

IN THE COURT OF APPEALS OF IOWA

No. 2-199 / 11-0880
Filed April 25, 2012

CHARLES ROSS,
Petitioner-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Charles Ross appeals from the district court order summarily dismissing
his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John Sarcone, County Attorney, and James D. Ward, Assistant County
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Charles Ross appeals from the district court order summarily dismissing his application for postconviction relief. Ross challenges his 2005 guilty pleas to two counts of second-degree robbery as a habitual offender. He contends he was not properly charged with and convicted of second-degree robbery. Instead, he seeks to receive the benefit of a new statute, Iowa Code section 714.3A (Supp. 2010), which sets forth the crime of aggravated theft. Ross also asserts his postconviction counsel was ineffective in failing to provide the transcript of the plea proceedings to the postconviction court.

Because Ross's claim falls outside of the statute of limitations for postconviction relief, we affirm the district court order granting summary judgment.

I. Background Facts and Proceedings.

On January 24, 2005, Ross pleaded guilty to two counts of second-degree robbery as a habitual offender. The convictions stem from two separate incidents: one where Ross robbed a convenience store and one where Ross robbed a liquor store. In both instances, Ross assaulted an employee and the amount or value of what he took or attempted to take was less than \$200.

Ross appealed his convictions and our supreme court affirmed in *State v. Ross*, 729 N.W.2d 806, 809-12 (Iowa 2007). *Procedendo* issued on April 27, 2007. In June 2007, Ross filed an application for postconviction relief, which the district court denied and our court affirmed. *Ross v. State*, No. 09-0180 (Iowa Ct. App. Nov. 12, 2009).

On July 6, 2010, Ross filed a second application for postconviction relief, claiming the facts of his offenses fell under Iowa Code section 714.3A, a new statute that was implemented after his convictions. The State sought summary disposition, claiming Ross's application was untimely and it failed on the merits. Following an October 15, 2010 hearing, the district court granted the State's motion for summary disposition.

II. Scope and Standard of Review.

Postconviction relief proceedings are actions at law generally reviewed on error. *Daughenbaugh v. State*, 805 N.W.2d 591, 593 (Iowa 2011). Where an applicant claims counsel was ineffective, our review is de novo. *Id.*

III. Analysis.

The only claim properly before the court is whether Ross was properly charged with and convicted of second-degree robbery. The district court found Ross failed to bring his claim within the statute of limitations and granted summary disposition.

Iowa Code section 822.3 requires 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." Here, procedendo was issued on April 27, 2007, and Ross's second application for postconviction relief was not filed until July 6, 2010, more than three years later. However, the limitation does not apply "to a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3.

Ross contends his claim could not have been raised prior to July 1, 2010, when the aggravated theft statute, Iowa Code 714.3A, went into effect. He argues the passage of this statute was a new remedy. The district court rejected his claim, finding Ross's crimes did not fall within the purview of section 714.3A. On appeal, Ross challenges this finding.

Second-degree robbery occurs when one has the intent to commit a theft and, in furtherance of the commission of the intended theft or the person's escape from the scene thereof, commits an assault on another that does not cause a serious injury or involve a dangerous weapon. Iowa Code §§ 711.1-3. Aggravated theft occurs when a person commits a simple assault after the person has removed or attempted to remove property not exceeding \$200 in value that has not been purchased from a store. Iowa Code § 714.3A(1). The court found Ross engaged in assaults in both the robberies involved in this action and, as a result, was properly charged with and pleaded guilty to two counts of second-degree robbery.

Ross argues the district court's ruling appears to find that if an assault is committed, the crime is second-degree robbery. The real question is whether the assault occurs during the robbery or while fleeing from the scene, rather than after the theft has occurred. *Compare id.* § 711.1 *with id.* § 714.3A(1). Ross contends the facts before the district court show the assaults occurred after the thefts. In the alternative, he argues there is a substantial question of fact as to when the assaults occurred.

In order to determine whether Ross pleaded guilty to facts that would comprise the crime of aggravated theft, it is necessary to review the guilty plea proceedings. Ross's postconviction counsel did not provide the district court with the transcript of that proceeding. He alleges his counsel was ineffective in failing to do so.

Even assuming the transcript of the plea proceedings would show the assaults occurred after the commission of the theft, Ross's claim must fail. Iowa Code section 4.13(2) provides:

If the penalty, forfeiture, or punishment for any offense is reduced by a re-enactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment *if not already imposed* shall be imposed according to the statute as amended.

(Emphasis added.) Here, the punishment was amended some five years after Ross was sentenced. Those sentenced prior to a change in the law that lessens the penalty for the crime committed cannot benefit from the change. *West v. Lainson*, 235 Iowa 734, 738, 17 N.W.2d 411, 413 (1945). Because section 714.3A cannot apply to Ross, there is no ground of fact or law that could not have been raised within the three-year statute of limitations on postconviction relief claims. Accordingly, we affirm the summary dismissal of Ross's second postconviction application.

AFFIRMED.