IN THE COURT OF APPEALS OF IOWA

No. 0-266 / 07-0470
Filed June 16, 2010

DENISE CLEONE RHODE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Martha L. Mertz, Judge.

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

Jon Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins and Virginia Barchman Assistant Attorneys General, and Bryan Tingle, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Denise Rhode appeals from the district court order dismissing her second application for postconviction relief. She contends the postconviction court erred because the district court at her original trial "was without jurisdiction to enhance second-degree murder to first-degree murder" under the statutory elements in Iowa Code section 707.2(2) (1989), because a single act cannot be both the act of murder and the predicate forcible felony to prove felony murder, and the supreme court in her direct appeal "illegally imposed an ex post facto construction" of the statutory term "serious injury" to include death. She also contends the postconviction court erred because a "new evidentiary legal standard" concerning expert opinion on medical causation in fact presents "a material ground of law not previously presented or heard" that requires vacation of her conviction and sentence.

I. Procedural Background.

Rhode was convicted in 1990 of felony murder by child endangerment for the 1989 death of her infant nephew. Her conviction was affirmed on direct appeal. *See State v. Rhode*, 503 N.W.2d 27, 30 (Iowa Ct. App. 1993). Procedendo issued on July 7, 1993, establishing a July 7, 1996 deadline for applying for postconviction relief. *See Rhode v. State*, No. 02-2003 (Iowa Ct. App. Jan. 28, 2004). Her application for habeas corpus relief was denied in April 1994, a denial the Eighth Circuit affirmed in 1996. *Id.*; *see also Rhode v. Olk-Long*, 84 F.3d 284, 290 (8th Cir. 1996), *cert. denied Rhode v. Long*, 519 U.S. 892, 117 S. Ct. 232, 136 L. Ed. 2d 163 (1996).

Rhode filed her first application for postconviction relief on July 31, 2000, claiming newly-discovered evidence. *Rhode v. State*, No. 02-2003 (Iowa Ct. App. Jan. 28, 2004). The district court determined the claim was time-barred and insufficient on the merits; the Iowa Court of Appeals affirmed. *Id.* The Supreme Court denied further review. *Id.*

Rhode filed the current application for postconviction relief action on May 4, 2004. She amended it on September 7, 2004, and again on May 26, 2005. The State moved for summary disposition of the application. The court sustained the motion as to four of the seven claims raised, including the claim concerning "one act constituting the underlying felony for the purposes of a conviction of felony murder." Rhode raised her remaining claims at hearings over several days from March to August of 2006. In its February of 2007 ruling, the court denied Rhode's application on the merits of the two newly-discovered-evidence claims. The court also noted the new decision in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) that overruled the previous interpretation of the felony murder rule. Consequently, the court reexamined the issue it dismissed in its summary disposition order. The court concluded the rule announced in *Heemstra* did not apply to Rhode because her direct appeal ended thirteen years before the *Heemstra* decision. The court further concluded:

> Applicant has been neither diligent nor vigilant in presenting or preserving her claims. Her claims are time-barred, procedurally defaulted, and waived, besides not meeting the criteria for newly-discovered evidence. Rhode is not entitled to a new trial on any of the grounds she asserted in her application.

II. Scope of Review.

> Generally, an appeal from a denial of an application for postconviction relief is reviewed for correction of errors at law. However, when the applicant alleges constitutional error, review is de novo "in light of the totality of the circumstances and the record upon which the postconviction court's rulings was made."

Goosman v. State, 764 N.W.2d 539, 540 (Iowa 2009) (citations omitted).

III. Merits.

Of the seven claims raised in her postconviction application, Rhode raises only two on appeal: (1) that the *Heemstra* decision's change in the felony-murder rule should apply to her, so the trial court "was without jurisdiction to enhance second-degree murder to first-degree murder" at the time of her conviction, and (2) that a new evidentiary legal standard concerning expert opinions on medical causation requires vacation of her conviction and sentence.

A. Felony Murder. Rhode contends the postconviction court erred in denying her relief because the *Heemstra* decision "did not consider the implications of due process, nor analyze the illegal impact [that] *State v. Beeman*, 315 N.W.2d 770 (Iowa 1982), had on the truth-finding process, nor on the allocation of the burden of proof on essential elements."

At the time Rhode murdered her nephew, murder in the first degree could be committed in several ways, including murdering a person "while participating in a forcible felony." Iowa Code § 707.2(2) (1989); *see also* § 707.1 (defining "murder" as killing another person "with malice aforethought either express or implied"). Rhode was convicted of both child endangerment, a forcible felony, and first-degree murder. *Rhode*, 503 N.W.2d at 30. In her direct appeal she argued, among other things, that the child endangerment conviction should have

merged with the elements of second-degree murder, "and therefore could not have been used to elevate the charge to first-degree murder." *Id.* at 40. The court of appeals concluded:

> Following statutory construction, the supreme court in *Beeman* held the legislature intended that felonious assaults may serve as the basis of a felony murder conviction. We find no reason to depart from existing law and precedent. The merger doctrine is inapplicable to Denise's convictions.

Id. (citation omitted).

In *Heemstra*, the supreme court overruled *Beeman* and its progeny "insofar as they hold that the act constituting [a forcible felony] and also causing the victim's death may serve as a predicate felony for felony-murder purposes." *Heemstra*, 721 N.W.2d at 558. The postconviction court recognized that the supreme court, in *Heemstra*, "adopted an interpretation of the felony-murder rule consistent with [Rhode's] espoused view." However, the postconviction court also understood that *Heemstra* "is not retroactive in cases such as this and, so, does not apply to this applicant." *See id.* (noting the change "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").

Rhode's arguments concerning the "illegal" effect of the *Beeman* case, the appellate court's "illegal" ex post facto statutory construction, felony murder elements, and shifting burden of proof all are attempts to argue the effects of *Heemstra* are retroactive. She contends the *Heemstra* decision "did not consider the implications of due process." She alleges she "presents a substantive federal due process claim unaddressed in *Heemstra*." Although Rhode is correct that the *Heemstra* decision does not address the due process implications of its

prospective-only application, our supreme court extensively analyzed the federal due process claim in *Goosman v. State*, 764 N.W.2d 539, 542-45 (Iowa 2009), and determined, "Our ruling in *Heemstra* clearly involved a change in law and not a mere clarification. . . . As a result, the limitation of retroactivity announced in *Heemstra* . . . did not violate federal due process . . . ." *Goosman*, 764 N.W.2d at 545. We conclude the analysis and result in *Goosman* controls the outcome in the case before us. The postconviction court properly determined the decision in *Heemstra* does not open any avenue of relief for Rhode. We affirm the dismissal of all of Rhode's claims relating to a change in the law or its effect on her trial or direct appeal.

B. New Evidentiary Legal Standard. Rhode contends "a new evidentiary legal standard" has emerged since her trial, which is "a material ground of law not previously presented or heard that requires vacation" of her conviction and sentence. *See* Iowa Code § 822.3 (2005) (allowing postconviction applications outside the three-year limitation for "a ground of fact or law that could not have been raised within the applicable time period"). The postconviction court analyzed her claim:

> The applicant cites *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202 (8th Cir. 2000), an Eighth Circuit Court of Appeals decision, to support her claim. In *Turner*, the Eighth Circuit applied a legal differential diagnosis analysis to exclude a treating physician's medical opinion on causation in a personal injury action. The federal Court of Appeals, applying Missouri law, excluded the opinion testimony, because the doctor failed to "rule out all other possible causes" for the patient's condition. 229 F.3d at 1208. Rhode asserts the Turner decision establishes a new legal standard applicable here.
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> Iowa has not yet adopted the analysis used by the Turner court. Iowa courts have a liberal tradition in the admission of

> opinion evidence. *In re Detention of Palmer*, 691 N.W.2d 413, 419 (Iowa 2005). In Iowa, admissible expert opinion testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Iowa R. Evid. 5.702. The weight given to expert testimony is for the finder of fact to determine. The fact finder may reject none, some, or all of an expert's opinion. *State v. Venzke*, 576 N.W.2d 382, 384 (Iowa Ct. App. 1997).
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> The standard suggested by the applicant here is far more stringent than that adopted by our Supreme Court. It is not necessary in our state that the expert's opinion eliminates all other possible explanations for an injury in order to be admissible. As a result, the court rejects Rhode's claim that Turner imposes a new legal standard in Iowa.

The postconviction court correctly noted that our supreme court has not adopted the stringent approach set forth in *Turner*.[1] We decline the invitation to change Iowa's liberal approach to the admission of expert testimony. The postconviction court did not err in denying relief on this claim.

IV. Summary and Disposition. Despite Rhode's arguments to the contrary, *Goosman* controls the resolution of all of her claims based on the change in the law announced in *Heemstra*. The postconviction court did not err in rejecting her claims based on *Heemstra*. Iowa has not yet adopted the stringent approach to expert opinion testimony set forth in *Turner*. The postconviction court did not err in rejecting Rhode's claims based on a new evidentiary legal standard. We affirm the postconviction court's dismissal of Rhode's application for postconviction relief.

AFFIRMED.

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[1] In an unpublished decision, the Iowa Court of Appeals rejected another argument by the same appellate counsel that the standard set forth in *Turner* should be applied in Iowa.