

**IN THE COURT OF APPEALS OF IOWA**

No. 1-806 / 10-1691  
Filed November 23, 2011

**TATIANA MICHELLE DIXON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,  
Judge.

Tatiana Dixon appeals from the district court's denial of her application for  
postconviction relief. **AFFIRMED.**

Lori J. Kieffer-Garrison, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Michael J. Walton, County Attorney, and Rob Cusack, Assistant County  
Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ. Tabor,  
J., takes no part.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

The facts relevant to this appeal were summarized on direct appeal as follows:

Lashawnda Rush was living in apartment 3A, a first-floor apartment, in the Schricker apartment building in Davenport. [Tatiana] Dixon was staying on the second floor of the same building in apartment 10. On the morning of January 10, 2003, Rush and Dixon got into an argument. Dixon believed she was pregnant by Cyrus Compton with whom she had been living for the few previous months. Dixon and Compton apparently separated after she told him she was pregnant. After the separation, Compton spent the nights with Rush in her apartment. Prior to the argument of January 10, Rush and Dixon were friendly toward one another.

The argument the morning of January 10 occurred in Rush's apartment in the presence of Compton and Adam Epps. During the argument, Rush picked up a knife and threatened Dixon with it. In response, Dixon produced a gun and threatened to kill Rush. Compton intervened and prevented a physical altercation between the women or any use of the weapons at that time.

Later that same night, between approximately 11:00 and 11:30 p.m., Rush and Dixon got into another argument on or near the stairs close to the front door of their apartment building. During the argument Dixon spit on Rush. At the end of the disagreement, Rush turned and started walking south down the hallway toward her apartment. Dixon testified that she believed Rush was going to get Compton's gun from her apartment because she had stated to Dixon that she was "going to fuck you up" and told her to "[s]tay right here, I got something for you" before she headed toward the apartment. As Rush was heading toward her apartment Dixon quickly went back up the stairs to apartment 10, retrieved a cut-off .22 caliber automatic rifle, and headed back down the stairs. Dixon came down only three or four stairs, leaned over the stairway railing, and fired between four and eight shots at Rush.

The police and emergency medical personnel arrived within minutes after the shooting occurred. Upon arrival, emergency personnel determined Rush had no carotid pulse. She was pronounced dead on arrival at the hospital. An autopsy revealed that Rush had been shot four times, but only the bullet which entered her back and perforated her thoracic aorta was fatal. One of the shots from Dixon also apparently ricocheted off of something and struck Wanda Tolbert, who was not involved in the argument

but was in the hallway near Rush during the shooting. Tolbert sustained a non-fatal bullet wound to her buttocks.

*State v. Dixon*, No. 03-1887 (Iowa Ct. App. Dec. 22, 2004).

After a bench trial, the district court found Dixon guilty of first-degree felony murder, willful injury causing serious bodily injury, and willful injury causing bodily injury. Dixon appealed her convictions on direct appeal, alleging her counsel breached an essential duty by not arguing that the court should reconsider its position on the use of willful injury as a qualifying underlying felony for felony murder. This court found Dixon's ineffective-assistance-of-counsel claim to be without merit, noting, "The use of willful injury as the underlying felony for felony murder . . . has been reviewed and approved numerous times by our supreme court . . . ." *Id.* This court continued, "Counsel could not have been expected to believe our supreme court would change its position on this issue, considering the firm stance it repeatedly has taken in previous cases." *Id.* Accordingly, the court concluded trial counsel had no duty to raise this issue before the trial court and was not ineffective for not doing so. *Procedendo* issued on March 24, 2005.

In August 2006, the supreme court decided *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). In *Heemstra*, the court reversed its position on the use of willful injury as the qualifying underlying felony, holding "[I]f the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." 721 N.W.2d at 558. *Heemstra* further provided, "The rule of law announced in this case . . . shall be applicable only to the present case and those

cases not finally resolved on direct appeal in which the issue has been raised in the district court.” *Id.*

On September 5, 2006, Dixon filed a motion to request review and reversal of direct appeal decision in light of new Iowa case law, relying on *Heemstra*. The district court considered the motion to be an application for postconviction relief. On February 19, 2008, Dixon filed an amended and substituted application for postconviction relief asserting due process required the retroactive application of *Heemstra* to her case. On September 1, 2010, Dixon filed an application for leave to amend her application for postconviction relief to add the following two arguments: (1) failing to apply *Heemstra* to her case violated her right to equal protection afforded by the United States and Iowa Constitutions; and (2) her trial counsel was ineffective for failing to assert that willful injury could not be used as the predicate felony for felony murder.

The district court denied Dixon’s application for postconviction relief. Dixon appeals, asserting the district court erred in denying her application based on the two arguments added in 2010.

## **II. Ineffective Assistance**

The State asserts, and we agree, that the principle of res judicata bars Dixon’s claim that her trial counsel was ineffective for failing to assert that willful injury could not be used as the predicate felony for felony murder. This issue was raised before and decided by this court on direct appeal. A postconviction proceeding is not a means for relitigation, on the same factual basis, of issues previously adjudicated, and the principle of res judicata bars such additional litigation. See Iowa Code § 822.8 (2005) (“Any ground finally adjudicated . . .

may not be the basis for a subsequent application . . . .”); *State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971). Because Dixon asserted the same ineffective-assistance-of-counsel claim in her application for postconviction relief, we conclude Dixon cannot now relitigate this issue decided adversely to her on direct appeal.

### **III. Equal Protection and Retroactivity**

Dixon also asserts a failure to apply the court’s holding in *Heemstra* retroactively to her case violates both the federal and state Equal Protection Clauses. Dixon does not articulate any basis for applying Iowa’s Equal Protection Clause differently than the federal clause for purposes of a retroactivity analysis. Dixon’s brief includes only conclusory statements that refusing to apply *Heemstra* retroactively denies her equal protection of the law. She does not distinguish her case from the United States Supreme Court’s decision in *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), endorsing the distinction between “cases that have become final [i.e. postconviction review proceedings] and those that have not [i.e. direct appeals]” and the reasoning for “applying new rules retroactively to cases in the latter category.” Nor does Dixon distinguish her case from our supreme court’s decision in *Everett v. Brewer*, 215 N.W.2d 244, 247 (Iowa 1974), finding a rational basis for classifying appellants in accordance with whether their cases have previously been fully adjudicated.

Dixon cites to *State v. Eischen*, 487 N.W.2d 335 (Iowa 1992) to support her argument that a defendant’s conduct, not court schedules, should determine whether *Heemstra* applies retroactively. In *Eischen*, the court considered how to measure the six-year time period imposed by Iowa Code section 907.3(1)(g)

(1989) within which a defendant's prior conviction of operating while intoxicated would defeat deferred judgment eligibility on a subsequent conviction. 487 N.W.2d at 336. The court determined the legislature intended the six-year time period to be measured from the date of the second violation, not the date of conviction or sentencing on the second violation. *Id.* In reaching this decision, the court concluded this result was desirable as it tied the timeline in with the conduct of the defendant rather than "the vagaries of the court schedule." *Id.* While *Eischen* disfavors the possibility that a court schedule could determine the outcome of a defendant's case, it is not controlling authority applicable to the present issue, whether a refusal to apply *Heemstra* retroactively violates equal protection. This is particularly true since Dixon's court schedules ended when the procedendo issued a year before *Heemstra* was decided.

Dixon cites to no authority that directly supports her contention that a failure to apply *Heemstra* retroactively to her case violates her equal protection rights. Accordingly, we affirm the district court's denial of Dixon's postconviction application.

**AFFIRMED.**