

**IN THE COURT OF APPEALS OF IOWA**

No. 2-604 / 11-1786  
Filed July 25, 2012

**BASIL C. PENDLETON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,  
Judge.

Basil Pendleton appeals the dismissal of his third application for  
postconviction relief. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant  
Attorney General, Michael J. Walton, County Attorney, and Joseph A. Grubisich,  
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

**MULLINS, J.**

Following a jury trial in 1984, Basil Pendleton was convicted of first-degree murder and first-degree robbery, and was sentenced to life imprisonment without the possibility of parole. He appealed his convictions which were affirmed by this court. See *State v. Pendleton*, No. 84-1319 (Iowa Ct. App. Nov. 26, 1985). Procedendo was issued on February 7, 1986.

Pendleton filed an application for postconviction relief, which the district court denied in a ruling filed in September 1989. Pendleton then sought federal habeas corpus relief. The federal district court denied the petition, and the denial was affirmed on appeal. See *Pendleton v. Hundley*, No. 95-3391, 1996 WL 224108 (8th Cir. May 6, 1996). Pendleton then filed a second application for postconviction relief in August 2001, which was denied by the district court in 2002 on statute of limitations grounds. Pendleton appealed, but our court dismissed the appeal as untimely filed. See *Pendleton v. State*, No. 02-1709, 2004 WL 57581 (Iowa Ct. App. Jan. 14, 2004).

On June 8, 2009, Pendleton filed pro se his current and third application for postconviction relief. Pendleton alleged the original trial court made ten separate errors in instructing the jury. The State moved to dismiss the application as time barred by the three-year statute of limitation under Iowa Code section 822.3 (2009). A hearing was held on the motion to dismiss on October 3, 2011. Pendleton was represented by appointed counsel at the hearing, and the hearing was not recorded. Following the hearing, the district court filed a ruling granting the State's motion to dismiss.

Pendleton now appeals, claiming his postconviction relief counsel provided ineffective assistance by: (1) failing to have the hearing on the State's motion to dismiss recorded, and (2) failing to amend or supplement his pro se postconviction relief application.

Our review is de novo. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). To establish a claim of ineffective assistance of counsel, Pendleton must show by a preponderance of the evidence that his postconviction counsel failed to perform an essential duty, and that prejudice resulted. *Id.* Failure to show either element is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

We find Pendleton has failed to establish prejudice.<sup>1</sup> Pendleton makes no argument on appeal that the district court erred in finding his third postconviction relief application time barred by the statute of limitations. Iowa Code § 822.3. His third application was filed over twenty years after procedendo was issued in his first appeal. Pendleton does not argue that his claims regarding the jury instructions at his original trial are a ground of fact or law that could not have been raised within the applicable time period. *Id.*

Furthermore, we find Pendleton has failed to show he was prejudiced by his postconviction counsel's conduct. Pendleton does not demonstrate what a record on the hearing on the motion to dismiss might have shown that would now help him, does not state what argument should have been made at the dismissal

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<sup>1</sup> Citing *Lado*, 804 N.W.2d at 252-53, Pendleton argues prejudice should be presumed because the alleged errors were "structural" in nature. We disagree. Counsel's alleged failures were not "structural defect[s] affecting the framework within which the trial proceed[ed]." *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

hearing, and does not articulate what issues or claims should have been raised in an amended or substituted application.

Because Pendleton has failed to show prejudice on two fronts, we affirm the dismissal of his third application for postconviction relief.

**AFFIRMED.**