

IN THE COURT OF APPEALS OF IOWA

No. 2-162 / 10-0681
Filed March 14, 2012

MICHAEL EUGENE BLACKWELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Applicant appeals from the dismissal of his third application for
postconviction relief. **AFFIRMED.**

Gerald B. Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, John P. Sarcone, County Attorney, and Steve Foritano,
Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ. Tabor, J.,
takes no part.

EISENHAUER, C.J.

Michael Blackwell appeals from the district court's dismissal of his third application for postconviction relief. He contends (1) the court violated the separation of powers doctrine in its dismissal of his second postconviction relief application in 2006 by "reading into" Iowa Code section 822.3 (2009) a three-year statute of limitations for bringing postconviction relief actions based on newly-discovered evidence and (2) the court erred in summarily dismissing his application. We affirm.

I. Background Facts and Proceedings

Blackwell was convicted of two counts of murder in the first degree and burglary in the first degree in 1991. On appeal, this court affirmed his convictions by operation of law in May 1993. *State v. Blackwell*, No. 91-1501 (Iowa Ct. App. May 4, 1993). The supreme court denied further review, and procedendo issued on July 7, 1993.

In 1994 Blackwell filed an application for postconviction relief, alleging trial counsel was ineffective in failing to call certain witnesses and in failing to investigate and call experts as witnesses concerning his mental health. In its 1996 ruling dismissing the application, the district court found the testimony of the other witnesses would not have changed the outcome of the trial and counsel investigated Blackwell's mental health, had him evaluated, but determined calling the psychiatric expert to testify would not have helped Blackwell's defense. On appeal, this court affirmed, concluding trial counsel's "decision not to present intoxication, insanity, or diminished responsibility theories was a reasonable, strategic choice." *Blackwell v. State*, No. 96-2086 (Iowa Ct. App. Apr. 24, 1998).

In a 1999 petition for federal habeas corpus relief, Blackwell alleged this court's rejection of his ineffective-assistance-of-counsel claim was an unreasonable application of clearly-established federal law. The federal district court denied the application in 2002, and the Eighth Circuit Court of Appeals affirmed in 2003. See *Blackwell v. Graves*, 349 F.3d 529, 534 (8th Cir. 2003).

In December 2004 Blackwell filed a second application for postconviction relief, alleging "trial counsel failed to investigate the substance of a written, favorable, psychiatric report generated by Dr. Margaret Shin," preventing Blackwell from pursuing his "only viable defense," the defense of insanity. He also alleged appellate counsel was ineffective in not preserving error on trial counsel's ineffectiveness concerning the Shin report, and his first postconviction counsel was ineffective in not preserving error on trial counsel's and appellate counsel's ineffectiveness concerning the Shin report. Blackwell submitted an affidavit from Roman Vald, who represented him in his appeal of the first postconviction proceeding. Attorney Vald averred he received the Shin report after requesting it in March 1997, included it in the appendix on appeal, and made reference to it in the appellate brief. The State moved to dismiss the application as time-barred. See Iowa Code § 822.3 (barring actions not filed within three years of procedendo on appeal, except for "a ground of fact or law that could not have been raised" within the three-year period). The State also argued the application should be dismissed because an applicant cannot relitigate issues finally adjudicated on direct appeal. See *Armento v. Baughman*, 290 N.W.2d 11, 12 (Iowa 1980); see also Iowa Code § 822.8. (requiring that "all grounds available for relief" be raised in the first postconviction relief proceeding).

In denying relief, the district court reasoned:

The objective of the escape clause of Iowa Code section 822.3 is to provide relief from the limitation period when an applicant had “no opportunity” to assert the claim before the limitation period expired. *Wilkins v. State*, 522 N.W.2d 822, 823-24 (Iowa 1994). The focus of the inquiry in prior cases has been whether the applicant was or should have been “alerted” to the potential claim before the limitation period expired. *Id.* at 824. While section 822.3 does not specifically state that the limitations period begins to run once new evidence is discovered, the Iowa appellate courts have applied it in that fashion and, in turn, this court will do the same. See *Wycoff v. State*, 2000 WL 701044, at *4 (Iowa [Ct.] App. May 31, 2000) (unreported decision) (holding that the applicant’s postconviction action was barred because he failed to bring the action within the time frame mandated by section 822.3 after being alerted to the new evidence). Similar to the *Wycoff* case, Blackwell’s failure to act within the time frame mandated by section 822.3 upon being alerted to the Shin report results in his claim being barred by section 822.3. See *Affidavit of Roman Vald*, ¶¶ 3-4.

The district court granted the State’s motion to dismiss in January 2006, concluding Blackwell’s claim was time-barred. The court subsequently denied Blackwell’s pro se motion to amend or enlarge.

On appeal, this court affirmed the district court’s denial of Blackwell’s second application for postconviction relief, concluding:

The statute provides an exception to the three-year limitation for “a ground of fact or law that could not have been raised within the applicable time period.” Iowa Code § 822.3. To take advantage of the exception, an applicant “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.” *Harrington [v. State]*, 659 N.W.2d [509,] 520 [(Iowa 2003)]. Examples of exceptions to the time bar are newly-discovered evidence or a ground the applicant was at least not alerted to in some way. *Hogan v. State*, 454 N.W.2d 360, 361 (Iowa 1990). Appellant argues the report by Dr. Shin is evidence that falls within the exception. The district court determined appellant failed to show the claim could not have been raised earlier. We conclude the district court’s determination is supported

by substantial evidence and that the court correctly applied the law. See *Harrington*, 659 N.W.2d at 520.

Blackwell v. State, No. 06-0401 (Iowa Ct. App. Mar. 28, 2007). The supreme court denied further review.

In December 2009, Blackwell filed his third application for postconviction relief, challenging the district court's 2006 interpretation of Iowa Code section 822.3 as "arbitrary and capricious, erroneous, and with a blatant disregard for the Separation of Powers provision, as set forth in the Iowa Constitution." As quoted above, the district court stated: "While section 822.3 does not specifically state that the limitations period begins to run once new evidence is discovered, the Iowa appellate courts have applied it in that fashion and, in turn, this court will do the same." The State moved to dismiss, alleging the application was untimely and "failed to set forth any ground for which relief can be granted pursuant to Iowa Code section 822.2."

The district court granted the motion to dismiss in March 2010, ruling, in relevant part:

Petitioner filed the application for postconviction relief now before the court on December 7, 2009. In this latest application, petitioner is ultimately relying on the same claim of newly-discovered evidence that he relied upon in the January 27, 2002 application. However, he now urges that the district court acted in an unconstitutional manner in its January 25, 2006 [ruling], and affirmed by the Iowa Court of Appeals. In summary, petitioner urges that the district court violated the separation of powers between the legislative and judicial branch by creating a three-year statute of limitations for newly-discovered evidence that is not present in the statute. He seeks to excuse his failure to raise this issue in the last postconviction relief proceeding by contending that his postconviction relief attorney was ineffective in failing to raise the issue.

In order for petitioner's theory of this postconviction proceeding to be viable, the ruling of the last postconviction

proceeding must result from an unconstitutional action by the district and appellate courts. Petitioner asserts that the courts in the last proceeding created a three-year statute of limitations from whole cloth, outside the terms of the applicable statute. A reading of the opinions in the last proceeding makes it clear that no such event occurred. The courts applied well-settled law interpreting the applicable statute to determine that in the event of a claim of newly-discovered evidence, the petitioner in a postconviction proceeding must allege that the discovery has occurred within three years of the date of the application. Petitioner failed to make such an allegation in his last case, which led to its demise. He now seeks to premise a new claim on the same faulty premise. The court concluded petitioner has failed to state a claim upon which relief may be granted. The motion to dismiss is granted.

In April the district court denied Blackwell's subsequent motion to amend or enlarge. Blackwell appeals.

II. Scope of Review

Generally, review of proceedings for postconviction relief is for correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). Issues of statutory construction are also reviewed for correction of errors at law. *Holm v. Iowa Dist. Ct.*, 767 N.W.2d 409, 414 (Iowa 2009). To the extent an applicant's claims are of a constitutional nature, review is de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

III. Merits

Blackwell frames his issue as a constitutional violation of the separation of powers. He contends the district court "read into the escape clause of Iowa Code section 822.3 a three-year statute of limitations for bringing postconviction relief actions upon the discovery of new evidence," which violates the separation of powers "by legislating this limitation, found nowhere in the Iowa Code, in contravention of the clear intent of what is referred to as [section] 822.3's escape

clause.” The State responds that Blackwell’s claim is both time-barred and previously adjudicated.

The legislature amended what is now section 822.3 to add the three-year time limitation and the escape clause for “a ground of fact or law that could not have been raised within the applicable time period.” 1984 Iowa Acts ch. 1193, § 1 (amending section 663A.3). The supreme court considered the limitation’s application to postconviction applicants whose applications were filed before and after the effective date of the amendment. See *Brewer v. Iowa Dist. Ct.*, 395 N.W.2d 841 (Iowa 1986). The court held “all potential postconviction applicants whose convictions became final prior to [the amendment] must file their applications [within three years of the amendment] or be barred from relief.” *Id.* at 844. A change in the law was “a ground of . . . law” that could not have been raised within the three-year limitation period. The legislature’s purpose was “to reduce injustices occurring as a result of lost witnesses” necessary to resolve factual issues arising in postconviction proceedings and upon retrial of cases where convictions have been overturned. *Id.* at 843. Following that reasoning, postconviction relief applications based on “a ground of fact” that could not have been raised within the three-year limitation period, must also be filed within three years of the discovery of the new ground of fact or be barred. See *id.* at 844; see also *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994) (reasoning the legislature also intended to conserve judicial resources and restore a sense of repose to our criminal justice system).

We conclude the district court correctly determined Blackwell’s 2009 application for postconviction relief failed to state a claim upon which relief could

be granted because the claim was not raised within the three-year limitation period of section 822.3 after Blackwell became aware of the ground in 1997. *See Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). In addition, we have previously determined the district court in the second postconviction action correctly applied the statute. *See Blackwell v. State*, No. 06-0401 (Iowa Ct. App. Mar. 28, 2007).

AFFIRMED.