IN THE COURT OF APPEALS OF IOWA

No. 1-096 / 10-1238
Filed March 7, 2011

DONALD LAWRENCE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Donald Lawrence appeals the dismissal of his application for postconviction relief. **AFFIRMED.**

Angela L. Campbell of Dickey & Campbell Law Frim, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jim Katcher, Assistant County Attorney, for appellee State.

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

DANILSON, J.

In his original appeal Donald Lawrence argued, among other things, his trial counsel was ineffective for failing to ensure that his waiver of a jury trial was "on the record" as required by Iowa Rule of Criminal Procedure 2.17(1) (then numbered rule 16(1)). *See State v. Lawrence*, 344 N.W.2d 227, 229 (Iowa 1984). The supreme court interpreted rule 2.17 as not requiring an in-court colloquy and rejected the ineffective assistance of counsel claim:

> We find that a written jury waiver taken in compliance with rule [2.17(1)] is prima facie evidence that the waiver was voluntary and intelligent. When the defendant subsequently attacks its validity, he bears the burden of proving otherwise. In this case defendant challenges the voluntariness of his waiver based on alleged misrepresentations by his trial counsel, but the record contains no evidence to support his contentions. Therefore defendant has not carried his burden, and no basis for reversal on this ground appears.

Id. at 230.

Lawrence filed this application for postconviction relief (PCR) on May 6, 2010, asserting his waiver of jury trial was invalid and citing *State v. Liddell*, 672 N.W.2d 805 (Iowa 2003), which overruled *Lawrence* in part.[1] The application states *Liddell* "held that the Constitution requires more of a record than 'merely in the file.'"[2]

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[1] Postconviction counsel writes, "It wasn't until undersigned counsel was researching potential postconviction claims for Mr. Lawrence that Mr. Lawrence found out his case had been overruled."

[2] This is a misstatement of the holding in *Liddell*. The court in *Liddell* ruled:

> Re-examining the legislative history of the rule, we think "on the record" is better understood as requiring some in-court colloquy or personal contact between the court and the defendant, to ensure the defendant's waiver is knowing, voluntary, and intelligent.

672 N.W.2d at 812. However the court emphasized noncompliance with a written waiver requirement did not necessarily invalidate a waiver of the right to trial by jury if the waiver can otherwise be shown to have been entered knowingly, voluntarily, and intelligently.

The district court dismissed Lawrence's PCR application, finding it was barred by the statute of limitations in Iowa Code section 822.3 (2009). The district court wrote:

> Counsel for the petitioner now argues that based upon this change in the law, and other equitable principles, the statute of limitations applied to post-conviction actions under Iowa Code § 822.3 should not apply. However, the Court disagrees with this analysis. This Court does not agree that this is newly discovered evidence which would allow for this new post-conviction relief action. This Court deems that it is denied by the statute of limitations provided for post-conviction relief actions, it is not newly discovered, and is not otherwise barred by the defense of equitable tolling as argued by counsel for the petitioner.

We also agree with the district court's observation that the *Liddell* "decision specifically stated that it applied prospectively and not retroactively."

"Postconviction proceedings are law actions ordinarily reviewed for errors of law." *Bugley v. State,* 596 N.W.2d 893, 895 (Iowa 1999). But when the basis for relief is a constitutional violation, our review is de novo. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). Lawrence contends, in essence, a written jury-trial waiver is unconstitutional. However, in *Feregrino* our supreme court concluded the requirement of an oral colloquy related to a jury-trial waiver is a

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Id. at 814. The interpretation was not constitutionally required. *State v. Feregrino,* 756 N.W.2d 700, 707-08 (Iowa 2008) (stating requirement of an oral colloquy related to a jury-trial waiver is a procedural device, not a constitutional right); *see also Liddell*, 672 N.W.2d at 816 (Cady, J., specially concurring) ("At the time our legislature originally enacted rule 2.17(1) in 1976, courts around the nation had begun debating the type of procedure necessary for a defendant to waive the right to a jury trial in a criminal case. The debate focused on whether the waiver should be made in writing or whether an in-court colloquy was needed. Ultimately, what emerged from this debate was that courts preferred an in-court colloquy, but such a strict procedure was not constitutionally required.").

In Mr. Lawrence's original appeal the court found no evidence to support his claim that his waiver was not voluntary. *Lawrence*, 344 N.W.2d at 230.

procedural device, not a constitutional right. 756 N.W.2d 700, 707-08 (Iowa 2008). We therefore review for errors of law.

Iowa Code section 822.3 provides that PCR 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. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

Lawrence claims the decision in *Liddell* presents a ground of fact or law that could not have been raised previously. The district court did not find the claim to be newly discovered evidence and we agree. *See*, *e.g.*, *Harrington*, 659 N.W.2d at 521 (finding Harrington's PCR application fell within the ground-of-fact exception and explaining the ground of fact alleged "must be of the type that has the potential to qualify as material evidence for purposes of a substantive claim under section 822.2").

Nor can Lawrence find refuge in his assertion that *Liddell* constitutes new law that could not have been raised within the three-year time period.[3] The State argues that even assuming the 2003 decision in *Liddell* revived the statute of limitations; the consequent three-year window would have expired in 2006, years before this application was filed. We agree. Any claim Lawrence may have

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[3] In any event, while *Liddell* did overrule *Lawrence*, the supreme court noted application of the new interpretation applied prospectively only:

> *For waivers taking place once this decision is final,* however, a trial court must conduct the proceedings 'on the record' in the sense that some in-court colloquy with the defendant is required in order to ensure the defendant's waiver is knowing, voluntary, and intelligent.

Liddell, 672 N.W.2d at 814 (emphasis added) (footnote omitted). *Liddell* does not apply retroactively. *State v. Spies*, 672 N.W.2d 792, 799-800 (Iowa 2003); *State v. Miranda*, 672 N.W.2d 753, 763 (Iowa 2003).

raised based on the *Liddell* ruling had to be raised long before his 2010 PCR application.

Finally, we decline the invitation to apply "equitable tolling" here. Even if equitable tolling is adopted to permit a late-filed PCR application, as Lawrence acknowledges one of the elements of the doctrine requires that the applicant show "some extraordinary circumstance stood in his way" preventing a timely filing of the application. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814, 161 L. Ed. 2d 669, 679 (2005). Here, Lawrence has failed to provide any extraordinary circumstances why he waited years to assert his claim.

The district court did not err in determining the PCR application was time-barred. We affirm.

AFFIRMED.