

IN THE COURT OF APPEALS OF IOWA

No. 1-043 / 08-1295
Filed March 7, 2011

CESAR HERRARTE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Sioux County, James D. Scott,
Judge.

Applicant appeals the dismissal of his second application for
postconviction relief. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Coleman McAllister, County Attorney, and Jared Weber, Assistant
County Attorney, for appellee.

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

SACKETT, C.J.

Applicant, Cesar Herrarte, appeals the district court's dismissal of his second application for postconviction relief. Herrarte claims that the Iowa Supreme Court's ruling in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) should be applied retroactively to his case. Specifically he claims that failure to apply *Heemstra* retroactively violates the federal Due Process Clause, and the Equal Protection Clause. We affirm.

I. BACKGROUND AND PROCEEDINGS. On September 22, 1995, Herrarte was convicted along with a co-defendant of felony murder for the stabbing death of Justin Younie. The jury was instructed that the State must prove Herrarte stabbed Younie while participating in the forcible felony of willful injury. Herrarte was sentenced to life in prison without parole for the murder conviction on November 3, 1995. Herrarte appealed and his conviction was affirmed by this court on April 30, 1997. *State v. Herrarte*, No. 95-2053 (Iowa Ct. App. April 30, 1997). The procedendo was issued on July 15, 1997. Herrarte and his co-defendant filed a joint application for postconviction relief which was dismissed by the district court. This court affirmed the dismissal on December 8, 2004. *Escobedo v. State*, No. 03-1913 (Iowa Ct. App. December 8, 2004).

On August 25, 2006, the Iowa Supreme Court decided the case of *Heemstra* holding that when the act causing willful injury is the same act that caused the victim's death, the assault merges into the murder and cannot serve as the predicate felony for felony murder purposes. *Heemstra*, 721 N.W.2d at 558. In this ruling, the Iowa Supreme Court held that this new rule of law applied

only to the present case and cases not finally resolved on direct appeal where this issue had raised in the district court. *Id.*

On August 8, 2007, Herrarte filed this application for postconviction relief challenging the Iowa Supreme Court's holding that *Heemstra* is to be applied prospectively only. The State filed a motion for summary disposition and on July 7, 2008, the district court ruled that neither the Due Process Clause nor the federal or state Equal Protection Clauses were implicated in the *Heemstra* decision. The district court went on to hold that because *Heemstra* did not apply retroactively, Herrarte's postconviction relief application was untimely under Iowa Code section 822.3 (2007). On August 4, 2008, Herrarte filed a notice of appeal.

II. STANDARD OF REVIEW. Postconviction relief actions are generally reviewed for errors at law. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). When an applicant alleges a constitutional violation, the review is de novo in light of the totality of the circumstances. *Id.*

III. DUE PROCESS. After Herrarte filed his proof brief, the Iowa Supreme Court stayed further appellate briefing in this case until its decision in *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009) was filed. *Goosman* addressed the implications of the federal Due Process Clause on the non-retroactive application of *Heemstra*. *Goosman*, 764 N.W.2d at 542-45. The Iowa Supreme Court in *Goosman* found "the limitation of retroactivity announced in *Heemstra* to cases on direct appeal where the issue has been preserved did not violate federal due process." *Id.* at 545. The court set out two propositions of retroactivity when a new substantive law is announced. *Id.* at 544. The first is when a new

substantive rule clarifies ambiguities in existing law federal due process requires the new law to be retroactively applied to all cases including collateral attacks such as postconviction relief. *Id.* The second proposition is when the new substantive rule overrules prior precedent federal due process does not require retroactive application. *Id.* The court held, because *Heemstra* overruled prior precedent rather than clarified ambiguities in the felony murder rule, retroactive application was not mandated. *Id.* at 545.

After the *Goosman* decision was filed, Herrarte was given an opportunity to file an amended proof brief or stand on his prior brief. Herrarte elected to stand on his prior brief, despite the fact his main argument was that failure to apply *Heemstra* retroactively violated his due process under the Federal Constitution. Based on *Goosman* we reject this claim.

IV. EQUAL PROTECTION. In addition to his due process claim, Herrarte also claims not applying *Heemstra* retroactively violates both the federal and state Equal Protection Clauses. Herrarte's brief includes only conclusory statements that denying Herrarte the retroactive application of *Heemstra* denies him equal protection of the law. Herrarte does not identify the right implicated by the challenged classification nor does he lay out the appropriate standard of review. *In re Detention of Hennings*, 744 N.W.2d 333, 339 (Iowa 2008) (holding that an analysis of an equal protection claim begins with determining the rights implicated and the appropriate standard of constitutional review).

Herrarte cites two cases which arguably involve whether or not the equal protection clause is violated by the court's failure to apply a new rule

retroactively. Neither case supports his position. Herrarte cites *Griffith v. Kentucky*, 479 U.S. 314 (1987), and argues, “In other words, the United States Supreme Court determined in *Griffith* that equal protection requires that substantive new rules in criminal cases be applied retroactively.”

As noted by the district court in footnote 2 of its ruling, Herrarte’s reading of *Griffith* is incorrect. The concern expressed in *Griffith* had to do with selective application of retroactivity to cases pending on direct appeal. *Griffith* supports, indeed endorses, “distinguishing between cases that have become final (i.e., postconviction review proceedings) and those that have not (i.e., direct appeals).” *Id.* at 322.

Herrarte also cites *Everett v. Brewer*, 215 N.W.2d 244, 247 (Iowa 1974). In *Everett*, the Iowa Supreme Court found no equal protection violation for failing to apply a new criminal procedural rule retroactively. *Id.*

We accordingly affirm the district court’s dismissal of Herrarte’s second postconviction application.

AFFIRMED.