

IN THE COURT OF APPEALS OF IOWA

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No. 7-613 / 96-2270

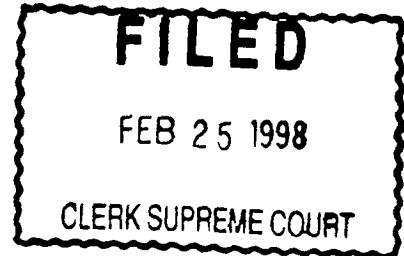
ROBERT ALLAN CORNELL,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Clarke County, Darrell Goodhue,
Judge.

Robert Cornell appeals from the denial of his third application for
postconviction relief. **AFFIRMED.**

Unes J. Booth of Booth Law Firm, Osceola, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General,
and John D. Lloyd, County Attorney, for appellee.

Considered by Cady, C.J., and Sackett, and Streit, JJ.

CADY, C.J.

Robert Cornell appeals from the denial of his third application for postconviction relief. He claims new evidence shows misconduct by the jury which convicted him for the 1976 murder of Kenneth Crow. We affirm.

We reviewed the facts and procedural history of Cornell's case in *Cornell v. State*, 529 N.W.2d 606 (Iowa App. 1994).

The primary witness against Cornell at his original trial was his thirteen-year-old stepbrother Glen Albert Oliver (Albert). Albert testified that he, Cornell, and Crow drove from Des Moines to Texas in Cornell's car in August 1976. According to Albert, a few days later, during their return to Des Moines, they stopped at a wooded area along Interstate 35 in Southern Iowa. Cornell and Crow then walked together into the woods. Albert testified Cornell had a .38 caliber pistol with him. A short time later, Albert heard a shot, and Cornell returned alone. Cornell implied, in response to a question by Albert, that he shot Crow. A few days later, Albert reported the incident to law enforcement authorities. The next day, with Albert's help, Crow's body was located. He had been shot once in the back of the head.

Another witness at trial was Eric Lynn Cross. Cross testified Cornell told him shortly after the Texas trip he broke Crow's neck after Crow tried to shoot him.

Cornell was convicted by a jury of first-degree murder. The conviction and sentence of life imprisonment without parole were affirmed on direct appeal. See *State v. Cornell*, 266 N.W.2d 15 (Iowa 1978), *cert. denied*, *Cornell v. Iowa*, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978). Cornell was unsuccessful in his initial habeas corpus challenge in federal court. See *Cornell v. State*, 628 F.2d 1044 (8th Cir.1980), *cert. denied*, 449 U.S. 1126, 101 S.Ct. 944, 67 L.Ed.2d 112 (1981). His first application for postconviction relief in state court was eventually denied. See *Cornell v. State*, 430 N.W.2d 384 (Iowa 1988). The hearings on the application were held in October 1985 and into 1986.

Cornell filed a second habeas corpus application in 1988, which was eventually amended to include as a ground for relief that Cross had recanted his trial testimony. The application was denied on appeal following successful relief from the district court. *See Cornell v. Nix*, 976 F.2d 376, 384 (8th Cir.1992). In *Cornell v. Nix*, the circuit court of appeals concluded Cornell procedurally defaulted on the recantation claim by not first presenting it during the 1985-86 state postconviction proceeding.

Id. at 608. Cornell's second application for postconviction relief was denied because it was untimely. *Id.* We must now address Cornell's third application for postconviction relief and determine whether newly discovered evidence reveals jury misconduct which denied him a fair trial. On appeal Cornell maintains a sheriff's office dispatcher improperly communicated information about other charges pending against him to a juror during his 1976 trial. He also claims the jury was improperly influenced by an incident during his trial where unidentified parties drove by jurors and took a photograph of the jurors.

I. Standard of Review

We review postconviction relief proceedings for errors of law. *State v. Blum*, 560 N.W.2d 7, 9 (Iowa 1997). To the extent Cornell raises a constitutional claim, the scope of review is *de novo*. *See id.*

II. Newly Discovered Evidence

Persons who seek postconviction relief in Iowa are required to file their application within three years from the date of conviction or issuance of procedendo in the event of an appeal. Iowa Code § 822.3 (1995). If the conviction became final

prior to the July 1, 1984 effective date of the statute, the limitation period is extended to June 30, 1987. *Brewer v. Iowa Dist. Court*, 395 N.W.2d 841, 844 (Iowa 1986).

The statutory time bar, however, is not absolute. It "does not apply to a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. Additionally, a claimant bringing an action for postconviction relief outside of the statute of limitations must plead and prove the exception. *Cornell*, 529 N.W.2d at 610.

Newly discovered evidence constitutes a ground of fact under the statute. *See Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994). To support a motion for a new trial, the proponent of the newly discovered evidence must show: (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996). We have also recognized that motions for new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly. *See, e.g., Cornell v. State*, 430 N.W.2d 384, 387 (Iowa 1988).

Assuming Cornell brought a timely postconviction relief action, he failed to prove the evidence could not have been discovered in the exercise of due diligence, that the evidence to the case is material and not cumulative or merely impeaching, and the evidence probably would have changed the result of the trial. A reasonable

investigation could have revealed the information Cornell now relies upon. *See State v. Farley*, 226 N.W.2d 1, 4 (Iowa 1975) (showing of due diligence requires a reasonable effort is made). Cornell has failed to establish why he could not have discovered this information sooner. Furthermore, Cornell has failed to show the jury misconduct would likely have changed the outcome of the trial. His claim is not based on the type of evidence which would implant prejudice of an indelible nature upon the mind of a typical juror. *See State v. Henning*, 545 N.W.2d 322, 325 (Iowa 1996). We need not determine whether Cornell's claims constituted jury misconduct as he has failed to meet the elements of the newly discovered evidence test.

We have considered all issues raised by Cornell. We affirm the district court.

AFFIRMED.

Streit, J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur specially. Robert Cornell was convicted of the first-degree murder of Kenneth Crow following a 1976 jury trial. Cornell always has long denied responsibility for the murder and has continued to challenge his conviction through appeals and postconviction procedures.

In the petition before us, Cornell contends there was jury misconduct that could have influenced the jury. The majority dismisses his claim advancing the evidence could have been discovered by due diligence and that Cornell has failed to show the jury misconduct would have been likely to change the outcome of the trial.

The State's theory of the case was that Cornell and Crow left a Jeep and went into a field off Interstate 35 south of Des Moines. There, Cornell shot Crow. Cornell denied the shooting contending he had last seen Crow alive when he got out of the Jeep near Mount Ayr on the day the State contended Crow died. The medical and physical evidence supported both the State's theory Crow was killed on August 30, 1976, and Cornell's theory he last saw Crow alive that day.

The testimony of three witnesses support the State's theory. The first was Cornell's ~~half-brother~~ Albert, who allegedly on August 30 saw Cornell take a gun and go with Crow to a field. Albert testified he heard a shot and said Cornell returned without Crow. Albert said he and Cornell then returned to Des Moines.

The second witness, Bryce Oliver, testified Cornell told him on August 30 Crow would not return to Des Moines as he had a broken neck. The testimony of the third witness, Eric Cross, corroborated Oliver.

At the original trial, Albert's testimony was impeached with prior inconsistent statements he made about what had happened. In subsequent proceedings, it was discovered the State had failed to produce exculpatory evidence in a Bureau of Criminal Investigation file that would have impeached what Albert said when he and Cornell returned to Des Moines. The file contained evidence impeaching testimony Oliver gave at trial. Additionally, Oliver recanted certain testimony.

Cornell was convicted only after lengthy jury deliberation when the jury at one time reported a five-seven division. On direct appeal, the conviction was affirmed by a divided court. There have followed additional challenges. Cornell initially received relief in this court and the district court. These decisions were reversed on appeal primarily on procedural grounds.

I concur with the majority that Cornell has failed to make the necessary filing in the required time. I cannot agree the jury misconduct may not have changed the outcome of the trial.