

**IN THE COURT OF APPEALS OF IOWA**

No. 6-569 / 05-0330  
Filed August 23, 2006

**ROBERT JAMES KNUPP,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Robert James Knupp appeals from the denial of his petition for postconviction relief. **AFFIRMED.**

Jeffrey M. Lipman of Lipman Law Firm, Clive, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Amy K. Beavers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Hecht and Vaitheswaran, JJ.

**SACKETT, C.J.**

Robert James Knupp was convicted, following a bench trial, of first-degree kidnapping and sentenced to life in prison as a result of an incident that occurred on January 1, 1980. Knupp filed this application for postconviction relief, which the district court denied. He appeals, contending the district court erred in finding (1) he knowingly and voluntarily waived his right to a jury trial, and (2) the claim was time barred under Iowa Code section 822.3 (2003). The State contends the district court was correct in dismissing Knupp's petition. We affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Knupp was charged with kidnapping and raping a woman he picked up while she was hitchhiking. There is a record entry that shows on March 19, 1980, Knupp appeared in person with his attorney before District Court Judge Ira F. Morrison and made an oral application under what was then Iowa Rule of Criminal Procedure 16 (now rule 2.17) to waive his right to a jury trial and have both charges tried to the court. The oral application was granted and in entering its written order the district court specifically found, "After interrogation of the defendant, it is the Court's ruling that the jury in these matters is waived, and the matters will be tried to the Court."

The matter was tried to the court on March 25, 1980, and on April 1 of the same year the district court found Knupp guilty of first-degree kidnapping and third-degree sexual abuse. Knupp was sentenced on May 15, 1980, at which time the district court amended its findings and defendant was convicted only of

the charge of first-degree kidnapping, the court having found it the higher of the two charges.

Knupp appealed contending (1) there was insufficient evidence to establish the elements of the crime, (2) his life sentence should be reduced, and (3) he was denied a fair trial. There was no claim on direct appeal that Knupp's waiver of his right to a jury trial was not knowing and intelligent. *State v. Knupp*, 310 N.W. 2d 179 (Iowa 1981). Knupp's conviction was affirmed. *Id.*

In February 1984, Knupp filed his first application for postconviction relief. His petition focused on claims of ineffective counsel. He also alleged that defense counsel coerced him into waiving his right to a jury trial.

In ruling on the petition, the postconviction court referenced the entry on March 19, 1980, where Judge Morrison found after interrogating Knupp that Knupp's jury trial should be waived. The postconviction court noted it had no transcript of the March 19, 1980 proceedings and without a transcript Knupp was unable to prove any impropriety of his attorney or that he suffered any prejudice. The petition was denied. An appeal was taken and this court in an unpublished opinion affirmed the district court's denial of relief. *Knupp v. State*, No. 85-0903 (Iowa Ct. App. Sept. 25, 1985).

Knupp filed a second application for postconviction relief in November 1999. Among other claims he alleged he was denied his right to a jury trial because his waiver was not voluntarily and intelligent and it was not in writing. The State filed a motion for summary judgment. The motion was submitted without a hearing and the court agreed with the State's position and dismissed

the action. Knupp appealed. In September of 2001 the supreme court dismissed Knupp's appeal as frivolous and procedendo issued on October 22, 2001.

Knupp filed a petition for postconviction relief in the case before us on December 9, 2003, and an amended application was filed by Knupp's counsel on August 18, 2004, after Knupp received appointed counsel. In his petition Knupp contended his conviction and sentence were in violation of the Constitution of the United States and the constitution or laws of the State of Iowa in that his right to a jury trial was denied; that any jury trial waiver was not knowing, willing, or voluntary; and that he received ineffective assistance of trial, postconviction, and appellate counsel in their failure to raise and argue this issue correctly in prior appellate and postconviction proceedings.<sup>1</sup> Knupp further contended that both allegations were exceptions to the time constraints of Iowa Code section 822.3 in that both were grounds of fact or law that could not have been raised within the applicable time period.

The district court concluded that the issue raised here was, in essence, the same issue raised in his first postconviction relief action. The court further concluded Knupp's application was time barred, and should be dismissed.

The district court made it clear it was somewhat dismayed by the fact that no transcript of the hearing the district court conducted prior to waiving the jury trial was provided. The court concluded after its own investigation there may never have been a transcript of the waiver of jury trial proceedings, as there was no transcript in the local clerk's office, nor did the court find any record of the

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<sup>1</sup> The claims of ineffective assistance of counsel, while litigated in the district court, are not raised in this appeal.

clerk having a transcript of the waiver proceedings. The district court noted that a lack of a transcript of the waiver proceedings, reinforced by the fact there was no court reporter's certificate in the kidnapping court, raised the possibility there was never such a transcript filed. The district court went on to note the clerk at times apparently cross-filed pleadings from the sexual abuse file, which was where the record entry from the waiver of the jury trial proceedings was found, as well as the court reporter's certificate verifying she reported a hearing on an application to waive a jury trial on March 19, 1980. The district court found the court's record confirmed that the hearing was held with the defendant personally appearing with his attorneys. The district court also determined that correspondence indicated Knupp had corresponded with the court reporter who indicated she had attempted to find her notes, but was unable to find them to create a transcript of the waiver proceedings. Having so searched the record, the district court found Knupp was correct when he asserted in his third postconviction relief application that no court had ever made an independent review of the actual waiver. The district court went on to find the fact no record of the proceedings existed did not by itself entitle Knupp to have his conviction set aside. The district court concluded Knupp's counsel testified that Knupp made a knowing decision to waive the jury trial.

## **II. SCOPE OF REVIEW.**

We review Knupp's constitutional claim de novo. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We note the great solicitude of courts for jury trials. *State v. Stallings*, 658 N.W. 2d 106, 108 (Iowa 2003). The Federal

Constitution provides: “The trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .” U.S. Const. art. III, § 2. Further, the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .” The Iowa Constitution also contains two provisions relating to a defendant's right to jury trial, both in Article I. Article I, section 9 provides in relevant part, “The right of trial by jury shall remain inviolate. . . .” Section 10 provides in part, “In all criminal prosecutions, and in cases involving the life, or liberty of an individual the accused shall have a right to a speedy and public trial by an impartial jury. . . .”

The adequacy of a jury trial waiver is a mixed question of fact and law, which an appellate court decides de novo. *Stallings*, 658 N.W.2d at 108 (citing *United States v. Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997)). A court's ruling on a jury waiver application is a matter vested in the court's sound discretion. *Id.* (citing *United States v. Saadya*, 750 F.2d 1419, 1421 (9th Cir. 1985)).

#### **A. WAIVER OF RIGHT TO JURY TRIAL.**

Knupp contends the record does not support a finding he knowingly waived a jury trial. He points to the absence of a written waiver and the fact there is no transcript of the waiver proceedings.

When the original records are lost, the State should initially be obligated to produce evidence which will provide a picture of what took place during the hearing. See *McKnight v. State*, 356 N.W.2d 532, 537 (Iowa 1984). Evidence

will be deemed sufficient for that purpose if it is material to the issues raised by the applicant and provides factual support for the ruling of the district court. *Id.*

The district court found the State satisfied its obligation when Knupp's attorney testified Knupp's waiver was voluntary. Therefore, the court concluded Knupp's claim was without merit. We agree the fact that Knupp's attorney testified from memory about the proceedings could satisfy the State's obligation to provide a record. *See id.* Once the State has provided that evidence, as it did here, Knupp must then sustain the burden to establish by a preponderance of the evidence facts supporting the claims for postconviction relief. He has failed to sustain that burden. *Id.* We affirm on this issue.

**B. CLAIM WAS TIME BARRED UNDER 822.3.**

Knupp also contends that his claims were not time barred under Iowa Code section 822.3.<sup>2</sup> We disagree. As the district court found, the claim raised

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<sup>2</sup> Iowa Code section 822.3 provides:

822.3. How to commence proceeding—limitation.

A [postconviction relief] proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction or sentence took place. However, if the applicant is seeking relief under section 822.2, subsection 6, 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. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct. The supreme court may prescribe the form of the application and verification. The clerk shall docket the application upon its receipt and promptly bring it to the attention of the court and deliver a copy to the county attorney and the attorney general.

on appeal here has twice been raised and rejected in two earlier postconviction proceedings. We affirm on this issue.

**AFFIRMED.**