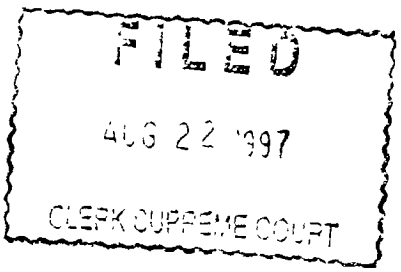
IN THE COURT OF APPEALS OF IOWA

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No. 7-361 / 96-1276



DANIEL BRIAN HARRIS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Daniel Harris appeals a district court order granting the State's motion for summary judgment and dismissing his application for postconviction relief. **AFFIRMED.**

Lawrence G. Whelan, Omaha, Nebraska, and William C. Bracker, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

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

CADY, J.

Daniel Brian Harris was convicted of first-degree murder and sentenced to life imprisonment on May 21, 1987. His conviction was affirmed on appeal. *State v. Harris*, 436 N.W.2d 364 (Iowa 1989). The factual background leading to Harris's conviction was described in the opinion on direct appeal. *See id.* at 365-67. It included the testimony of Loren Cole, an inmate at the county jail during the time Harris was detained there awaiting trial, who told the jury Harris admitted to him he committed the murder.

Harris filed an application for postconviction relief in 1992. In 1994, the Pottawattamie County district court dismissed his petition. Harris filed a second application for postconviction relief in 1995. After extensive discovery, the State filed a motion for summary judgment. At the hearing on the motion Harris argued, among other things, he should be granted a new trial because Cole had recently recanted his trial testimony under oath. Harris maintains Cole's recantation seriously undermines the credibility of the verdict rendered against him. The district court, upon examination of the record, granted the State's motion for summary judgment and denied Harris's application for postconviction relief. Although it did not find the recantation to be credible, it determined Harris "failed to show . . . the outcome at trial would have been different even if it was credible."

On appeal, Harris argues the district court should not have decided his claim without a full evidentiary hearing. He claims the credibility of the recantation was

a genuine issue of material fact, and without Cole's trial testimony he could not have been found guilty. Additionally, Harris argues his prior counsel were ineffective for a variety of reasons. The State responds the evidence presented at the summary judgment hearing supports a finding the recantation was not credible. Furthermore, the State asserts the recantation claim could have been raised within the three-year statute of limitation period. The State further contends summary judgment was proper because the outcome of the trial would not likely change even without Cole's testimony. Finally, the State argues the claims of ineffective assistance of counsel were time barred.

Postconviction relief proceedings are law actions triable to the court. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994). Therefore, our review is for error. *Id.* Similarly, our review of a summary judgment motion is for the correction of errors at law. *Carr v. Bamberi Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996). We look to determine the existence of any genuine issue of material fact, and whether the district court correctly applied the law. *Id.*

The principles underlying our summary judgment procedure in civil actions also apply to summary dispositions under postconviction procedures. *Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994). Thus, summary judgment is proper only where a genuine issue of material fact does not exist and the moving party is entitled to judgment as a matter of law. *Barnhill v. Davis*, 300 N.W.2d 104, 105 (Iowa 1981). If a material issue of fact exists, it is improper to grant summary disposition of a

postconviction relief application. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

Typically, summary judgment is inappropriate if the credibility of a witness is at issue. *Mercer v. Peterson*, 927 F. Supp. 764, 765 (D. Vt. 1996). The evidence presented by the nonmovant is to be believed, as well as all justifiable inference from the evidence. *Williams v. Kansas Gas & Elec. Co.*, 805 F. Supp 890, 893 (D. Kan. 1992).

In this case, the district court erred by determining the credibility of the recantation in the summary judgment proceeding. Nevertheless, the district court went further and found the result of the trial would not likely have been different even if the recantation was true. Thus, the issue before us is whether the State was entitled to judgment as a matter of law even if Cole's recantation was true.

Recantation of a witness is not an absolute ground for a new trial. *See State v. Compiano*, 261 Iowa 509, 517, 154 N.W.2d 845, 849 (1967). Like other claims of newly discovered evidence raised in postconviction proceedings, the applicant must establish the recantation is relevant and likely to change the result of the trial.[1] *See Whitsel*, 525 N.W.2d at 863.

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[1] The State argues recantation by a witness is not "newly discovered evidence." *See Compiano*, 154 N.W.2d at 849. We agree it may not amount to newly discovered evidence in some instances, but it does in this case. The evidence presented in the other affidavits submitted by Harris would not constitute newly discovered evidence. Thus, we only consider the recantation in addressing the claim for a new trial based on newly discovered evidence.

In determining whether newly discovered evidence probably would have changed the result of the trial, we examine the district court ruling regarding the new evidence in view of the strength or weakness of the State's proof of guilt. *State v. Weaver*, 554 N.W.2d 240, 249 (Iowa 1996). The State points to the strength of the evidence presented at trial, including evidence Harris was seen with the victim shortly before she was murdered. Harris was also acquainted with the victim, and there was sufficient time for Harris to commit the murder before reporting to work. Furthermore, the pattern of the sole of Harris's shoes was similar to a shoe print found at the crime scene, and the victim's blood type was found on one of the shoes. Fibers consistent with the victim's scarf were also found in Harris's car, and a necklace and earring similar to those owned by the victim were found in the Harris residence. The victim's vagina contained seminal fluid and amylase consistent with that of Harris. Harris points out all the evidence is circumstantial and none of it conclusively establishes his guilt.

Considering our standard of review, we cannot conclude the district court erred by determining the recantation probably would not have changed the result of the trial. Assuming the recantation was true, the question turns to the essential elements of a new trial Harris must establish, in particular whether the recantation would likely change the result of the case. Under the circumstances, this is a question which involves the legal consequences of the facts and is properly resolved by summary adjudication. The facts presented at trial must be considered without reference to

Cole's testimony. Clearly there were facts in the record to support the conclusion by the district court the verdict would have been the same without the testimony of Cole.

We lastly address the claim by Harris that his prior counsel were ineffective. This claim is time barred. *See* Iowa Code § 822.3 (1995). Our legislature did not intend a claim of ineffective assistance of counsel to serve as an exception to the three-year statute of limitations. *State v. Dible*, 557 N.W.2d 881, 885 (Iowa 1996). We note Harris had ample opportunity to raise a claim of ineffective assistance of counsel on his direct appeal and at his first postconviction relief hearing. Because he did not do so, he is barred from doing so now.

We affirm the trial court's dismissal of Harris's application for postconviction relief.

AFFIRMED.