

IN THE COURT OF APPEALS OF IOWA

No. 1-048 / 10-0359
Filed March 30, 2011

RICHARD A. MILLSAP,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

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

Francis P. Hurley of Phil Watson, P.C., Des Moines, for appellant.

Richard A. Millsap, Fort Dodge, pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and James Ward, Assistant County
Attorney, for appellee State.

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

DANILSON, J.

Richard Millsap appeals the dismissal of his second application for postconviction relief. We review this dismissal for the correction of errors of law. *Veal v. State*, 779 N.W.2d 63, 64 (Iowa 2010). Finding Millsap's claim was time barred under Iowa Code section 822.3 (2009), we affirm.

Millsap was convicted of two counts of felonious child endangerment for an incident that occurred September 7, 2002, resulting in the deaths of his two young nephews. His conviction was affirmed by the supreme court in *State v. Millsap*, 704 N.W.2d 426, 431 (Iowa 2005). Millsap filed his first application for postconviction relief on March 27, 2007. His application was denied, and the denial of postconviction relief was subsequently affirmed on appeal in *Millsap v. State*, No. 07-2098 (Iowa Ct. App. Jan. 22, 2009).

Millsap filed his second application for postconviction relief on April 28, 2009, contending his postconviction counsel had been ineffective. The State filed an answer and a motion to dismiss seeking to dismiss the second application as untimely under Iowa Code section 822.3. The district court denied the State's motion to dismiss, finding that three of the four claims Millsap raised were not precluded by the statute of limitations. As the district court stated, "[T]he State cannot rely on the date of that Supreme Court affirmance [of Millsap's convictions] as triggering a limitation as to the applicant's claims of postconviction counsel Rosenberg's ineffective assistance" because "[a]ll of Rosenberg's conduct in prosecuting the first postconviction relief application and appeal, was after the Supreme Court decision affirming the criminal convictions."

However, the court notified the parties that the issues raised in the application appeared to be without merit and it was considering summary dismissal of the second application pursuant to section 822.6. After further briefing, the court summarily dismissed Millsap's second application, finding in part:

The Court recognizes that an evidentiary hearing is ordinarily required in a post conviction relief action when ineffectiveness of counsel is argued. However, the Applicant raises the same substantive issues that have already been decided by the Iowa Supreme Court and an evidentiary hearing would only serve to allow the Applicant to collaterally attack a previous ruling. Mr. Millsap's present postconviction application is nothing more than a reassertion of his prior claims wrapped in the disguise of an ineffective assistance of counsel claim.

(Citations omitted.) Millsap now appeals.

The State asserts that Millsap's claims are barred by the three-year statute of limitations provided by Iowa Code section 822.3.¹ That section provides in relevant part:

[A]pplications 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. *However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.*

Iowa Code § 822.3 (emphasis added).

Millsap posits the district court correctly determined he "could proceed with his second application for postconviction relief insofar as that application raised the issue of the ineffectiveness of counsel in his first application." Millsap

¹ In his reply brief, Millsap points out that the State did not file a notice of cross-appeal and Millsap did not raise the statute of limitations issue on appeal. Therefore, Millsap argues, the State has waived this issue. We note that Millsap raised this argument in a motion to strike, which was denied by the supreme court on November 23, 2010.

further states “the legitimate issue raised in the second application did not directly attack the conviction, only the representation of his counsel in the first application.”

Our supreme court has interpreted section 822.3 and found that an applicant for postconviction relief cannot circumvent the effect of the three-year time bar by merely claiming the ineffective assistance of postconviction counsel. *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994). “Section 822.3 creates an exception for untimely filed applications if they are based on claims that ‘could not’ have been previously raised because they were not available.” *Id.* at 824.

In addition to the obvious requirement that an applicant relying on section 822.3 must show the alleged ground of fact could not have been raised earlier, the applicant must also show a nexus between the asserted ground of fact and the challenged conviction.

Harrington v. State, 659 N.W.2d 509, 520 (Iowa 2003).

Millsap’s second application for postconviction relief raised three issues alleging the ineffectiveness of his postconviction counsel, involving: (1) the failure to obtain trial transcripts to prepare for postconviction; (2) the failure to call witnesses “who could have explained if the child endangerment statute needed to prove intent”; and (3) the prevention of Millsap “from adequately raising issues attempted to be asserted in his pro se application.” Each of these claims was available and could have been (and/or were) raised in Millsap’s direct appeal or in his first application for postconviction relief.²

² Millsap’s brief in resistance to summary disposition suggests there is a fourth issue: Ineffective assistance of postconviction relief counsel for failing to pursue the issue that “felonious” child endangerment requires that the crime be intentional.

The legal and factual underpinnings of Millsap's claims were in existence during the three-year period and were available to be addressed in his appellate and postconviction proceedings. See *Smith v. State*, 542 N.W.2d 853, 854 (Iowa Ct. App. 1995). In fact, as the district court correctly noted, Millsap now "raises the same substantive issues that have already been decided by the Iowa Supreme Court [in *State v. Millsap*, 704 N.W.2d at 431, 435-36]."

Millsap "cannot circumvent the three-year time-bar by claiming the ineffective assistance of postconviction counsel." See *Smith*, 542 N.W.2d at 854. We agree with the district court's conclusion that "Millsap's present postconviction application is nothing more than a reassertion of his prior claims wrapped in the disguise of an ineffective assistance of counsel claim." Further, because Millsap raised the same claims in an earlier, timely postconviction relief action, he cannot establish that he did not know of the claims within the three-year period. *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996), *abrogated on other grounds in Harrington*, 659 N.W.2d at 520 (Iowa 2003). For those reasons, the district court could have correctly concluded Millsap's second application was time-barred. In any event, the dismissal of the application was appropriate.

AFFIRMED.