IN THE COURT OF APPEALS OF IOWA

No. 8-310 / 07-0541
Filed June 11, 2008

KEITH WALKER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Keith Walker appeals from the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Angela Y. Gruber-Gardner of Marks Law Firm, O.C., Des Moines, for appellant.

Keith Walker, Fort Madison, pro se appellant.

Thomas J. Miller, Attorney General, Robert Ewald and Mary Tabor, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee State.

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

VAITHESWARAN, J.

Keith Walker was found guilty of first-degree murder for a crime committed in 1990. This court affirmed his conviction in 1992. *State v. Walker*, No. 90-1883 (Iowa Ct. App. Feb. 25, 1992). Walker subsequently filed three postconviction relief applications. The third, filed in 2006, was summarily dismissed as untimely.

On appeal from the dismissal of that application, Walker's appellate attorney and Walker, acting pro se, focus on the merits of two ineffective-assistance-of-counsel claims. Walker's attorney contends Walker raised a newly discovered evidence claim in his second application for postconviction relief and the ineffective assistance of several attorneys prevented him from pursuing the merits of that claim. In his pro se filing, Walker contends his trial attorney in the third postconviction relief action was ineffective in failing to raise the applicability of *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). Whether the merits of these claims should have been reached depends on whether the third postconviction relief application was timely.

I. Timeliness

Iowa Code section 822.3 requires the filing of most postconviction relief applications "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" unless the applicant has raised "a ground of fact or law that could not have been raised within the applicable time period."

As an initial matter, Walker maintains that the newly discovered evidence claim raised under an ineffective-assistance-of-counsel rubric "fell within the three-year statute of limitations since procedendo was issued on February 17,

2006." As the State points out, however, the February 17, 2006 procedendo was issued in connection with a prior postconviction appeal. Section 822.3 refers to an appeal from the conviction. Walker's direct appeal from his conviction was decided in 1992, fourteen years before his third postconviction relief application was filed. Therefore, his third postconviction relief application was untimely.

The question remains as to whether Walker raised "a ground of fact or law that could not have been raised within the applicable time period." This exception "applies to situations in which there 'would be no opportunity to test the validity of the conviction in relation to [the ground of fact or law that allegedly could not have been raised within the time period].'" *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994) (quoting *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989)). We will address this exception as it relates to the two substantive claims raised on appeal.

A. Newly Discovered Evidence.

In his second PCR application, Walker alleged that he possessed newly discovered evidence. His allegation was as follows:

> There exists evidence not known of nor presented before that would of (sic) had a critical impact on the jury and the jury's decision, the newly discovered testimony of Mark Wilder attested to in a signed statement would of (sic) proved that the Defendant did not aid and abet anyone in any crime the night Mr. Woods was shot, that the incident was not premeditated, and that no one present in the car at any time made plans nor agreed to commit any crime of robbery, to shoot anyone, or harm anyone at any time with each other.

Walker now makes the following argument relating to this allegation: (1) "Claims based on newly discovered evidence fall within [the ground of fact] exception," (2) "Walker's second postconviction relief petition alleged that he had newly

discovered evidence," (3) second PCR counsel's "failure to address the State's motion to dismiss" in that action precluded the court from reaching the merits of this newly discovered evidence claim, and (4) appellate counsel in the second PCR action as well as trial counsel in the third PCR action were ineffective in failing to raise the ineffectiveness of second PCR counsel.

The problem with Walker's argument is that Mark Wilder's recanting statement is, as a matter of law, not newly discovered evidence.[1] *See Jones v. Scurr*, 316 N.W.2d 905, 908-10 (Iowa 1982) (holding recanting statement given by person after judgment where person was unavailable at trial due to the exercise of a Fifth Amendment right against self-incrimination was not "newly discovered evidence"). In *Jones*, a co-defendant exercised his Fifth Amendment right against self-incrimination and declined to testify at Jones's trial. After Jones was found guilty, the co-defendant submitted a statement indicating he, not Jones, committed the murder. In a postconviction relief action, Jones maintained this statement was newly-discovered evidence. The district court rejected the argument, as did the Iowa Supreme Court. After canvassing the law from around the country, the Court found more persuasive the authority "holding that exculpatory evidence that was unavailable, but known, at the time of trial is not newly discovered evidence." *Id.* at 910. The court reasoned that

> such statements should not automatically be allowed to interfere with the finality of the underlying trial. Otherwise, the underlying trial would always be tentative unless all codefendants and alleged accomplices testified fully at that trial.

Id.

[1] We assume without deciding that Wilder's statement was signed after judgment and sentence was entered against Walker.

We are faced with a similar situation here. Mark Wilder provided a pretrial statement to police but later invoked his constitutional right against self-incrimination. The State sought an order requiring Wilder to testify at trial notwithstanding his assertion of this right. The district court denied the State's request and Mark Wilder did not testify at trial. According to Walker's second postconviction relief petition, Wilder later expressed a willingness to exculpate Walker. As in *Jones*, this evidence, "although unavailable, was known to defendant, and cannot be considered newly discovered." *Id.*

We conclude the ground of fact exception to the three-year statute of limitations does not apply, Walker's newly discovered evidence claim raised under an ineffective-assistance-of-counsel rubric was untimely, and the district court did not err in summarily dismissing it.

B. Heemstra.

In *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), the Iowa Supreme Court held "if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." Walker asserts his third postconviction relief attorney should have raised this type of challenge.

The question for us is whether this is a ground of law that could not have been raised within the applicable period. The record reveals that Walker raised a *Heemstra*-style challenge in his direct appeal of his judgment and sentence. This challenge was rejected based on the law as it stood at the time. *State v. Walker*, No. 90-1883 (Iowa Ct. App. Feb. 25, 1992). We conclude, therefore, that this argument for reversal could have and, indeed, was made within the applicable

time period. *See Smith v. State*, 542 N.W.2d 853, 854 (Iowa Ct. App. 1995) ("The legal and factual underpinnings . . . were in existence during the three-year period and were available to be addressed in Smith's appellate and postconviction proceedings."). As the challenge was raised within the applicable time period, the district court did not err in summarily dismissing the second iteration of this claim.

II. Disposition

We affirm the district court's summary dismissal of Walker's third postconviction relief application. Because Walker's claims were barred by the statute of limitations, the district court did not err in declining to separately address each of the pro se claims, as Walker contends. *See Gamble v. State*, 723 N.W.2d 443, 446 (Iowa 2006).

AFFIRMED.