

IN THE COURT OF APPEALS OF IOWA

No. 3-931 / 12-1776
Filed October 23, 2013

JAMES ANTHONY MURRAY JR.,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

James Anthony Murray Jr. appeals from the dismissal of his application for
postconviction relief. **AFFIRMED.**

James A. Murray, Anamosa, appellant pro se.

Magdalena B. Reese of Carr & Wright, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, John P. Sarcone, County Attorney, and Celene Gogerty, Assistant
County Attorney, for appellee State.

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

POTTERFIELD, P.J.

James Anthony Murray Jr. appeals from the dismissal of his third application for postconviction relief. We affirm, finding the application was barred by our three-year statute of limitations.

I. Facts and Proceedings.

This is the second time we have heard Murray's claims on appeal from the dismissal of an application for postconviction relief. See *Murray v. State*, No. 10–0845, 2011 WL 1781682 (Iowa Ct. App. May 11, 2011). We adopt the facts and procedural history presented in the prior opinion.

James Anthony Murray Jr. appeals the dismissal of his second application for postconviction relief (PCR). Because the ineffective-assistance-of-counsel issue was raised in Murray's original PCR and Murray did not have sufficient reason for asserting other claims in the second PCR, we affirm. . . .

On August 16, 2004, in exchange for an agreement on sentencing (terms to be served consecutively for indeterminate term of sixteen years) and the State's promise to amend a trial information (originally charging attempted murder, second-degree sexual abuse, felon in possession of a firearm, and two counts of assault with a dangerous weapon), Murray stipulated to a trial on the minutes on reduced charges (willful injury causing bodily harm, assault with intent to commit sexual abuse, felon in possession of a firearm, and two counts of assault with a dangerous weapon) and agreed to immediate sentencing.

At sentencing, the district court informed Murray:

You will have to register as a sex offender. And all of these matters are going to be contained within a written order finding your guilt based on the stipulation to the minutes of testimony and the sentencing. So before you leave here today, I am going to want you to review all of this with [your counsel]. And if you have any questions, ask him and he can help answer your questions.

The court's "Order re: Finding of Guilt on Stipulation and Immediate Sentencing" provided in part:

IT IS FURTHER ORDERED that defendant shall register as a sex offender within five days of this order and keep his registration current and correct as

provided in Iowa Code Chapter 692A. Further, defendant is advised that the offense of conviction is a sexually predatory offense within the meaning of Chapter 901 A of the Iowa Code. This conviction will be used to enhance any future convictions for any sexually predatory offense as described in Iowa Code section 901A.2.

On October 21, 2005, Murray filed a notice of appeal, which was dismissed as untimely. *Procedendo* issued on April 24, 2006. Murray filed an application for PCR on December 12, 2005, claiming trial counsel was ineffective in failing to inform him that his conviction would result in a required registration as a sex offender and was misleading in the extent to which his stipulations would affect his case. Murray was appointed counsel, and a hearing was held. On November 17, 2006, the district court rejected Murray's claim of ineffective assistance of counsel and dismissed the petition. Murray's appeal from the PCR dismissal was dismissed as frivolous. *Procedendo* issued on February 1, 2008.

On November 6, 2009, Murray filed this second PCR application. Counsel filed an amended and substituted application, claiming the conviction or sentence violated the federal or state constitution (not further specified) and asserting as facts supporting the application:

Count III, Assault With Intent to Commit Sexual Abuse, also requires as a provision of sentencing that Mr. Murray register as a sex offender. At no time during the State's record of the agreement or the Court's colloquy with Mr. Murray about the maximum or minimum penalties for the charges was Mr. Murray ever advised about the requirement that he register as a sex offender.

He also asserted he "was not provided a copy of the transcript until September 11, 2009." Murray's second PCR application specifically stated, "The Applicant would request the court take judicial notice of the pleadings and documents in the court file for this case as well as the original criminal case as well as any transcript of any hearing or the trial in the original criminal matter."

The State moved to dismiss this PCR application because: (1) the action was time barred pursuant to Iowa Code section 822.3 (2009); (2) having failed to raise the issue on direct appeal it was procedurally defaulted, see Iowa Code § 822.2; (3) section 822.8 or principles of *res judicata* prohibited the matter; and (4) the claim was without merit as Murray was informed by the sentencing court of the sex offender registry requirement. Murray filed nothing in response.

After a hearing, and "having reviewed the file and heard and considered the arguments of the parties," the district court summarily dismissed Murray's second PCR application, concluding

the issue now raised (1) should have been raised by motion in arrest of judgment or direct appeal, (2) was barred by section 822.8, which prohibits the re-litigation of issues already adjudicated in an original PCR application; and (3) Murray was informed of the consequences of his plea.

Id. at *1–2. We concluded Murray’s application was properly dismissed as barred by Iowa Code section 822.8 (2009), as “Murray asserted an ineffective-assistance claim in his first PCR action and may not re-litigate it here.” *Id.* at *3.

Murray filed his third application for postconviction relief in 2011, again arguing his counsel was ineffective in failing to inform him of the sex offender registry requirement, along with various other pro se claims. At the hearing, the State made an oral motion to dismiss based on the same grounds for dismissal as in the prior application, referencing its prior motion to dismiss. The court dismissed Murray’s application, finding his counsel was effective and his sentence was not illegal.

Murray appeals, arguing his counsel was ineffective.¹ The State again argues the action should be procedurally barred. Murray responds that the State failed to preserve error on this issue.

II. Analysis.

We review for the correction of errors at law. *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012). We first address the statute of limitations issue.

Before addressing the merits of appellant’s issues, we briefly examine the propriety of raising the statute of limitations [under our postconviction relief statute] by a motion to dismiss. Generally, this defense must be affirmatively asserted by a responsive pleading. *Pride v. Peterson*, 173 N.W.2d 549, 554 (Iowa 1970). However, when it is obvious from the uncontroverted facts shown on the face

¹ Murray argues several grounds of ineffective assistance, both in the brief filed by counsel and in his pro se brief.

of the challenged petition that the claim for relief was barred when the action was commenced, the defense may properly be raised by a motion to dismiss. *Id.*

Davis v. State, 443 N.W.2d 707, 708 (Iowa 1989). “As we have indicated many times before, we will uphold a district court ruling on a ground other than the one upon which the district court relied provided the ground was urged in that court.”

King v. State, 818 N.W.2d 1, 11 (Iowa 2012) (internal quotation marks omitted).

Iowa Code section 822.3 (2013) reads, in relevant part:

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.

Since his first application almost eight years ago, Murray has continued to make very similar (if not identical) arguments regarding the ineffectiveness of his counsel based on the circumstances of his agreement to stipulate to trial on the minutes of testimony. These grounds were discoverable previously, and should have been raised together during his multiple earlier actions. *See Murray*, 2011 WL 1781682, at *3; *Perez*, 816 N.W.2d at 361 (“There is no dispute that Perez filed his application more than three years after the judgment in his criminal case became final. Thus, in order to avoid the time bar of section 822.3, Perez must be asserting a ground of fact or law that ‘could not have been raised’ earlier. . . . Perez should have raised his claim regarding failure to advise of immigration consequences within the three-year limitations period of section 822.3.”). We conclude Murray’s application is time-barred and was properly dismissed by the district court.

AFFIRMED.