

IN THE COURT OF APPEALS OF IOWA

No. 2-930 / 11-1909
Filed December 12, 2012

JAMES ZIMMER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Applicant appeals the district court decision denying his request for
postconviction relief from his conviction for conspiracy to manufacture a
controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, John P. Sarcone, County Attorney, and Andrea Petrovich, Assistant
County Attorney, for appellee State.

Considered by Potterfield, P.J., Danilson, J., and Mahan, S.J.* Tabor, J.,
takes no part.

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

MAHAN, S.J.**I. Background Facts & Proceedings.**

On January 14, 2003, James Zimmer and his former wife, Ernestine Kiss, were charged with (I) conspiracy to manufacture a controlled substance (methamphetamine), (II) manufacturing a controlled substance, (III) conspiracy to deliver a controlled substance, (IV) possession of a controlled substance with intent to deliver, (V) failure to affix a drug tax stamp, and (VI) possession of a controlled substance.

Zimmer and Kiss entered into a package plea deal that required both of them to plead guilty. Zimmer pled guilty to Count I, conspiracy to manufacture a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(b)(7) (2003).¹ On March 24, 2003, he was sentenced to a term of imprisonment not to exceed twenty-five years. Zimmer did not appeal his conviction.

Zimmer filed an application for postconviction relief on July 6, 2010. He claimed he received ineffective assistance because his defense counsel permitted him to plead guilty although as a result of mental health problems he could not assist in his own defense. The State filed a motion to dismiss and/or for summary disposition based on the untimeliness of the application. The district court found there was a genuine issue of material fact as to whether Zimmer could have raised his mental health claims within three years after sentencing.

¹ Kiss pled guilty to possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Her guilty plea is not an issue in the present appeal.

The case proceeded to a hearing. Zimmer produced evidence he was diagnosed with attention deficit hyperactivity disorder (ADHD) in 2007. He also testified he was diagnosed with post-traumatic stress disorder (PTSD) in 2009. Zimmer testified he believed he was suffering the symptoms of ADHD and PTSD at the time he pled guilty, although the plea came before either diagnosis. He argued his guilty plea was not voluntary due to his mental condition at that time. Zimmer's defense counsel testified he had no independent recollection of the case, but had extensive experience with clients who had mental health problems. Defense counsel testified that if he believed Zimmer was experiencing mental health problems at the time of the guilty plea, he would have taken action.

The district court determined that even though there was an issue as to whether Zimmer's claim was time-barred, the court would address the claim on the merits. The court noted the transcript from the 2003 plea proceedings showed Zimmer was able to participate in the proceeding. The court found there was nothing about Zimmer's behavior at the time of the plea that would have alerted his defense counsel of a need to request a competency evaluation. The court found, "There is no evidence to support the fact that a request for a competency evaluation should have been made or would have been granted." The court determined Zimmer had failed to show he received ineffective assistance of counsel and denied his request for postconviction relief. Zimmer now appeals.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective

assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). “In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy.” *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel’s breach of duty, he would not have pled guilty. *Ennenga*, 812 N.W.2d at 708.

III. Ineffective Assistance.

A. Zimmer claims he received ineffective assistance because his defense counsel allowed him to plead guilty even though he was suffering from the symptoms of ADHD and PTSD at the time of the guilty plea. He contends defense counsel should have made further inquiry into his mental health condition at that time.

Like the district court, we have read the transcript from the 2003 plea proceeding. The transcript does not support Zimmer’s claims at the postconviction hearing that he was unable to fully participate in the proceeding or contribute to his defense due to his mental health problems. The transcript shows Zimmer was fully engaged, raised issues on his own, and asked the court for a new attorney.² We note that at the time of his guilty plea, the district court was able to observe Zimmer and found he had acted voluntarily in entering his plea. We agree with the district court’s conclusion that Zimmer’s behavior at the

² Later in the guilty plea proceeding Zimmer withdrew his request for new counsel.

2003 plea proceedings did not alert his defense counsel of the need to request a competency evaluation.

We affirm the decision of the district court finding Zimmer has not shown he received ineffective assistance due to defense counsel's failure to take steps to address Zimmer's mental health condition at the time of his 2003 guilty plea.

B. On appeal, Zimmer claims his guilty plea was not voluntary due to pressure from Kiss to accept the package plea deal. He claims he received ineffective assistance because defense counsel permitted him to plead guilty, even though his plea was not voluntary. This issue was not raised before the district court during the postconviction relief proceedings, and Zimmer claims this is due to ineffective assistance by postconviction counsel.

We determine even if this issue had been raised during the postconviction hearing, it would have been dismissed as untimely under Iowa Code section 822.3. Under section 822.3, an application for postconviction relief must be filed within three years from the date a conviction is final, or if a defendant has appealed, from the date procedendo is issued. In this case, because Zimmer did not appeal, an application for postconviction relief should have been filed within three years after his sentencing on March 24, 2003.

Zimmer's application, filed more than seven years after he was sentenced, is untimely unless he raised a ground of fact or law that could not have been raised within the applicable time period. See Iowa Code § 822.3. A claim of ineffective assistance of counsel will not extend this three-year time period. *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994). Zimmer would have been aware at the time of the guilty plea proceeding of Kiss's statements to him, and

we conclude his claims his plea was not voluntary due to pressure from Kiss could have been raised within the three-year time period. We conclude Zimmer's claims on this issue, including his claims regarding the "package plea deal," are barred by the limitations period found in section 822.3.

We affirm the decision of the district court denying Zimmer's application for postconviction relief.

AFFIRMED.