

IN THE COURT OF APPEALS OF IOWA

No. 2-560 / 11-0209
Filed October 31, 2012

JIMMY LEE ALLEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

The applicant appeals the denial of his application for postconviction relief
as untimely. **AFFIRMED.**

Kevin E. Hobbs, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant County
Attorney, for appellee State.

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

VAITHESWARAN, P.J.

Jimmy Allen appeals the dismissal of his application for postconviction relief as untimely.

I. Background Proceedings

Allen was found guilty of first-degree murder in 1982. In the ensuing thirty years, he made several efforts to have his judgment and sentence set aside. That procedural history is detailed in this court's previous opinion, *Allen v. State*, No. 07-1116, 2008 WL 2200054, at *1 (Iowa Ct. App. May 29, 2008).

Allen's prior appeal raised a challenge to the district court's summary dismissal of his second application for postconviction relief. Allen argued the district court failed to consider "141 pages" of "newly discovered evidence" that he contended fell within the "ground-of-fact" exception to the applicable three-year time bar. Iowa Code § 822.3 (2003). This court partially agreed with Allen and remanded the case to the district court "for an evidentiary hearing on . . . the applicability of the ground-of-fact exception and, specifically, whether those records could have been discovered within the applicable time period in the exercise of due diligence." *Allen*, 2008 WL 2200054, at *5.

On remand, the district court held an evidentiary hearing to determine what was included in the 141 pages and to decide whether the documents could have been discovered during the three-year limitations period. After reviewing the pages Allen identified, the court concluded that all of the documents could have been discovered during that period. The court dismissed the application as untimely, and this appeal followed.

II. Ground-of-Fact Exception

Iowa Code section 822.3¹ 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.” “This 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. A ground of fact would present itself if, for example, “newly-discovered evidence became known, and it appeared that it was of the type that would be relevant.” *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989).

The district court characterized Allen’s “newly discovered evidence” as “a moving target.” We agree with this characterization. In 2001, the Des Moines Police Department identified “141 pages” that were responsive to a request for documents submitted by Allen. The department sent those documents to Allen. At the remand hearing, the prosecutor attempted to pin Allen down on the documents he believed were newly discovered. His efforts amounted to an exercise in futility. At the end of the hearing, it became clear that the documents were not newly discovered.

First, a list prepared by Allen and titled “the 141 pages of documents that were obtained from the Des Moines Police Department in September of 2001,” identified far more than 141 pages.²

¹ Although this statute was enacted after Allen’s conviction and appeal became final, our supreme court held in *Brewer v. Iowa District Court*, 395 N.W.2d 841, 844 (Iowa 1986), “that all potential postconviction applicants whose convictions became final prior to July 1, 1984, must file their applications for postconviction relief on or before June 30, 1987, or be barred from relief.”

² The list was admitted at the postconviction relief hearing and is attached to this opinion.

Second, the packet of documents purportedly received from the department contained papers that were not generated by the department, such as a summary of provisions from the 1981 Iowa Code in an identical font as the font used by Allen in his pro se filings and a copy of an envelope postmarked April 1, 2006, and addressed to a district court judge, with the return address listed as the Fort Dodge Correctional Facility.

Third, Allen's first postconviction attorney confirmed that he did indeed see the documents included in the "141 pages" at the time of the first postconviction hearing. He categorically stated that he "obtained every police report" and further testified, "I know that I was aware of all of the information that appears in my review of the 141 pages." *Cf. Harrington v. State*, 659 N.W.2d 509, 517–18 (Iowa 2003) (determining police reports were newly discovered evidence where postconviction counsel testified he had never seen the reports before despite requesting them from the police department). He also contradicted Allen's testimony that certain medical records included in the packet were not known within the limitations period.

Finally, while Allen initially denied seeing any of the "141 pages" (except the material witness complaint) before they were produced by the department in 2001, a 1988 pro se filing belies this assertion. In that filing, he cited a police report authored by an officer identified as "Shaver," statements taken from Sally and Karen Galageous, and a statement taken from Craig Olson, all of which were in the department's 2001 production. Notably, the "141 pages" presented to the district court on remand also included documents that were introduced as deposition exhibits in 1988 during Allen's first postconviction relief proceeding

and were marked with exhibit stickers. And, of even greater note, Allen ultimately admitted he could not “say for sure” whether some of the documents were produced by the county attorney and were in the possession of his attorneys.

Allen attempts to overcome these hurdles by arguing, “It is probable that if [postconviction counsel] had received all of the police reports contained in the 141 pages he would have used the relevant reports to further support” one of his arguments. However, we have stated that “when a claim could have been discovered upon reasonable investigation, failure to timely pursue it is not excused merely because the evidence ultimately discovered might have strengthened the claim.” *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994).

Allen had the burden of establishing that his claim fell within the ground-of-fact exception to the three-year time bar. See *id.* at 610 (“A party claiming an exception to a normal limitations period must plead and prove the exception.”). On this record, we have no trouble concluding he failed to satisfy his burden. We conclude the “141 pages” did not implicate the ground-of-fact exception to the three-year time bar set forth in section 822.3. Accordingly, we affirm the district court’s dismissal of Allen’s second postconviction relief application as untimely.³

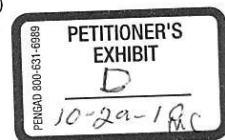
AFFIRMED.

³ Allen alternately asks us to overrule an Iowa Supreme Court opinion, *Dible v. State*, 557 N.W.2d 881, 886 (Iowa 1996) *abrogated on other grounds by Harrington*, 659 N.W.2d at 521. There, the court held that “ineffective assistance of postconviction relief counsel is not a ‘ground of fact’ within the meaning of section 822.3.” *Id.* This is not our prerogative. See *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) (stating it was the prerogative of the supreme court, rather than the lower court, to determine the law and if “previous holdings are to be overruled, we should ordinarily prefer to do it ourselves”).

E.O.

This document represents a list of the 141 pages of documents that were obtained from the Des Moines Police Department in September of 2001.

# page	Author	Contents of document	Appendix Reference
1-2	Foster	*Crime scene report/footprints	1 - 2
3 - 4	Lumley	* Crime scene report/latent fingerprints	3 - 4
5	Shaklee	* Crime scene report/photographs	5
6 - 20	Shaver	Crime scene report/ tape recordings	6 - 20
21 - 26		Transcript pf tape recording	23 - 28
27	Briggs	Crime scene report/diagrams	29
28 - 29	Shaklee	* Autopsy/ property report pajama's	30 - 31
30 - 32	Ervin	Interview juvenile	38 - 40
33 - 34	Shaver	Interview niece of victim	41 - 42
35 - 38	Ervin	* Interview juvenile/credit card	43 - 46
39	Schleuber	Elderly lady re: cars at crime scene	47
40 - 42	Rowley	* Francis Brown/wallet, credit cards	48 - 50
43	Lumley	* Photographed wallet	51
44	Kilgore	* Fingerprints on credit cards/telephone	52
45 - 46	Shaver	Interviewed Juveniles	53 - 54
47 - 48	Ervin	Interview Hewitt, same M.O.	55 - 56
49 - 50	Shaver	Interview re silverware & ring	57 - 58
51	Swan	Re: Leo Hutchins & Leonard Morris	59
52 - 55	Shaver	* New Locks scene/butcher knife	60 - 63
56	Shaver	Interview 2707 Cleveland	64
57	D'Ostilio	Crime Alert/ Trailer # 75	65
58	Soderquist	Diagram crime scene	66
59 - 61	Shaver	Shirt/ person on tape recording	67 - 69
62 - 63	Shaver	* Chet Welling phone calls	70 - 71
64 - 65	Shaver	Schermerhorn & sons	72 - 73
66 - 67	Shaver	Interview of 3 juveniles	74 - 75
68	Shaver	Stolen 1973 Mercury	76
69	Shaver	Waiver of rights Mark Jans	77
70 - 75	Shaver	* Chet Welling phone calls/reward	78 - 83
76	Martin	Firearm check	84
77 - 80	Shaver	* Billy Allen's Probation officer	85 - 88
81 - 83	Smith	* Billy's Firearm charges & warrants	89 - 91
84 - 85	Schuett	Sally Galageous report	92 - 93
86 - 88	Rowley	* Danny's charges & arrest warrant	94 - 96
89 - 94	Shaver	* Ohio arrests/ Danny's shoes	97 - 102
95 - 97		Ohio consent to search forms	109 - 111
98		Ohio Billy Allen waiver of rights	114
99 - 113	Rowley	* Jimmy Allen's Charges/search warrants	149 - 163
114	Rowley	* Property report brief case/jeans	164
115	Rowley	* Consent to search form for 1318 4 th	165
116 - 120	Brewer	* Jimmy Allen's Statements/arrest records	166 - 170



121	Rowley	*Certificate of probable cause	253
122	Rowley	*Fist degree murder complaint	244
123 – 124	Rowley	*Search of DeOtis Coleman's home	245 – 246
125 – 127	Thomas	Danny Reimer's suicide attempt	247 – 249
128 – 130	Glann	Danny Reimer's transfer to hospital	250 – 252
131 – 136		*Braodlawms Medical Report	253 - 259
137	Kilgore	I.D. of fingerprint on telephone	260
138	Lumley	Transfer of Knife to D.C.I.	261
139	Shaver	Transfer of Billy from Ohio	270
140	Shaklee	Scar on Billy's right hand	271
141		Billy Allen's arraignment	272
	Wheeler	Trial information	273 – 274

Note : Although I had not seen any of the 141 pages of documents before September of 2001, only approximately 74 of those pages would qualify as relating to counts II, IV & VI of the postconviction relief application that the court of appeals indicated remained viable. Those documents are identified with a red asterisk .