

IN THE COURT OF APPEALS OF IOWA

No. 2-762 / 10-0950
Filed October 3, 2012

DAVID MONTGOMERY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Applicant appeals the decision of the district court that denied his
application for postconviction relief on the ground it was time-barred.

AFFIRMED.

David Montgomery, Anamosa, pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, until withdrawal,
and Kevin Cmelik, Assistant Attorneys General, Thomas J. Ferguson, County
Attorney, and Kim Griffiths, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., Danilson, J., and Huitink, S.J.* Tabor and
Bower, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

On February 4, 2000, David Montgomery was convicted of robbery in the first degree, in violation of Iowa Code section 711.2 (1999); burglary in the first degree, in violation of section 713.3; and assault while participating in a felony, in violation of section 708.3. His direct appeal was dismissed as frivolous under Iowa Rule of Appellate Procedure 6.1005. *Procedendo* was issued on February 26, 2001.

On February 21, 2003, Montgomery filed his first application for postconviction relief. The district court denied his application. Montgomery appealed that ruling,¹ and we affirmed the district court ruling denying his request for postconviction relief. *Montgomery*, 2007 WL 257674, at *1. *Procedendo* from that appeal was issued on March 16, 2007.

Montgomery filed a second application for postconviction relief on March 8, 2010. The State filed a motion to dismiss, claiming Montgomery's application was untimely under section 822.3. The district court granted the motion to dismiss. Montgomery now appeals the district court's decision.² Our review of a district court ruling dismissing a postconviction action as time barred is for the correction of errors at law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

¹ In the first appeal, Montgomery claimed he received ineffective assistance because defense counsel failed (1) to convey the benefit of a plea bargain to him or the elements of the crimes alleged and (2) to call any witnesses to testify at the trial, other than Montgomery. *Montgomery v. State*, No. 05-0819, 2007 WL 257674, at *1 (Iowa Ct. App. Jan. 31, 2007).

² In this appeal, Montgomery asserts he received ineffective assistance because trial counsel failed to explain an element of an amended charge. He also claims he received ineffective assistance because counsel in his first postconviction action failed to call his trial counsel as a witness.

Section 822.3 provides, “[a]ll other applications must 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.” There is an exception to this time limitation for “a ground of fact or law that could not have been raised within the applicable time period.” Iowa Code § 822.3. An applicant must additionally “show a nexus between the asserted ground of fact and the challenged conviction.” *Harrington*, 659 N.W.2d at 520.

Montgomery’s second petition for postconviction relief was filed more than three years after procedendo was issued in his direct appeal. Procedendo was issued on February 26, 2001, and the second petition for postconviction relief was filed on March 8, 2010, more than nine years later. In order to avoid the time bar of section 822.3, Montgomery was required to assert there was a ground of fact or law that could not have been raised within the three-year time limitation. See *Perez v. State*, 816 N.W.2d 354, 316 (Iowa 2012). In his pro se appeal, Montgomery does not claim there is a new ground of fact or law³ and, in fact, does not address the issue of the timeliness of his petition at all.

We affirm the decision of the district court dismissing Montgomery’s second application for postconviction relief on the ground that it was not filed within the three-year time limitation found in section 822.3.

AFFIRMED.

³ We note that in his present appeal, Montgomery raises a claim of ineffective assistance by his counsel in his first postconviction action. An applicant, however, “cannot circumvent the effect of the three-year time bar by merely claiming ineffective assistance of postconviction counsel.” *Smith v. State*, 542 N.W.2d 853, 854 (Iowa Ct. App. 1995) (citing *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994)).