

IN THE COURT OF APPEALS OF IOWA

No. 3-747 / 12-1496
Filed August 21, 2013

MARLIN JACKSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve,
Judge.

Marlin Jackson appeals from the dismissal of his action for postconviction
relief. **AFFIRMED.**

Marlin Jackson, Anamosa, appellant pro se.

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Christopher Scott, Student Legal Intern, Michael J. Walton, County
Attorney, and Amy Devine, Assistant County Attorney, for appellee State.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Marlin Jackson appeals from the dismissal of his second action for postconviction relief. We affirm, finding the district court correctly applied the three-year statute of limitations.

I. Facts and Proceedings.

Jackson was convicted of two counts of robbery in the second degree in 2005. His direct appeal from the convictions was dismissed as frivolous. He subsequently applied for postconviction relief; the application was denied following trial in 2009. The district court wrote a lengthy opinion, addressing each of Jackson's claims including those presented by counsel and those presented by Jackson pro se. Jackson appealed; our court addressed each of the ineffective assistance of counsel issues presented and affirmed the district court's denial of relief. *Jackson v. State*, No. 09-1388, 2010 WL 4867385 (Iowa Ct. App. November 24, 2010). Jackson again filed for postconviction relief in April of 2012, alleging his appellate postconviction counsel was ineffective and further facts had not been presented to the district court. The State moved for summary dismissal of the application, citing the three-year statute of limitations for postconviction relief actions.

The court scheduled hearing on the State's motion, instructed Jackson to call the courthouse from his correctional institution to participate in the hearing, and provided Jackson with a phone number. On the first scheduled date of the hearing, Jackson did not call the courthouse. The court re-set the hearing date at the request of Jackson's counsel. At the re-set hearing date, Jackson again did not call to participate. He was represented by counsel. The district court

found Jackson's presence was unnecessary, as the motion was based on a purely legal issue: when the statute of limitations began to run on the application for postconviction relief. The district court granted the application to dismiss, finding Jackson's application was filed more than three years after the conviction. It rejected Jackson's argument that the three-year limitations period begins to run only after procedendo issued from the postconviction appeal. Jackson appeals, arguing dismissal was improper as to his ineffective assistance argument relating to his prior postconviction appeal, and that his counsel provided ineffective assistance in allowing the hearing on the motion to dismiss to proceed without his presence.

II. Analysis.

We review the dismissal of an action for postconviction relief for the correction of errors at law. *Manning v. State*, 654 N.W.2d 555, 560 (Iowa 2002). We review claims of ineffective assistance of counsel de novo. *Everett v. State*, 789 N.W.2d 151, 155 (Iowa 2010).

A. Dismissal of application.

Iowa Code section 822.3 provides a three-year statute of limitations for the filing of postconviction relief petitions. It states:

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 (2011). Jackson argues the statute of limitations does not apply to his claim that his postconviction appellate counsel provided ineffective representation, as this is a claim he could only make on a successive

postconviction petition. He argues this claim was “a ground of fact or law that could not have been raised within the applicable time period.” See *id.*

Our courts have repeatedly held that “an applicant for postconviction relief cannot circumvent the effect of the three-year time bar by merely claiming the 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, 823 (Iowa 1994)). Jackson argues his case is distinguishable as he is claiming his postconviction *appellate* counsel is ineffective, but our case law is clear that postconviction counsel’s conduct does not have a direct impact on the validity of the criminal conviction and does not qualify as a ground of fact that will avoid the limitations period. See *Dible v. State*, 557 N.W.2d 881, 884 (Iowa 1996) (abrogated on other grounds by *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003)).

It is important not to confuse the effect of ineffective assistance of trial counsel with the ineffective assistance of appellate or postconviction counsel. The errors of trial counsel have a direct impact on the validity of a criminal conviction. In contrast, the incompetency of appellate counsel or postconviction counsel cannot have this type of impact because their involvement postdates the defendant’s conviction. The effect of the ineffective assistance of appellate or postconviction counsel is to prevent the defendant from adequately presenting the errors that occurred in the trial court, including any errors by trial counsel, and thereby obtaining relief from the conviction or sentence. Because the “ground of fact” exception, as we interpreted it in [*Hogan v. State*, 454 N.W.2d 360 (Iowa 1990)], is limited to grounds that would likely have changed the result of the criminal case, such grounds may include the ineffectiveness of trial counsel, but cannot include the ineffectiveness of appellate or postconviction counsel.

Id. Therefore, the “ground of fact” exception does not extend to ineffectiveness of postconviction counsel of any kind—including postconviction appellate counsel.

See id.

Further, Jackson’s second petition for postconviction relief simply states in conclusory fashion that his postconviction appellate counsel failed to raise on appeal from the denial of his first petition for postconviction relief “several issues in his original PC meriting review from the High Court.” His “Specific Explanation of Grounds” contains several claims of ineffective assistance of trial counsel and claimed errors in district court rulings in his original trial. All of these claims are well over three years before his second application for postconviction relief. As our supreme court held in *Dible*, these postconviction counsel were not involved until after Jackson’s conviction and their failures, if any, do not create an extension of the limitations period. *See id.* The court properly dismissed Jackson’s second application for postconviction relief as beyond the statute of limitations. Because Jackson’s claim was properly dismissed, we do not reach the merits of his ineffective-assistance-of-counsel claim.

AFFIRMED.