

**IN THE COURT OF APPEALS OF IOWA**

No. 9-316 / 08-0225  
Filed June 17, 2009

**ALBERT WINFREY,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

A postconviction applicant challenges his 2000 conviction for second-degree murder, contending that it was impermissible for the court to instruct the jury that malice could be implied through the commission of a forcible felony in the context of a second-degree murder prosecution. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**VAITHESWARAN, P.J.**

Albert Winfrey, found guilty of second-degree murder in 2000, appeals the district court's denial of his second application for postconviction relief. His application was predicated on *State v. Heemstra*, 721 N.W.2d 549, 554 (Iowa 2006), in which the court was asked to decide "whether willful injury may be considered a predicate for felony murder." The court held as follows:

[I]f 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.

*Id.* at 558.

Winfrey contends that his case "presents a question left unanswered by the Iowa Supreme Court in the wake of its holding in *State v. Heemstra*—that is, whether it is permissible to imply malice aforethought from the commission of an underlying forcible felony in the context of a charge of second-degree murder." Winfrey concedes "his appeal hinges on the retroactivity of the *Heemstra* decision." We turn, therefore, to the question of whether *Heemstra*, decided in 2006, was retroactively applicable to Winfrey, whose direct appeal from the second-degree murder conviction was finalized in 2001.

The Iowa Supreme Court answered the retroactivity question in its final *Heemstra* opinion, stating:

The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.

*Heemstra*, 721 N.W.2d at 558. The court later held that its refusal to apply *Heemstra* retroactively did not violate federal due process. *Goosman v. State*, 764 N.W.2d 539, 545 (Iowa 2009). Together, these opinions leave no doubt that *Heemstra*'s holding does not apply retroactively to Winfrey. In light of this conclusion, we need not address Winfrey's request to expand *Heemstra*.

This leaves us with Winfrey's pro se supplemental argument. He asserts that the State filed a resistance to his postconviction relief application outside the timeframe prescribed by rule, leaving the district court without "legal authority to act on said resistance, as it lacked subject matter jurisdiction."

Winfrey cites no authority for the proposition that non-compliance with the timeframe for filing a resistance deprives a court of subject matter jurisdiction. For that reason, we reject his argument.

We affirm the district court's denial of Winfrey's application for postconviction relief.

**AFFIRMED.**

Doyle, J. concurs. Potterfield, J. concurs specially.

**POTTERFIELD, J.** (concurring specially)

I concur in the majority's opinion that the district court correctly denied Winfrey's application for postconviction relief. However, I agree with the district court that the supreme court's decision in *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), limiting the use of willful injury as a predicate felony for felony murder, has no application to Winfrey's conviction for the lesser-included offense of second-degree murder.

Winfrey complains that the trial court instructed the jury, in accordance with Iowa Uniform Jury Instruction 700.9, that the element of malice "may be inferred from the commission of Willful Injury which results in death." The supreme court mentioned this instruction in *Heemstra* in the context of felony murder.<sup>1</sup> Winfrey contends the supreme court in *Heemstra* did not decide the propriety of the inference of malice from the commission of willful injury in the context of second-degree murder.<sup>2</sup> I agree.

Because *Heemstra* does not implicate the jury instruction about which Winfrey now complains, in the context of his conviction for second-degree murder, this claim is time-barred. Iowa Code § 822.3 (2005). I would affirm the ruling of the district court denying Winfrey's second application for postconviction relief.

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<sup>1</sup> The Supreme Court quoted Robert R. Rigg's criticism of the use of willful injury as a predicate felony: "Coupled with an instruction that malice may be inferred from the commission of an assault, the application of Beeman creates an ever expanding felony murder rule." *Heemstra*, 721 N.W.2d at 555 (quoting 4 Robert R. Rigg, *Iowa Practice Criminal Law (I)* § 3:16, at \_\_\_ (2006)).

<sup>2</sup> Winfrey also argues, apparently in the alternative, that his claims are governed by *Heemstra* and depend upon the retroactivity of the reinterpretation of the felony murder rule in that case.