

IN THE COURT OF APPEALS OF IOWA

No. 9-309 / 97-2339

Filed June 23, 1999

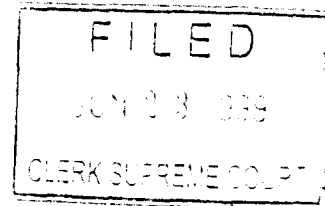
CHARLES D. NELSON,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.



Appeal from the Iowa District Court for Des Moines County, David B. Hendrickson, Judge.

Applicant appeals the dismissal of his postconviction relief action.

AFFIRMED.

Ronald E. Ellerhoff, Burlington, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Patrick C. Jackson, County Attorney, for appellee.

Considered by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Charles Nelson appeals the dismissal of his petition for postconviction relief. He contends the district court erred in dismissing his petition. He also maintains the district court should have appointed counsel to represent him. We affirm.

In 1981, Nelson was convicted of first-degree murder based on his involvement with the shooting death of an ex-girlfriend. The conviction was affirmed on direct appeal in 1982. *State v. Nelson*, 325 N.W.2d 118 (Iowa 1982). Nelson was denied postconviction relief in 1989; his second petition for relief was dismissed in September 1997. His third petition is the subject of this appeal.

In October of 1997, Nelson filed his third petition for postconviction relief asserting he should have been convicted of terrorism and involuntary manslaughter instead of first-degree murder.¹ The relief requested was vacation of his murder conviction and sentence, and imposition of convictions and sentences for terrorism and involuntary manslaughter. He indicated the autopsy report and the ballistics report from the Department of Criminal Investigation supported the relief requested.

The district court gave Nelson notice of intention to dismiss the postconviction application in fifteen days unless he filed a written response demonstrating dismissal would be inappropriate. Nelson filed a timely response alleging the reports would show the shooting of his ex-girlfriend was accidental. He failed to give any reasons why the grounds for relief were not asserted or were inadequately raised in his prior

¹ We note this is less than one month after the dismissal of his second petition for postconviction relief.

applications. The district court dismissed the petition pursuant to Iowa Code section 822.8. The court found the accidental death claim could have been raised in prior proceedings and Nelson had shown no reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications.

Nelson appeals.

I. DISMISSAL. Nelson contends the district court erred in dismissing his petition on the ground he failed to show the claims could not have been raised in prior proceedings. We disagree.

Our review of dismissals of petitions for postconviction relief is for corrections of errors at law. *Hines v. State*, 288 N.W.2d 344, 345 (Iowa 1980).

Nelson's claim for postconviction relief falls under Iowa Code section 822.2(4). Applications on the ground there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice must be filed within three years of the date the conviction became final. Iowa Code § 822.3. Because Nelson's conviction became final prior to July 1, 1984, the effective date of the new three-year statute of limitations, he had until June 30, 1987, to file a postconviction application challenging his murder conviction. *See Fuhrmann v. State*, 433 N.W.2d 720, 723 (Iowa 1988).

Thus, Nelson's application was untimely unless he could show the existence of a ground of fact or law that could not have been raised within the applicable time period. Iowa Code § 822.3. In his third petition, Nelson fails to show the existence

of grounds of fact that could not have been raised within the statute of limitations, nor did he show any reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications. See Iowa Code §§ 822.3 and 822.8. Pursuant to Iowa Code section 822.6, the district court notified Nelson of its intention to dismiss the petition and gave Nelson an opportunity to respond. Nelson did in fact respond; however, Nelson again failed to show reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications. Therefore, we conclude there was no error in dismissing Nelson's petition for postconviction relief pursuant to Iowa Code section 822.8.

II. COURT-APPOINTED COUNSEL. Nelson maintains the district court should have appointed counsel to assist him in curing the defects in his petition. We disagree.

Our review of this claim is for abuse of discretion. *Leonard v. State*, 461 N.W.2d 465, 467 (Iowa 1990); *Ferguson v. State*, 217 N.W.2d 613, 615 (Iowa 1974).

As discussed above, Nelson's third petition and amended petition did not allege his claims could not have been raised in a prior proceeding nor were reasons shown why the grounds for relief were not asserted or were inadequately raised in his prior applications. In the absence of any hint of a claim that raising these grounds was not barred by either 822.3 or 822.8, the district court did not err in failing to appoint counsel to represent Nelson. See *Fuhrmann*, 433 N.W.2d at 723-24. Our supreme court has recognized "an attorney need not *always* be appointed to represent an

individual postconviction applicant." *Ferguson*, 217 N.W.2d at 615 (citing *State v. Mulqueen*, 188 N.W.2d 360, 365 (Iowa 1971)). If an application has no cognizable claim, "it is wasteful to appoint counsel to determine solely if the applicant has some grounds for relief not stated in his original application." *Ferguson*, 217 N.W.2d at 615. We conclude the district court did not abuse its discretion in failing to appoint counsel.²

III. ADDITIONAL PROCEEDINGS. Nelson asserts he should be given an opportunity to explain why the grounds for relief are not barred by Iowa Code sections 822.3 or 822.8. We disagree.

Nelson's application was inadequate on its face to survive dismissal. He received notice, was given an opportunity to amend his application, and again failed to allege his claims could not have been raised in a prior proceeding nor did he show reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications. We conclude it was not error to dismiss Nelson's petition and we will not order further proceedings on his petition.

For these reasons, we affirm the dismissal of Nelson's petition for postconviction relief.

AFFIRMED.

² We also note Nelson did not request counsel at any stage of the proceedings or in any pleadings.

No. 97-2339. [9-309] NELSON v. STATE

Appeal from the Iowa District Court for Des Moines County, David B. Hendrickson, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Mahan and Zimmer, JJ. Opinion by Mahan, J. (5 pages \$2.00)

In 1981, Nelson was convicted of first-degree murder based on his involvement with the shooting death of an ex-girlfriend. In October of 1997, Nelson filed his third petition for postconviction relief. The district court gave Nelson notice of intention to dismiss the postconviction application in fifteen days unless he filed a written response demonstrating dismissal would be inappropriate. Nelson filed a timely response alleging reports would show the shooting of his ex-girlfriend was accidental. The district court dismissed the petition, found the accidental death claim could have been raised in prior proceedings, and Nelson had shown no reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications. **OPINION HOLDS: I.**

Dismissal. In his third petition and his response to the notice of intention to dismiss, Nelson fails to show the existence of grounds of fact that could not have been raised within the statute of limitations, nor did he show any reasons why the grounds for relief were not asserted or were inadequately raised in his prior applications. We conclude there was no error in dismissing Nelson's petition for postconviction relief. **II. *Court-Appointed Counsel.*** In the absence of any hint of a claim that raising these grounds was not barred by either 822.3 or 822.8, the district court did not err in failing to appoint counsel to represent Nelson. **III. *Additional Proceedings.*** We conclude it was not error to dismiss Nelson's petition. We will not order further proceedings on Nelson's petition to give him an opportunity to explain why the grounds for relief are not barred by Iowa Code sections 822.3 or 822.8.