

**IN THE COURT OF APPEALS OF IOWA**

No. 6-866 / 05-0541  
Filed January 18, 2007

**MANTHA LEE HENDERSON,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Mantha Henderson appeals the dismissal of his third postconviction relief application. **AFFIRMED.**

Jon M. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

In 1985, a jury found Mantha Henderson guilty of first-degree sexual abuse. Our court affirmed the judgment and sentence. Henderson subsequently filed three applications for postconviction relief. The Iowa Supreme Court affirmed the denial of the first postconviction relief application and our court affirmed the denial of the second application.

Henderson's third application, filed in 2002, alleged the following basis for relief:

The trial court's jury instruction ("specific intent") violated the Applicant's Due Process Clause protection under the Fourteenth Amendment, in that, said "constitutionally" infirm instruction, served to relieve [the State] of its burden to prove by proof beyond a reasonable doubt that the Applicant/Defendant possessed the requisite mental state as to the offenses charged.

The State moved to dismiss the application on the ground that it was not filed within a statutory three-year limitation period. See Iowa Code § 822.3 (2001) (requiring the filing of applications for postconviction relief "within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the procedendo is issued"). The district court granted the motion to dismiss, stating "any objection to the jury instruction is not new and was available during the three-year statute of limitations period, if not immediately at the time of trial." The court also concluded that Henderson's failure to raise the issue on direct appeal resulted in a procedural default. See Iowa Code § 822.8.

This appeal is from the district court's dismissal of Henderson's third application for postconviction relief. On appeal, Henderson does not address the three-year time bar or the procedural default. Instead, he repackages his

challenge to the jury instruction as a challenge to his sentence. He argues that the trial court omitted an “essential element from the marshaling instruction,” rendering his sentence illegal. His reasoning is as follows: “the omission of an essential element of a crime deprives the trial court of jurisdiction to impose a sentence for first-degree sexual abuse.”

Henderson re-characterizes his argument to avail himself of the well-established principle that an illegal sentence may be challenged at any time. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). *Cf. State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997) (“McCright attempts to avoid the consequences of her failure to raise [the issue] in the district court . . . by characterizing the sentence as an ‘illegal’ one.”). The problem is that his challenge is not to an illegal sentence. *Tindell*, 629 N.W.2d at 359 (stating that illegal sentence is one “not authorized by statute.”). Henderson is not contending that his sentence for first-degree sexual abuse was “beyond the power of the court to impose,” but that his sentence is void because, in his view, the jury received an erroneous instruction. *See id.*; *cf. State v. Wilson*, 294 N.W.2d 824, 825-26 (Iowa 1980) (noting objections to jury instructions waived if not made because defendant had opportunity to raise objections in trial court, whereas challenge to court’s failure to give reasons for sentence not waived because defendant had no procedure to challenge failure before sentence imposed). As Henderson’s claim is not a claim that his sentence was illegal, the normal error preservation rules apply. *McCright*, 569 N.W.2d at 608.

Henderson’s third postconviction relief application did raise the claim that the court gave an erroneous jury instruction. However, the postconviction court

did not rule on the merits of this claim, as the court dismissed the postconviction relief application on procedural grounds. Therefore, we have nothing to review. See *DeVoss v. State*, 648 N.W.2d 56, 60-61 (Iowa 2002) (stating issues generally must be raised and decided to be preserved for review).

Henderson makes no additional arguments in support of reversal. He does not contend that the court erroneously relied on Iowa Code sections 822.3 or 822.8 in dismissing the application, nor does he argue that exceptions to the time-bar and procedural bar apply. Failure to cite or argue authority in support of a position is deemed a waiver of the argument. Iowa R. App. P. 6.14(1)(c).

We affirm the dismissal of Henderson's third application for postconviction relief.

**AFFIRMED.**