

IN THE COURT OF APPEALS OF IOWA

No. 3-063 / 12-0909
Filed April 10, 2013

ASUNCION FUENTES,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Mitchell E. Turner, Judge.

The State appeals from the district court's grant of postconviction relief.

REVERSED AND REMANDED.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Janet M. Lyness, County Attorney, and Susan Nehring, Assistant County Attorney, for appellant.

Rockne O. Cole of Cole & Vondra, L.L.P., Iowa City, for appellee.

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

EISENHAUER, C.J.

The State appeals from the district court's grant of postconviction relief. It contends the court erred in concluding Asuncion Fuentes's discovery of the immigration consequences of his guilty plea to a drug possession charge constituted a "ground of fact or law that could not have been raised within the applicable period." See Iowa Code § 822.3 (2009). We reverse and remand for dismissal.

I. Background Facts and Proceedings

Asuncion Fuentes is a citizen of El Salvador. He came to the United States in 1989 and was granted refugee status in 1992. In 2002 he became a legal permanent resident. In September 2004 during a search of Fuentes following his arrest on another charge, police found a small plastic bag containing cocaine. He was charged with possession of cocaine. In January 2006 he entered a written guilty plea to the possession charge, was sentenced to two days in jail, given credit for time served, and ordered to pay a fine.

In November 2009 Fuentes went to El Salvador for a religious ceremony following the death of his mother. On return to the United States in December 2009, he was detained at the airport and told he was inadmissible because of his 2006 drug-related conviction. With the help of an immigration attorney, Fuentes was granted temporary admission.

In July 2010 Fuentes filed an application for postconviction relief from his 2006 conviction. In relevant part, Fuentes alleged his trial attorney provided ineffective assistance (1) for failing to make certain the written plea form contained the "immigration consequences" advisory required by Iowa Rule of

Criminal Procedure 2.8(2)(b)(3),¹ (2) for affirmatively misadvising him about the consequences of the guilty plea, and (3) for failing to advise him about the immigration consequences of a drug-related conviction. He further alleged his plea was not knowingly and intelligently given because he was not properly advised of the consequences. He alleged he did not learn of the immigration consequences of his January 2006 plea until he attempted to re-enter the United States in December 2009 following his trip to El Salvador.

Following a hearing on the merits of the application in December 2011, the court issued its ruling in April 2012 granting the application, vacating the guilty plea, and directing the clerk of court to expunge the conviction. The State appeals.

II. Scope and Standards of Review

Generally, review of proceedings for postconviction relief is for correction of errors at law. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011). To the extent an applicant's claims are of a constitutional nature, review is de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

III. Merits

Was the application timely? The State contends the court erred in finding the three-year statute of limitations for filing postconviction relief applications was tolled until December 2009 when Fuentes discovered the immigration

¹ Before accepting a guilty plea, a court must determine a defendant understands "[t]hat a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws." Iowa R. Crim. P. 2.8(2)(b)(3). If this procedure is waived, "the defendant shall sign a written document that includes a statement that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences if the defendant is not a United States citizen." Iowa R. Crim. P. 2.8(2)(b)(5).

consequences of his guilty plea. Iowa Code section 822.3 provides all applications for postconviction relief must be filed within three years of the date the conviction is final. However, the three-year 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 reasonable interpretation of the statute compels the conclusion that exceptions to the time bar would be, for example, newly-discovered evidence or a ground that the applicant was at least not alerted to in some way.” *Perez v. State*, 816 N.W.2d 354, 360 (Iowa 2012) (citation omitted).

The State argues the court erred in finding Fuentes’s ignorance of the immigration consequences of his drug conviction constituted a new ground of fact or law as set forth in section 822.3, because the consequences “were in existence during the three-year period of section 822.3 and thus available to be addressed then.” *Lopez-Penalosa v. State*, 804 N.W.2d 537, 542 (Iowa Ct. App. 2011); see also *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989) (noting a “claimed lack of knowledge is not provided as a ground for exception from the effects of the statute of limitations” in postconviction proceedings).

The State also argues Fuentes reasonably could have discovered the complete immigration consequences of his guilty plea within the three-year period because he was alerted to them. His trial attorney testified he had advised Fuentes he could lose his legal status and face removal under federal law, although his experience in Johnson County was that the county did not routinely report drug-related convictions to immigration authorities. The attorney also advised Fuentes an immigration attorney could advise him of the complete ramifications of his conviction. On appeal, the State argues Fuentes would have

known the immigration consequences within the three-year period had he consulted with an immigration attorney, and the court erred in finding Fuentes had no obligation to make his own inquiry into the immigration consequences.

We conclude the district court erred in finding Fuentes's "discovery" of the serious immigration-related effects of his drug possession conviction is "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. The consequences were in existence at the time of Fuentes's plea. See *Lopez-Penaloza*, 804 N.W.2d at 542. Although his trial attorney was focusing on the more serious charge, he advised Fuentes he could lose his resident status and face removal. His "claimed lack of knowledge [of the full effect of his conviction] is not provided as a ground for exception from the effects of the statute of limitations." See *Edman*, 444 N.W.2d at 106. No exception applies to make Fuentes's postconviction relief application, filed more than three years after his drug conviction, timely. Therefore, we reverse the contrary decision of the district court and remand for dismissal of the application.

Because the application was untimely, we need not address any of the claims Fuentes raised in it.

REVERSED AND REMANDED.