IN THE COURT OF APPEALS OF IOWA

No. 1-965 / 11-0596
Filed January 19, 2012

JOSEPH EUGENE BROCKERT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Mary E. Howes, Judge.

Joseph Brockert appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Joseph Brockert, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, and Alan Ostergren, County Attorney, for appellee State.

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

VAITHESWARAN, P.J.

Joseph Brockert appeals the district court's denial of his application for postconviction relief. He claims (1) the court "erred as a matter of law when it dismissed [the] application for postconviction relief without a hearing," and (2) "[i]f error on Issue I was not preserved, postconviction counsel was ineffective."

I. Background Proceedings

Brockert filed the postconviction relief application that is the subject of this appeal almost fifteen years after his judgment and sentences for first-degree murder and robbery became final. The State moved to dismiss the application, asserting it was untimely under Iowa Code section 822.3 (2009).[1] A stamp on the motion indicated it was to be submitted to the district court three weeks later, without oral argument. Before the expiration of the submission period, Brockert's attorney filed an "Answer to Motion to Dismiss," admitting the application was untimely and asking the court to enter an "appropriate Order regarding the State's Motion to Dismiss." The court did so, finding and concluding as follows: "Brockert had until November 3, 1998, to take postconviction relief. This application was filed 13 years too late. The application does not assert any new ground of fact or law." Brockert appealed.

[1] This statute requires all applications for postconviction relief to "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." Iowa Code § 822.3.

II. Analysis

Brockert does not directly attack the district court's ruling that his application was untimely.[2] He simply asserts the district court erred in dismissing the application without first holding a hearing. The problem with his argument is that the opinion on which he relies for support, *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994), was based on summary judgment rules that have since been changed. *See* Iowa Code § 822.7 (stating the rules of civil procedure apply to actions for postconviction relief). While *Poulin*, 525 N.W.2d at 816, held "it is error for the court not to set for hearing a state's motion to dismiss an application for postconviction relief," this court later pointed out that "[c]urrent summary judgment rules no longer require the court to set a hearing date before ruling on a motion for summary judgment." *Brown v. State*, 589 N.W.2d 273, 275 (Iowa Ct. App. 1998). Under existing rules, "nothing prevents the trial court from reviewing the summary judgment motion and response thereto and ruling thereon without affording the parties a hearing." *Id.*; *see also* Iowa Code § 822.6 (authorizing "summary disposition" of postconviction relief applications). For that reason, *Poulin* is inapposite.

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[2] Brockert's application alludes to an exception to the three-year limitations period for "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. In his rely brief, Brockert suggests this reference together with a reference to newly discovered evidence would, under "notice pleading principles," entitle him to a hearing. However, neither his application nor his resistance to the State's motion to dismiss specifies what this evidence is. We have recognized that a "party claiming an exception to a normal limitations period must plead and prove the exception." *Cornell v. State*, 529 N.W.2d 606, 610 (Iowa Ct. App. 1994); *see also Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003) ("In addition to the obvious requirement than 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.").

The key inquiry under current rules is whether the applicant received notice of the dismissal motion and an opportunity to respond. *Brown*, 589 N.W.2d at 275. Brockert received both. The State's motion was served on his attorney, who timely filed a response. *See* Iowa R. Civ. P. 1.442(2) ("Service upon a party represented by an attorney shall be made upon the attorney unless service upon the party is ordered by the court."). A copy of the response was sent to Brockert. The court ruled on the motion more than twenty days after the motion was filed. *See* Iowa R. Civ. P. 1.981(3) ("Notwithstanding the provisions of rule 1.431 and 1.435, the time fixed for hearing *or nonoral submission* shall be not less than 20 days after the filing of the motion, unless a shorter time is ordered by the court." (emphasis added)). For these reasons, the district court did not err in dismissing his application without first holding a hearing.

In light of our conclusion, we find it unnecessary to address Brockert's alternate ineffective-assistance-of-counsel claim based on the same issue.

AFFIRMED.