

IN THE COURT OF APPEALS OF IOWA

No. 3-016 / 11-1780
Filed April 10, 2013

**ARTURO AVINA a/k/a
ABEL GOMEZ AVINA,**
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Tama County, Ian K. Thornhill,
Judge.

Arturo Avina, also known as Abel Gomez Avina, appeals from a district
court order denying his application for postconviction relief. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, Brent D. Heeren, County Attorney, and David Walker, Assistant County
Attorney, for appellee.

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

BOWER, J.

Arturo Avina, also known as Abel Gomez Avina, appeals from a district court order denying his application for postconviction relief. Avina argues his guilty plea was procedurally deficient because of certain constitutional errors which occurred during the plea process, he was not properly informed of the immigration consequences of his plea in violation of *Padilla v. Kentucky*, and the district court erred in dismissing his application because it was not timely filed. We affirm.

I. Background Facts and Proceedings

On March 7, 1993, the Tama County Sheriff's Department executed a search warrant for an apartment where deputies discovered seven individuals. Cocaine was found on a table in the living room and in a bedroom closet. Avina, one of the seven individuals, was found sleeping on a bed in the living room. All seven individuals were arrested and submitted to urine tests.

Avina made his initial appearance that same day. His application for appointment of counsel was denied. The State filed a trial information charging Avina with possession of cocaine on March 15, 1993. On March 25, 1993, Avina appeared at the courthouse with attorney, Pat White,¹ who secured a reduction in bond.

On April 6, 1993, Avina appeared without counsel and entered a guilty plea to the charge contained in the trial information. The circumstances of the court appearance are the basis of this application for postconviction relief.

¹ Mr. White appeared at the bond hearing with Avina and was mailed a copy of the order; however, he did not enter a formal appearance in the case.

During the course of the April 6, 1993 plea proceeding, Avina was provided with an interpreter and requested immediate sentencing, pursuant to a plea bargain. He was not, however, notified by the State that his urine test had come back clean, nor that other co-defendants with clean urine tests had or would have their charges dismissed. Avina was sentenced to a term of fifteen days in the county jail with credit for fifteen days served. At no point during the hearing was Avina represented by counsel, though the presiding judge did offer to appoint counsel. Avina, through his interpreter, rejected the offer.

On August 20, 2010, Avina filed an application for postconviction relief. Avina alleged in the application that interpretation errors and the absence of counsel prevented his plea from being voluntary and intelligent. He was allowed to orally amend his application to later include a claim pursuant to *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The district court conducted a full evidentiary hearing concerning the events and circumstances of Avina's guilty plea. The district court issued its ruling on October 13, 2011, ruling that each of Avina's claims were barred by the statute of limitations found in Iowa Code section 822.3 (2009). Avina now appeals.

II. Scope and Standard of Review

Our review of the district court's denial on the grounds of statute of limitations is for correction of errors at law. See *Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993) (reviewing motion to dismiss on statute of limitations grounds for errors at law). "Thus, we will affirm if the trial court's findings of fact are

supported by substantial evidence and the law was correctly applied.” *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

III. Discussion

Chapter 822 of the Iowa Code provides for and governs postconviction relief actions. Section 822.3 places a limitation on the commencement of such actions. Most applications for postconviction relief must be filed within three years. Iowa Code § 822.3.² Exceptions exist, however, for grounds “of fact or law that could not have been raised within the applicable time period.” *Id.* The statute is to be read and understood as an effort to “conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of repose in our criminal justice system.” *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994). Exceptions found within the section act as an escape clause when an applicant had “no opportunity” to assert them within the limitations period. *Id.* When a party claims the benefit of the limitations exception they must plead and prove the exception by showing they were not or

² The statute reads:

However, if the applicant is seeking relief under section 822.2, subsection 1, paragraph “f”, the application shall be filed with the clerk of the district court of the county in which the applicant is being confined within ninety days from the date the disciplinary decision is final. All 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. However, 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. The errors urged by Avina do not fall within the confines of section 822.2, subsection 1, paragraph f, therefore the three-year period applies to the facts of this case.

should not have been alerted to the potential claim before the period expired. *Id.* at 610–11.

In the present case Avina argues that the State suppressed evidence at the time of his plea providing an undiscovered ground of fact which should excuse his late filing. He also claims the absence of counsel while pleading guilty is a “structural deficiency” which excuses the late date of his postconviction application and that precedent establishes that such collateral challenges to a conviction are permissible despite the statute of limitations. Finally, he asserts that he is entitled to relief under *Padilla v. Kentucky* despite the statute of limitations.

A. *Brady* claim

Avina argues the State’s failure to disclose his clean urine test prior to his plea and sentencing is a violation of the rule announced in *Brady v. Maryland*, 373 U.S. 83 (1963). He relies upon the case of *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003), to excuse his failure to file his application within the required three-year limitations period.³

Harrington concerned the suppression of certain police investigative reports which were not made available to the defendant at the time of trial. 659 N.W.2d at 517–18. The defendant was denied access to eight separate investigative reports, as well as during a subsequent postconviction relief

³ The State argues that Avina has failed to preserve error on this issue because the district court did not specifically address the issue in its ruling. Because the issue was properly presented during the postconviction relief hearing, and because the district court noted that it reviewed “all the allegations of the Application,” we conclude the issue was raised and decided by the district court and therefore error was properly preserved. *LaMaster v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

proceeding, despite having requested “everything” relevant to the investigation. *Id.* Our supreme court held that to succeed in a post-limitations period postconviction relief application premised upon a *Brady* violation, the defendant is required to show that the ground of fact could not have been raised earlier and that the suppressed evidence contain a causal nexus between the asserted ground of fact and the conviction. *Id.* at 520. Having been withheld for approximately twenty years, the investigative reports in *Harrington* clearly and obviously could not have been used within the limitations period. *Id.* at 522–23.

The *Harrington* case differs from the case at bar. The *Harrington* court stated that in order to avoid the statute of limitations the ground raised could not have been raised earlier. *Id.* The district court found that all of the allegations made by Avina were known to him within three years of the judgment becoming final. We agree. Assuming without deciding that the urinalysis result was suppressed, it is unquestionable that Avina knew or should have known that a helpful test result would be forthcoming. Having participated in the urine test, nothing prevented Avina from knowing of its results within the limitations period. The district court’s conclusion on the issue is substantially supported. We therefore affirm.

B. Denial of Counsel Claim and Plea Irregularities

Avina next argues that he was denied counsel during the plea process, and that denial was a “structural error” excusing his failure to file an application for postconviction relief during the three-year limitations period.⁴

Support for Avina’s position comes in two parts. First, he points out that the absence of counsel has prevented criminal convictions from being used in subsequent proceedings, particularly for enhancement purposes. Second, he argues for a “discovery rule” exception under *Harrington*.

In *Baldasar v. Illinois*, the United States Supreme Court held that a “prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.” 446 U.S. 222, 226 (1980) (partially overruled by *Nichols v. United States*, 511 U.S. 738 (1994), which allowed for the use of uncounseled misdemeanor convictions for enhancement purposes when no prison term was imposed). It is unmistakable, however, that questions of enhancement stand on a different procedural posture than Avina’s case. It may be true that Avina’s 1993 conviction could not be used for enhancement purposes; however, chapter 822 of the Iowa Code is unconcerned with enhancement. The section expressly concerns itself with applications for postconviction relief. Cases cited by Avina on this point do not address the postconviction relief statute of limitations, and the statute itself does

⁴ The State once again argues that Avina has failed to preserve error because the district court did not specifically address the issue in its ruling. Because the issue was properly presented in Avina’s application, and because the district court noted that it reviewed “all the allegations of the Application,” we conclude the issue was raised and decided by the district court and therefore error was properly preserved.

not provide an exception for such “structural errors.” Chapter 822 applies to constitutional violations, which would include “structural errors.” Iowa Code § 822.2 (1)(a). The statute of limitations in section 822.3 would apply to this argument and, absent a showing of new facts, would bar the application. Once again, this court finds that all relevant facts were known to Avina within the limitations period.

Avina’s *Harrington* argument fares no better. He argues that *Harrington* crafts a discovery rule whereby an application for postconviction relief may be presented outside the statute of limitations when the State is responsible for concealing relevant information from the applicant. This argument is simply another attempt at presenting the exception to the statute of limitations, as a new ground of fact, later discovered. Once again, Avina is unable to avail himself of the exception. Avina knew, within the limitations period, that he was without counsel when entering his plea.

This case illustrates the difficulty in inappropriately using the postconviction relief mechanism for purposes of attacking a guilty plea. The postconviction relief process is not designed for litigation of guilty pleas and should not normally be employed in such a manner.

The court also notes that Avina was not prejudiced by his lack of representation in this case. With counsel present, all indications are that Avina would have entered an identical plea leading to an identical outcome. Though prejudice is not a part of the statute of limitations analysis, it does eliminate any injustice application that the statute of limitations might otherwise cause.

The district court's conclusion that there is no new ground of fact on this issue is substantially supported, and we therefore affirm.

C. *Padilla v. Kentucky*

Finally, Avina contends he is entitled to relief under *Padilla v. Kentucky*, 130 S. Ct. 1473. The issue we confront today is whether *Padilla* applies retroactively to Avina's plea, or, whether application of *Padilla* is barred by the postconviction relief statute of limitations.

Padilla requires counsel to advise a criminal defendant of the potential immigration consequences of a plea. 130 S. Ct. at 1483. The decision does not, however, explain whether it is to be applied retroactively, leaving open the question of how *Padilla* is to be applied to the facts before the court today.

The question of the retroactive application of *Padilla* was recently settled by the United States Supreme Court. In *Chaidez v. United States*, the Court directly confronted the question presented by a lawful permanent resident of the United States who, after being convicted of mail fraud prior to the announcement of *Padilla*, faced deportation. 133 S. Ct. 1103, 1105–06 (2013). Like Avina, Chaidez argued that *Padilla* announced an old rule which can apply retroactively to his conviction. The *Chaidez* court disagreed. Examining *Padilla* at length, the Court noted that *Padilla* started not with the question of whether counsel is ineffective for failing to advise a client of immigration consequences under *Strickland v. Washington*, 466 U.S. 668 (1984), but rather with the question of whether immigration advice was a part of Sixth Amendment analysis at all. *Id.* at 1108. Based upon that analysis, the court determined that *Padilla* announced a

new rule and that “defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding.” *Id.* at 1113. As a new rule, Avina may not avail himself of *Padilla* in this proceeding.

That *Padilla* announced a new rule does not mean Avina may use the “ground of fact or law that could not have been raised within the applicable time period” exception to the statute of limitations. Iowa Code § 822.3.

The Iowa Supreme Court recently examined possible applications of *Padilla* in *Perez v. State*, 816 N.W.2d 354 (Iowa 2012). The facts of *Perez* are strikingly similar to the case at bar. *Perez* was arrested and charged with possession of a schedule II controlled substance after drugs were discovered following a barroom fight. *Perez*, 816 N.W.2d at 355–56. He pleaded guilty and received a thirty day sentence, with credit given for thirty days previously served. *Id.* at 356. Nine years later and facing immigration consequences, *Perez* filed an application for postconviction relief based upon the *Padilla* decision. *Id.* The district court granted the State’s motion to dismiss based upon the statute of limitations found in section 822.3, and this court affirmed. *Id.* On further review, our supreme court discussed the split in authority on the question of whether *Padilla* qualifies as a new rule but withheld judgment on the issue. *Id.* at 358–59. Instead, the court examined the statute of limitations and concluded that *Perez* was unable to avail himself of the rule in *Padilla* regardless of retroactive application. *Id.* at 360–61. If *Padilla* is a new rule, it would fit the exception to the statute of limitations, but it would not be applied retroactively, whereas if *Padilla* is an old rule and thereby eligible for retroactive application, it would fail to

meet the exception in the statute of limitations. *Id.* The present matter is substantially similar to *Perez*.⁵ *Chaidez* answers the question as to which of these possibilities applies, though it does not change the result. As our supreme court indicated in *Perez*, because *Padilla* is a new rule, it fits the exception to the statute of limitations, but as a new rule it cannot be applied retroactively. Accordingly, we affirm.

AFFIRMED.

⁵ Avina additionally relies upon *Danforth v. Minnesota*, 552 U.S. 264 (2008) to argue that the state of Iowa is permitted to treat *Padilla* as an old rule for federal purposes, thereby opening the door to retroactive application, while simultaneously treating *Padilla* as a new rule for statute of limitations purposes. See also *Bennett v. State*, No. 06-1254, 2008 WL 2039303, at *6 (Iowa Ct. App. May 14, 2008) (discussing *Danforth*). As *Padilla* has been determined to be a new rule for federal purposes, this argument is unavailing.