IN THE COURT OF APPEALS OF IOWA

No. 5-499 / 94-2113

FILED
OCT 31 1995
CLERK SUPREME COURT

BEVERLY DAVIS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Beverly Davis appeals the dismissal of her second application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Mark Campbell, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., Cady, J., and Oxberger, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

PER CURIAM

Beverly Davis appeals the dismissal of her second application for postconviction relief. We review this dismissal for the correction of errors of law. *Wilkins v. State*, 522 N.W.2d 822, 823 (Iowa 1994). Finding her claim was time barred under Iowa Code section 822.3, we affirm.

Davis was convicted of second-degree murder. She appealed her conviction which was affirmed by operation of law. Iowa Code § 602.5106(1) (1989). Her request for further review by the supreme court was denied and procedendo issued on April 5, 1991.

Davis filed her first application for postconviction relief on April 10, 1991. Her application contended her trial counsel had been ineffective in failing to procure expert testimony to establish that the gross negligence of the decedent's treating physician was the intervening cause of the decedent's death. During the course of the postconviction proceedings, the applicant was allowed to employ a medical expert. The opinion of the expert was consistent with those of the State's experts in finding the decedent's stab wound was the cause of death. Given this opinion, the postconviction court found no prejudice resulted from trial counsel's failure to retain an expert, and it granted the State's motion for summary judgment. The postconviction court's ruling was subsequently affirmed by this court. *Davis v. State*, 520 N.W.2d 319 (Iowa App. 1994).

Davis filed her second application for postconviction relief on September 14, 1994. Her application claimed her trial and postconviction counsel were ineffective "for failing to present evidence of gross medical negligence." The State sought to dismiss this application as untimely under Iowa Code section 822.3. The postconviction court agreed and dismissed the application.

Iowa Code section 822.3 (1993) provides in relevant part:

> [A]pplications must be filed within three years from the date the conviction or decision is final or, in the even of an appeal, from the date the writ of procedendo is issued. *However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.*

(Emphasis added.) The Iowa Supreme Court has held an applicant for postconviction relief cannot circumvent the effect of the three-year time bar by claiming the ineffective assistance of postconviction counsel when the applicant "knew of the underlying claim before it became time barred." *Whitsel v. State*, 525 N.W.2d 860, 864-65 (Iowa 1994); *see also Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994).

In this case the applicant claims "[a] hearing was necessitated to generate evidence that postconviction counsel could have obtained expert evidence that the improper placement of the feeding tube amounted to gross medical negligence." The underlying claim in her allegation of ineffective assistance of postconviction counsel is whether expert evidence should have been offered on the issue of gross negligence. It is evident from the record Davis knew of this claim, and even raised a variation of

it in her first application for postconviction relief, prior to the expiration of the three-year time bar.

Davis claims this case is distinguishable from *Wilkins* and falls within the above-italicized exception to the section 822.3 time bar. She claims "the applicant could not have raised her claim at a previous proceeding because it relies on the ineffective presentation of the claim during the first postconviction proceeding." However, the supreme court has held an attorney's alleged mishandling of a postconviction claim is not excepted from application of the three-year bar if the applicant knew of the underlying claim. *See Whitsel*, 525 N.W.2d at 864-65 (review of postconviction counsel's failure to timely file a second postconviction application barred where applicant knew of the underling claim before it became time-barred). The trial court acted properly in dismissing Davis's application.

AFFIRMED.

OXBERGER, S.J. (specially concurring)

I concur the conviction should be affirmed. I have a concern in applying the three-year time bar to postconviction cases in which applicants are held to have knowledge of the principles of law. I would divide responsible knowledge into two groups: knowledge of facts that reasonable people have or should have; and a separate group of knowledge that requires expertise in the law. I would not hold a postconviction applicant responsible for the latter.

Also, I do not agree a finding that defendant's knife wound was a probable cause of the victim's injury forecloses a jury from finding the defendant not guilty if the victim's medical treatment was grossly negligent. The defense of gross negligence is based on the principle that wrongdoers are not responsible for unforeseen results of their conduct such as grossly negligent medical treatment. This is true even though their original wrongful conduct started the chain of circumstances that led to the victim's death.

I concur because I do not believe fair-minded people could find there is substantial evidence of grossly negligent medical treatment in this case. Even if a medical expert would testify there was negligence in the creation of the opening for the insertion of the gastro feeding tube, I do not find any evidence that would justify submission of gross negligence to the jury. 57A Am. Jur. 2d § 256 (1989).