

IN THE COURT OF APPEALS OF IOWA

No. 7-697 / 06-2084
Filed October 24, 2007

WILLIAM C. SCOTT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Defendant appeals from the district court order denying his application for postconviction relief. **AFFIRMED.**

William C. Scott, Anamosa, pro se.

Jeremy B.A. Feitelson of Feitelson Law, L.L.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

William C. Scott appeals from the district court order denying his application for postconviction relief (PCR). We affirm.

I. Background Facts and Prior Proceedings

In 1991 a jury convicted Scott of first-degree murder. The jury was instructed on both first-degree murder and felony murder, but the general verdict form did not specify the ultimate basis for the guilty verdict. We affirmed the conviction on direct appeal and preserved his claim of ineffective assistance of counsel for postconviction proceedings. See *State v. Scott*, No. 92-0064 (Iowa Ct. App. Sept. 2, 1993). Scott filed a PCR application in 1996 asserting several claims of ineffective assistance. After a hearing, the district court denied Scott's application. On appeal, we affirmed the district court's decision denying his PCR application. *Scott v. State*, No. 98-173 (Iowa Ct. App. Dec. 28, 1998).

In 2006 the Iowa Supreme Court issued its decision in the case of *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), and significantly altered the existing felony-murder rule. The court made the new felony-murder rule applicable to all prospective cases and all cases pending on direct appeal, but specifically chose not to make the modification retroactive. *Heemstra*, 721 N.W.2d at 558.

Scott filed the current pro se PCR application on September 8, 2006. The basis for this application, and the subsequent amendment to the application, was the new felony-murder rule set forth in *Heemstra*. Scott claimed the postconviction court should reverse his conviction because the original trial court's jury instructions were now improper in light of the *Heemstra* decision. He

also claimed the supreme court's decision not to make *Heemstra* retroactive violated his constitutional rights.

The State filed a motion to dismiss the PCR application, noting that the *Heemstra* decision was not retroactive. The State also argued the application should be dismissed because it was filed after the limitations period for PCR actions. Scott's appointed counsel filed a brief resistance to this motion to dismiss.

The district court held an unrecorded hearing on the State's motion to dismiss and entered an order dismissing Scott's application for postconviction relief on the grounds that the application was barred by the statute of limitations set forth in Iowa Code section 822.3 (2005). The court also rejected Scott's claim that the retroactivity provision in *Heemstra* violated his constitutional rights.

On appeal, Scott claims (1) United States Supreme Court precedent requires that the *Heemstra* felony-murder rule be applied retroactively to his own case, (2) in light of *Heemstra*, the district court improperly instructed the jury during his original trial, and (3) that his PCR counsel for his second application for postconviction relief was ineffective.

II. Standard of Review

Iowa appellate courts typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, where the applicant asserts claims of a constitutional nature, our review is de novo. *Id.*

III. Merits

Heemstra. Scott's first two issues urged on appeal hinge on the Iowa Supreme Court's decision to give the rule set forth in *Heemstra* prospective,

rather than retroactive, application. Scott contends the court's decision to do so was unconstitutional.

We disagree. The United States Supreme Court holds that, “[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.” *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148, 159 (1990). We find that our supreme court's decision to alter the existing felony murder rule falls within this general rule. Accordingly, we find no constitutional violation here. See also *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) (“If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”).

Ineffective Assistance of Counsel. Scott also claims his PCR counsel for the current postconviction action was ineffective. In doing so, he claims PCR counsel was ineffective because she did not: (1) raise any additional issues in her resistance to the motion to dismiss, (2) raise any additional arguments that the original trial counsel was ineffective, or (3) raise any additional arguments that his appellate counsel was ineffective. Finally, Scott claims she was ineffective because she “neglected to make a record” of the hearing on the motion to dismiss.

To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). “To prove the first prong, the defendant must overcome the presumption that counsel was competent.” *Id.* To prove the second prong, the defendant must

show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). If the defendant is unable to prove either prong, the ineffective-assistance claim fails. *Ledezma*, 626 N.W.2d at 142.

Scott mounted several attacks against his underlying conviction prior to the current PCR proceeding. His direct appeal, initial petition for postconviction relief, and appeal of the decision denying his petition for postconviction relief were all unsuccessful. We find no merit to his claim that PCR counsel was ineffective because she did not find more issues to challenge beyond those raised in the current PCR petition. Also, in light of our decision that his constitutional rights were not violated by the retroactivity provision in the *Heemstra* decision, we find no resulting prejudice from PCR counsel’s alleged failure to raise additional arguments to resist the motion to dismiss and alleged failure to insist that a record be made during the hearing on the State’s motion to dismiss. We find no ineffective assistance here.¹

Waiver. Scott does not claim the court erred when it dismissed his PCR application on statute of limitations grounds. Because the “[f]ailure . . . to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue,” Iowa R. App. P. 6.14(1)(c), we also affirm the district court’s decision on statute of limitations grounds.

AFFIRMED.

¹ We also find it unnecessary to preserve these ineffective assistance claims for further postconviction proceedings so that Scott may conduct further investigations to determine whether he may have been prejudiced by his counsel’s alleged ineffective assistance.