

IN THE COURT OF APPEALS OF IOWA

No. 1-694 / 10-0250
Filed October 19, 2011

JOE WILLIE CANNON JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, John G. Linn,
Judge.

Joe Cannon appeals the district court decision denying his application for
postconviction relief. **AFFIRMED.**

Jeffrey M. Lipman of Lipman Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, Patrick C. Jackson, County Attorney, and Amy Beavers,
Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Joe Cannon appeals the district court decision denying his third application for postconviction relief. We conclude Cannon's claims are: time-barred pursuant to the three-year statute of limitation set forth in Iowa Code section 822.3 (2009); procedurally barred because all grounds were not raised in his original application pursuant to section 822.8; or insufficient because Cannon has failed to prove he was prejudiced by his counsel's alleged failures.

Discussion. Cannon's criminal trial took place in 1993, following his arrest for an incident in which he allegedly broke into the Burlington home of eighty-nine-year-old Orley Culp, beat Culp with a baseball bat, and ransacked Culp's home in search for money to finance his crack cocaine habit. Culp later died from skull fractures and brain injury he sustained from his injuries. At trial, the State presented an extensive array of evidence against Cannon establishing motive, means, opportunity, and consciousness of guilt. The jury convicted Cannon as charged, with murder in the first degree and burglary in the first degree. This court summarily affirmed the judgment of the trial court. *State v. Cannon*, No. 93-1527 (Iowa Ct. App. Nov. 28, 1994). *Procedendo* issued on February 9, 1995.

In January 1996, Cannon filed his first application for postconviction relief. The district court determined the allegations had not been raised on direct appeal and Cannon had failed to provide sufficient reason for not previously raising the claims. Further, the court concluded all of Cannon's grounds for relief were meritless and denied the application for postconviction relief. This court affirmed the judgment of the district court, determining Cannon failed to preserve his

claims. *Cannon v. State*, No. 97-2365 (Iowa Ct. App. Aug. 27, 1999). This court further observed that Cannon was unable to prove he was prejudiced by his trial counsel's alleged failures and that his other claims were without merit. *Id.*

Cannon filed his second application for postconviction relief in December 2004, which was summarily dismissed by the district court. As the court observed:

Cannon had three years from February 9, 1995, the date procedendo issued [on his direct appeal], in which to file an application for postconviction relief. Cannon did not file his second application until December 29, 2004, over nine years from the date procedendo issued. Cannon argues he was not aware of his postconviction counsel's ineffective assistance until the postconviction appeal. Even assuming this to be true, procedendo issued on the postconviction appeal November 18, 1999, yet Cannon's second application was not filed until five years later.

Cannon did not appeal that ruling.¹ Cannon filed the present action in June 2007. In a thorough and well-written ruling, the court again determined Cannon's claims were time-barred. The court also addressed one of Cannon's new claims, concluding his trial counsel performed effectively, despite any misconduct by the prosecutor. More significantly, the court determined Cannon suffered no prejudice by counsel's alleged failure.

Cannon now appeals, alleging various claims of ineffective assistance of trial, appellate, and postconviction counsel. He also raises several claims not premised on ineffective assistance of counsel.

Upon our review, we conclude Cannon has failed to prove any of his claims. Significantly, as observed by the district court in denying Cannon's

¹ We acknowledge counsel failed to provide a copy of the court's ruling to Cannon, but at no time did Cannon apply for permission to file an untimely notice of appeal.

second and third postconviction applications, we find Cannon's claims are time-barred pursuant to the three-year statute of limitations set forth in Iowa Code section 822.3 ("[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 issued."). The majority of Cannon's claims are also procedurally barred pursuant to section 822.8 ("All grounds for relief . . . must be raised in the applicant's original, supplemental or amended application.").

We further conclude Cannon either received effective assistance of counsel, or was not prejudiced by counsel's alleged failures. One of the issues raised by Cannon in his application alleged trial counsel was ineffective in (1) allowing the State to introduce allegedly inappropriate expert testimony regarding foot impressions, and (2) failing to gather a police report outlining alternative suspects. Cannon argues these claims rely on newly discovered evidence and are therefore timely, even though his application was filed more than twelve years after procedendo issued in the direct appeal.² See Iowa Code § 822.2(1)(d) (allowing an application to be filed requesting relief where "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice").

² On this issue, Cannon's application for postconviction relief and his appellate brief appear to make a freestanding newly discovered evidence claim as well as a claim of ineffective assistance of counsel. As the district court observed, "[I]t is clear that Cannon's submissions are at times confused in their discussion of the issues presented in this application." However, the district court's ruling only addressed Cannon's basis for seeking postconviction relief on this ground as a claim of ineffective assistance of trial counsel. Cannon did not file a post trial motion asking the court to rule on a separate freestanding newly discovered evidence claim. Accordingly, we limited our consideration to the issue that was both presented to and ruled on by the district court. See *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002).

The district court correctly concluded these issues were not “new”; that Cannon “failed to make even a colorable argument on how these claims were previously unknown”; and therefore, that Cannon should have been aware of the claims before the three-year period expired. We agree. Cannon was free to develop different expert testimony on shoe impressions in 1993. Further, the evidence in *this* case about *these* shoeprints revealed that they contained a number of unique deformities and identifying points of reference, sufficient to make a positive identification. In regard to the police report, it is clear that Cannon’s trial attorney was provided with the report. Just because Cannon himself never saw the report, it should not be treated as newly discovered evidence. See *Robinson v. State*, 687 N.W.2d 591, 594 (Iowa 2004) (“Our courts have long recognized the general rule that notice to an attorney in respect to a matter in which he is then acting for a client is notice to the client.”).

Similar conclusions can be drawn in respect to the *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), prosecutorial misconduct issue that was also raised by Cannon in his application.³ This issue was potentially viable at the time Cannon filed his second postconviction relief action.⁴ However, Cannon provided no explanation for failing to raise this issue in his second postconviction relief action.

³ Again, Cannon’s application for postconviction relief and his appellate brief appear to make alternate claims of a due process violation and ineffective assistance of counsel; however, the district court’s ruling stated that Cannon’s basis for seeking postconviction relief on this ground was a claim of ineffective assistance of trial counsel. Because Cannon did not file a post trial motion asking the court to rule on a separate due process claim, we limited our consideration to the issue that was both presented to and ruled on by the district court. See *Meier*, 641 N.W.2d at 539.

⁴ The *Graves* ruling in 2003 preceded Cannon’s second postconviction relief, which was filed on December 29, 2004. Further, the supreme court’s 2008 ruling, *Millam v. State*, 745 N.W.2d 719 (Iowa 2008), upon which Cannon also relies, only reiterates conclusions made in *Graves*. See *Millam*, 745 N.W.2d at 722 (observing the test “is

Conclusion. We have carefully considered the numerous issues raised by Cannon, and conclude Cannon has failed to prove any of his claims. The claims are time-barred by the three-year statute of limitations, or procedurally barred because all grounds were not raised in his original application. Further, Cannon either received effective assistance of counsel, or was not prejudiced by counsel's alleged failures. In this regard, we emphasize the strong evidence of Cannon's guilt that was presented at his criminal trial. And Cannon's claims not premised on ineffective assistance are not properly before this court. Accordingly, we affirm the district court's order denying Cannon's third application for postconviction relief.

AFFIRMED.

whether a normally competent attorney would have concluded that the question . . . was not worth raising" (quoting *Graves*, 668 N.W.2d at 881)).