IN THE COURT OF APPEALS OF IOWA

No. 0-542 / 09-1082
Filed August 25, 2010

CHESTER POLK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Nathan A. Callahan, District Associate Judge.

A postconviction relief applicant appeals the district court's dismissal of his second application for postconviction relief as untimely. **AFFIRMED.**

Shean D. Fletchall of Craig, Smith & Cutler, L.L.P., Eldora, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

A postconviction relief applicant appeals the district court's dismissal of his second application for postconviction relief as untimely.

I. Prior Proceedings

Chester Polk was found guilty of first-degree theft. On direct appeal of his judgment and sentence, we preserved an issue for postconviction relief. *See State v. Polk*, No. 04-0570 (Iowa Ct. App. Aug. 31, 2005). The appeal became final when procedendo issued on September 29, 2005.

Polk's first postconviction relief application was dismissed for failure to pursue it. *See* Iowa R. Civ. P. 1.944(1). Polk's attorney filed a motion to reconsider the dismissal and reinstate the action pursuant to rule 1.944(6). That motion was denied because it was filed more than six months after the case had been dismissed. *See* Iowa R. Civ. P. 1.944(6) ("Application for . . . reinstatement, setting forth the grounds therefore, shall be filed within six months from the date of dismissal."). Polk did not file a notice of appeal.

Polk's second application for postconviction relief was filed on November 25, 2008. The State moved to dismiss the application on the ground that it was not filed within the statutorily prescribed timeframe. The district court granted the motion.

On appeal, Polk claims his attorney in the first postconviction relief action provided ineffective assistance. He alternately contends that we should reinstate the first postconviction relief action.

II. Ineffective Assistance/Timeliness of Second PCR Application

Under Iowa Code section 822.3 (2007) all postconviction relief 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." As noted, procedendo in the direct appeal issued on September 29, 2005, and Polk's second postconviction relief application was not filed until November 25, 2008. As more than three years elapsed between the issuance of procedendo and the filing of the second postconviction application, the second postconviction application was untimely.

Polk alludes to an exception to the three-year limitations period for "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. He asserts that his attorney in the first postconviction relief action was ineffective in failing to meet time deadlines, thereby preventing the court's consideration of the merits of his first postconviction relief application. There are several problems with this argument.

First, Polk makes no argument relating to the untimely filing of his second postconviction application. Nor does he attempt to establish a nexus between the claimed ineffectiveness of his attorney in his first postconviction relief action and the untimely filing of his second postconviction relief application.

Second, even if Polk had made this argument, he acknowledges that ineffective assistance of postconviction counsel is not a "ground of fact" that would excuse the untimely filing of his second postconviction relief application. *See Dible v. State,* 557 N.W.2d 881, 885 (Iowa 1996) (stating if "the legislature

had intended that ineffective assistance of counsel serve as an exception to the statute of limitations, it would have said so"), *abrogated on other grounds by Harrington v. State*, 659 N.W.2d 509 (Iowa 2003).

Third, Polk's attempt to distinguish his ineffective-assistance-of-counsel claim from the one raised in *Dible* on the ground that his claim raises a constitutional violation is a distinction without a difference, as all ineffective-assistance-of-counsel claims are constitutionally grounded. *See Evitts v. Lucey*, 469 U.S. 387, 403–05, 105 S. Ct. 830, 840–41, 83 L. Ed. 2d 821, 834–36 (1985) (noting a defendant's right to the effective assistance of appellate counsel is grounded in the Due Process Clause's guarantee of fairness).

Finally, Polk fails to explain why his claim could not have been "raised within the applicable time period." Iowa Code § 822.3; *see also Whitsel v. State*, 525 N.W.2d 860, 864–65 (Iowa 1994) (rejecting a claim that the ineffectiveness of an attorney in one postconviction action can save a second postconviction relief application "from being time barred under section 822.3" because the claims could have been raised earlier). Polk was aware of his first postconviction attorney's claimed errors almost one year before the three-year limitations period expired and was aware of the substantive issue preserved by our court for postconviction proceedings immediately after our opinion was filed in 2005. *See State v. Polk*, No. 04-0570 (Iowa Ct. App. Aug. 31, 2005); *see also Dible*, 557 N.W.2d at 884 (stating the proper focus should be on whether the applicant knew, within the three-year period, of the underlying claims upon which he now challenges his conviction). As these issues could have been raised within three

years of the issuance of procedendo, the exception to the time-bar cannot be invoked.

III. Reinstatement of First PCR Action

Polk alternately argues that the district court should have reinstated his first application for postconviction relief under Iowa Rule of Civil Procedure 1.944(6). Because Polk did not appeal that final decision, he cannot now mount a collateral attack to it. *See Schott v. Schott*, 744 N.W.2d 85, 88 (Iowa 2008) ("We have repeatedly said a final judgment is conclusive on collateral attack, even if the judgment was erroneous, unless the court that entered the judgment lacked jurisdiction over the person or the subject matter.").

In addition, our supreme court

> has repeatedly held that even if "good cause" is shown for reinstating a case dismissed pursuant to rule [1.944], a district court lacks the authority to do so where the application for reinstatement was filed more than six months after the dismissal.

Walker v. State, 572 N.W.2d 589, 590 (Iowa 1997). Ineffective assistance of counsel is not an exception to that rule. *Id.* (rejecting argument that postconviction relief applicant's due process rights were violated by counsel's negligence in allowing case to be dismissed under rule 1.944). Accordingly, reinstatement of the first postconviction relief action is precluded.

We affirm the dismissal of Polk's second postconviction relief application as time-barred.

AFFIRMED.