

IN THE COURT OF APPEALS OF IOWA

No. 1-956 / 08-1930
Filed March 14, 2012

BRANDY BYRD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha Bergan,
Judge.

Brandy Byrd appeals from the denial of her application for postconviction
relief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson,
Assistant Appellant Defender, for appellant.

Brandy Byrd, pro se.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Jerry Vander Sanden, County Attorney, and Todd Tripp, Assistant
County Attorney, for appellee State.

Considered by Eisenhauer, C.J., Vogel, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

EISENHAUER, C.J.

Brandy Byrd appeals from the denial of her application for postconviction relief. She contends her trial counsel was ineffective in failing to challenge the restitution award she was ordered to pay at sentencing. By way of pro se brief, Byrd challenges her trial counsel's representation in several other respects.

On July 13, 2003, Byrd was found guilty of first-degree murder and first-degree robbery. She was sentenced to life imprisonment on the murder charge and twenty-five years on the robbery charge, to be served concurrently. Byrd was also ordered to pay \$250,000 victim restitution, fees, and costs. Her direct appeal of her conviction was affirmed by this court. *State v. Byrd*, No. 03-1578 (Iowa Ct. App. Oct. 27, 2004).

On September 14, 2005, Byrd filed an application for postconviction relief, alleging her counsel was ineffective in failing to adequately cross-examine witnesses and in failing to object to certain evidence. An amended petition was filed on September 7, 2006, alleging counsel was ineffective in failing to move for a new trial, and argued the felony murder theory should not have been submitted to the jury. At the January 8, 2008 hearing, Byrd informed the court she only wished to have the claims in her amended petition considered. The court rejected those claims in its November 12, 2008 order. Byrd appeals.

We generally review the denial of an application for postconviction relief for the correction of errors at law. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). Where constitutional error is alleged, our review is de novo "in light of the totality of the circumstances and the record upon which the postconviction court's rulings was made." *Id.*

For the first time on appeal, Byrd contends the district court erred in imposing a \$250,000 victim restitution award. She claims the award is excessive and the court failed to state its reasons for the order on the record. She raises this claim under an ineffective-assistance-of-counsel rubric.

As noted, this claim is being raised for the first time in this appeal. We have no record before us to determine why counsel did not challenge the award as excessive or challenge the court's failure to state its reasons for imposing a higher award than the statutory minimum.¹ The State notes the possibility the higher fine was part of an agreement between the parties. Without the benefit of a record, we have no basis for knowing. Accordingly, this issue is preserved for possible future proceedings.

In her pro se brief, Byrd also contends trial counsel was ineffective in several respects. She makes challenges regarding change of venue, the jury instructions on felony murder, and examination of her defense expert regarding her ability form specific intent. To the extent these claims were raised and decided in her direct appeal, see *State v. Byrd*, No. 03-1578 (Iowa Ct. App. Oct. 27, 2004), the doctrine of res judicata bars her from relitigating the issues in a postconviction proceeding. See *Holmes v. State*, 775 N.W.2d 733, 735 (Iowa 2009) (noting a postconviction proceeding is not intended as a vehicle for relitigation of issues previously adjudicated). Although the challenge to the felony murder instruction was raised and decided on direct appeal, Byrd now claims the supreme court's decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa

¹ Iowa Code section 910.3B(1) (2003) provides for a minimum payment of \$150,000 to the victim's estate.

2006) changed the rule to her benefit. While *Heemstra* only applies to felony murder cases involving willful injury and not robbery, as in Byrd's case, it also does not apply retroactively. *Heemstra*, 721 N.W.2d at 747 ("The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes 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.").

Regarding Byrd's claim counsel was ineffective in failing to file a motion for new trial because the verdict was contrary to the weight of the evidence, we concur with the district court's assessment a motion for new trial would have been meritless because "significant evidence offered at trial . . . supported the jury's finding that Byrd was guilty of the crimes with which she was charged, including substantial evidence that she was capable of forming specific intent." Because Byrd cannot prove she was prejudiced by any alleged failure by counsel, we affirm the denial of her application for postconviction relief.

AFFIRMED.

Sackett, S.J., concurs; Vogel, J., concurs in part and dissents in part.

VOGEL, J. (concurring part and dissenting in part)

I respectfully dissent as to the majority's preservation of the restitution issue for possible further proceedings.

As the majority notes, Byrd raises the imposition of the \$250,000 restitution for the first time on appeal, framing it as an ineffective assistance of "prior" counsel. However, Byrd did not raise this issue in her application for postconviction relief, or at the subsequent hearing. We consequently have no ruling on the issue from the postconviction court. I would find that error has not been preserved for our review, as Byrd cannot now raise an entirely new claim—one that was never litigated nor ruled on—in an appeal from a denial of postconviction relief. See *Harper v. State*, 397 N.W.2d 740, 742 (Iowa 1986) ("On appeal, we should not address issues . . . if error has not been preserved on the issue in the postconviction court."). I would therefore dismiss Byrd's appeal as to this issue. In all other respects, I concur with the majority.