

**IN THE COURT OF APPEALS OF IOWA**

No. 8-123 / 07-0873  
Filed March 14, 2008

**MICHAEL L. SCHAWITSCH,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge.

Michael Schawitsch appeals from the district court's summary disposition of his second application for postconviction relief. **AFFIRMED.**

Tom Keiderling, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney General, Michael Short, County Attorney, and Bruce C. McDonald, Assistant County Attorney, for appellant.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

**MILLER, J.**

Michael Schawitsch was tried for, convicted of, and sentenced on two counts of robbery in the first degree, two counts of unauthorized possession of an offensive weapon, and one count of burglary in the first degree. He appealed, his convictions were affirmed, and procedendo issued on September 27, 2001.

Following an unsuccessful application for postconviction relief and an appeal, and an unsuccessful habeas corpus action in federal district court,<sup>1</sup> on October 31, 2006 Schawitsch filed his second application for postconviction relief. In it he claimed he was denied effective assistance of trial counsel, direct appeal counsel, and postconviction counsel. The State moved for summary disposition, asserting the application was untimely under the three-year statute of limitations in Iowa Code section 822.3 (2005). Schawitsch resisted, citing Iowa Code section 822.8. The district court granted the State's motion and dismissed Schawitsch's second application. Schawitsch appeals, claiming the district court erred in finding he could not justify or excuse his failure to file his application within the times permitted by Iowa Code sections 822.3 and 822.8.

Summary disposition of an application for postconviction relief, provided for by Iowa Code section 822.6, is analogous to the summary judgment procedure provided for in our rules of civil procedure. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). Our review of a district court's grant or denial of summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 306 (Iowa 1998). A postconviction proceeding is a law action, ordinarily reviewed for errors of law. *Bugley v. State*,

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<sup>1</sup> The State's brief notes that the federal district court's denial of habeas corpus relief was subsequently affirmed in *Schawitsch v. Burt*, 491 F.3d 798 (8th Cir. 2007).

596 N.W.2d 893, 895 (Iowa 1999). We conclude our scope of review is for errors of law.

Our supreme court has clearly distinguished between the purposes and applications of Iowa Code sections 822.3 and 822.8. The language of section 822.8 “presumes a timely filed application for postconviction.” *Wilkins v. State*, 522 N.W.2d 821, 823 (Iowa 1994). Schawitsch’s second application for postconviction relief is not timely filed, being outside the three-year statute of limitations provided by section 822.3. A claim of ineffective assistance of counsel does not constitute a claim that “could not have been raised within the applicable time period” of section 822.3. *Whitsel v. State*, 525 N.W.2d 860, 864 (Iowa 1994).

If the legislature had intended that ineffective assistance of counsel serve as an exception to the statute of limitations, it would have said so. It certainly knew how to do so, as shown by the language it used in section 822.8.

*Dible v. State*, 557 N.W.2d 881, 883-85 (Iowa 1996), *abrogated on other grounds by Harrington v. State*, 659 N.W.2d 509, 520-21 (Iowa 2003).

We conclude the district court correctly concluded that there is no genuine issue of material fact, and correctly concluded that Schawitsch’s application is time barred under section 822.3. We therefore affirm its summary disposition of the application. See Iowa Ct. R. 21.29(1)(c)-(e).

**AFFIRMED.**