony unavailable through the exercise his Fifth Amendment right, does not make his later exculpatory affidavit newly discovered evidence. Other than the fact that Bennett never placed Molloy in a position to exercise the Fifth Amendment privilege, Bennett presents us with a situation not unlike those presented in *Scurr* and *Jones*. In those cases postconviction relief was denied where the defendants asserted that post-trial exculpatory statements by already convicted codefendants constituted "newly discovered evidence."

Additionally, Bennett did not exercise due diligence in attempting to secure Molloy's testimony as Molloy was not subpoenaed or called to testify at Bennett's trial, nor was he requested to give a deposition. *Scurr*, 316 N.W.2d at 910 n.1.

We conclude Molloy's affidavit does not meet the test for newly discovered evidence and the postconviction court made no error in so finding.

Even if the exculpatory statement of Molly was found to be newly discovered, a new trial would probably not change the result in this case. Again, the postconviction court summed up the matter succinctly as follows:

> Bennett argues that Molloy's latest version of the murder would have changed the outcome of Bennett's trial. Molloy told multiple versions of what happened the night of the murder and this is just one more. Bennett argues that Molloy's latest version explains the "real plan" to murder Mr. Spradau and to show Bennett had no motive to be involved. This argument fails to note that Bennett testified at his own trial that he had no reason to want to rob or kill Mr. Spradau. Bennett explained to the jury he was not involved in the planning or execution of the murder. The issue of Bennett's motivation or lack thereof to commit the crime was presented to the jury. Clearly, the jury did not believe him. Bennett told various stories to the police which make no sense if he was in fact completely innocent. The evidence of Bennett's changing stories and his lack of credibility do not change even with Molloy's latest version of the incident.
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> In considering the impact of Molloy's latest testimony, the court also considers the strength of the other evidence against

> Bennett. The third co-defendant, Tony Vang, clearly implicated Bennett in the planning and execution of the crime. While Vang also told the police more than one version of what happened, his testimony in the Molloy and Bennett trials was fairly consistent. Vang and Molloy each implicated themselves as having a role in the murder, so Bennett's testimony that the co-defendants implicated him (Bennett) in order to exonerate themselves is not believable. The evidence regarding the shell casings and gun indicate that the gun and ammunition was in the bedroom shared by Bennett and Molloy sometime prior to the murder. By his own admission, Bennett was at the scene of the murder when it happened, and yet he told a series of stories to the police which were not true. There is strong evidence against Bennett. Even with Molloy's latest testimony, the outcome of Bennett's trial would not have been different.

We agree with the assessment by the postconviction court.

Since Molloy's affidavit fails to meet factors set forth in *Harrington*, the postconviction court made no error in concluding Bennett cannot prevail on his newly discovered evidence claim.

***B. Retroactivity of* Heemstra *Issue*.**

In his appellate brief, Bennett argues the failure to apply *Heemstra* retroactively to his case violates his equal protection rights under the Fourteenth Amendment of the United States Constitution and Article I, section 6 of the Iowa Constitution, and also violates the separation of powers clause of article III, section 1 of the Iowa Constitution.[3] Bennett did not raise the separation of powers issue before the postconviction court, nor did the court address such a claim. Therefore error was not preserved on this issue. *State v. Mitchell*, 757

[3] Because the applicant in *Goosman* did not raise equal protection and separation of powers in his application for postconviction relief, and the district court did not rule upon the issues, the supreme court declined to address those issues. *Goosman*, 764 N.W.2d at 545. Thus, resolution of the merits of those issues remains for another day, but not today as we find Bennett's claim time-barred by the operation of section 822.3.

N.W.2d 431, 435 (Iowa 2008) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal."). Similarly, Bennett did not raise the equal protection argument under the Iowa Constitution before the postconviction court. The postconviction court found that "the Iowa Supreme Court's decision that *Heemstra* does not apply retroactively does not violate Bennett's constitutional rights." Because Bennett did not raise the Iowa constitutional equal protection issue before the postconviction court, we read the court's findings to be limited to the constitutional rights Bennett did raise under United States Constitution. We therefore conclude an equal protection issue under the Iowa Constitution was not addressed by the postconviction court, thus error was not preserved on this issue. *Id*.

Whether or not Bennett's constitutional issues were properly preserved, we conclude they are all barred by the applicable statute of limitations. Iowa Code section 822.3 requires an application for postconviction relief to be filed within three years of the date of procedendo in the event of an appeal. Bennett did not file his second application for postconviction relief until August 2007, three and a half years after the limitations period expired.

The exception in section 822.3 for "ground[s] of fact or law that could not have been raised within the applicable time period" is of no help to Bennett. "[T]he objective of the escape clause of section 822.3 is to provide relief from the limitation period when an applicant had 'no opportunity' to assert the claim before the limitation period expired." *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994). The "statute compels the conclusion that exceptions to the time bar would be, for example, newly-discovered evidence or a ground that the applicant

was at least not alerted to in some way." *Wilkins v. State*, 522 N.W.2d 821, 824 (Iowa 1994).

The rule that allowed the use of willful injury as a predicate felony for felony-murder purposes began with *State v. Beeman*, 315 N.W.2d 770, 776-77 (Iowa 1982). Prior to Bennett's 1999 conviction, the validity of the rule was criticized and litigated. *See Heemstra*, 721 N.W.2d at 554-58. Bennett could have done the same during his criminal trial, on direct appeal, or by timely application for postconviction relief, but he did not, nor does he now argue he had no opportunity to do so. The legal and factual underpinnings of Bennett's claims were in existence during the three-year period and were available to be addressed in Bennett's appellate and postconviction proceedings. Accordingly, we conclude Bennett's equal protection and separation of powers arguments regarding the retroactivity of *Heemstra* are all time-barred under section 822.3.

***IV. Conclusion*.**

For all the above reasons, we affirm the district court's denial of Bennett's application for postconviction relief. *See DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002) (stating we may affirm a district court ruling on a proper ground urged by the successful party but not relied upon by the court).

**AFFIRMED.**