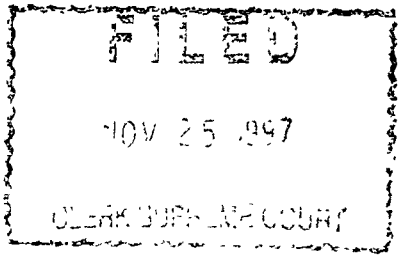
IN THE COURT OF APPEALS OF IOWA

No. 7-559 / 96-1579

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ARTHUR B. BENNETT,
Appellant,

vs.

STATE OF IOWA,
Appellee.

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

Arthur Bennett appeals the dismissal of his application for postconviction relief. **AFFIRMED.**

Theodore E. Karpuk of Bikakis, Arneson & Karpuk, Sioux City, until withdrawal, then John Messina, Assistant State Appellate Defender, until withdrawal, then Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Mark A. Campbell, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

VOGEL, J.

Arthur Bennett appeals the district court's dismissal of his application for postconviction relief as untimely under Iowa Code section 822.3 We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Arthur Bennett was convicted of three counts of second degree sexual abuse and one count of indecent contact with a child, and sentenced to up to twenty-five years in prison. This court affirmed his conviction and sentence on August 27, 1991. Bennett subsequently filed a postconviction relief application claiming ineffective assistance of counsel. This application was dismissed on summary judgment and the summary judgment was affirmed on appeal. On June 26, 1996, Bennett filed a second application for postconviction relief, the subject of this appeal, again asserting an ineffective assistance claim. The State moved to dismiss the application on grounds it was untimely under the three-year time limit of Iowa Code section 822.3. After a hearing on the State's motion, the court sustained the State's motion and dismissed the application.

Bennett appeals. He argues his application is not time-barred because it is based on a ground of law, rather than a ground of fact, which was not raised due to the ineffective assistance of his prior counsel and which he could not raise in time. He contends he had no timely knowledge of the legal arguments which his counsel

omitted. He also complains the district court did not give him the opportunity to develop evidence demonstrating the issues could not have been previously raised.

The State contends the "ground of law" raised by Bennett in his application could have been asserted within the three-year limitations period. The State also argues Bennett was given an opportunity to present any evidence on the issue before the trial court.

Iowa Code section 822.3 requires:

> All other applications must be filed 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. However, this limitation does not apply to a ground of fact or law that *could not* have been raised within the applicable time period.

Id. (emphasis added); *see State v. Smith*, 542 N.W.2d 853, 854 (Iowa App. 1995).

The ground Bennett raises could have been raised in his first post-conviction relief application and appeal, but was not. Simply asserting a new legal theory concerning the alleged ineffective assistance of counsel claim does not create a new ground. *Rinehart v. State*, 234 N.W.2d 649, 655 (Iowa 1974). The district court properly determined Bennett's application for postconviction relief was untimely. Accordingly, we affirm.

AFFIRMED.