IN THE COURT OF APPEALS OF IOWA

No. 8-521 / 97-1071

DENNIS LAMAR,

Appellant,

vs.

STATE OF IOWA,

Appellee.

FILED
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CLERK SUPREME COURT

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

Dennis Lamar appeals from the dismissal of his second postconviction action.

AFFIRMED.

David L. Rose of Selby, Updegraff, Smith & Holwerda, Newton, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Steven Johnson, County Attorney, and John C. Heinicke, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Huitink, Vogel, and Mahan, JJ. Streit, J., takes no part.

MAHAN, J.

Dennis Lamar appeals the district court dismissal of his application for postconviction relief. We affirm.

Lamar was convicted in 1986 of three counts of first-degree robbery and one count of first-degree murder. The court of appeals affirmed on November 30, 1987. *Lamar v. State*, No. 7-267/86-1044 (Iowa App. Nov. 30, 1987) (unpublished). On October 22, 1990, Lamar filed an application for postconviction relief. The application was denied by the district court. The court of appeals affirmed the dismissal on February 2, 1996. *Lamar v. State*, No. 5-523/94-1215 (Iowa App. Feb. 2, 1996) (unpublished).

On May 7, 1996, Lamar filed a second application for postconviction relief. The district court expressed its intention to dismiss the application and Lamar was given ninety days to reply. After Lamar filed a response, the district court entered a supplemental order on October 25, 1996, ruling Lamar's claims of ineffective assistance of postconviction relief counsel were time-barred under Iowa Code section 822.3 (1995). The court also ordered Lamar to file affidavits to support his claim he had discovered new evidence sufficient to warrant a new trial.

Lamar filed his own affidavit, but failed to file affidavits from witnesses whose statements would purportedly support his application for postconviction relief. On June 2, 1997, the district court dismissed this second application for postconviction relief. The court found Lamar had not filed an affidavit from his co-defendant even

though the court had ordered him to do so. The co-defendant had exercised his Fifth Amendment right against self-incrimination at the time of Lamar's trial and he apparently continued to do so at the time Lamar was directed to secure his affidavit. It also found even if Lamar had provided the requested information, none of it would constitute newly-discovered evidence. This appeal now follows.

I. SCOPE OF REVIEW. Appellate review of dismissal of a postconviction application is for correction of errors at law. *Marbrier v. State*, 519 N.W.2d 84, 85 (Iowa 1994). The appellate court will not disturb the trial court's denial of postconviction relief if the trial court's findings of fact in support of its judgment are supported by substantial evidence and are justified as a matter of law. *Carroll v. State*, 466 N.W.2d 269 (Iowa App. 1990).

II. INEFFECTIVE ASSISTANCE OF POSTCONVICTION RELIEF COUNSEL. Lamar contends the district court erred in finding his claims were time-barred. He argues he timely raised his claims in his first postconviction application and his counsel was ineffective in obtaining a ruling thereon. We disagree.

Under Iowa Code section 822.3 (1995), an application for postconviction relief must be filed within three years of a final conviction or, if appealed, within three years from the date the writ of procedendo is issued. The sole exception to this rule is a ground of fact or law that could not have been raised in the applicable time

period. Iowa Code § 822.3 (1995); *State v. Edman*, 444 N.W.2d 103 (Iowa App. 1989).

Lamar's second application is barred by the statute of limitations. It was filed nine years after his conviction was affirmed and six years after the statute of limitations had run.

Lamar nevertheless argues the second application is timely because the claims raised therein were originally raised in the timely first application. He contends he is not barred from reiterating his claims because the district court never ruled upon them in his first application. He asserts his first postconviction counsel provided ineffective assistance by failing to obtain rulings on all of the grounds raised in his first application. He claims his inability to bring a timely second application was due to the ineffective assistance of postconviction counsel. His claim is without merit.

"Ineffective assistance of postconviction relief counsel is not a 'ground of fact' within the meaning of section 822.3." *Dible v. State*, 557 N.W.2d 881, 886 (Iowa 1996). It provides no exception to the three-year statute of limitations imposed by section 822.3. *Id.* A "ground of fact" exception concerns grounds that may change the result of a criminal case. *Id.* at 884. This may include ineffectiveness of trial counsel but cannot include ineffectiveness of postconviction or appellate counsel. *Id.*

This case is similar to *Wilkins v. State* where a second application for postconviction relief was filed nine years after procedendo issued on his appeal affirming his conviction. There, the court rejected an ineffectiveness-of-counsel

argument similar to that raised herein by Lamar. *See Wilkins v. State*, 522 N.W.2d 822 (Iowa 1994).

We affirm the district court's dismissal of Lamar's claims of ineffective assistance of postconviction relief counsel.

III. NEWLY-DISCOVERED EVIDENCE. Lamar also contends the district court erred in dismissing his claim of newly-discovered evidence. We disagree.

Lamar sought to introduce testimony of a co-defendant that the murder was not done in furtherance of the robbery, thus shielding Lamar from a finding of guilt under a felony-murder theory. Lamar contends this testimony was unavailable during his trial because the co-defendant exercised his Fifth Amendment privilege against self-incrimination.

Under Iowa Code section 822.2(4), a defendant may be entitled to a new trial due to newly-discovered evidence. To prevail on a motion for a new trial based on a claim of newly-discovered evidence, a defendant must show: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991).

The Iowa Supreme Court has specifically rejected claims similar to those raised by Lamar. "The potentially exculpatory testimony of a co-defendant who . . . had earlier exercised his fifth amendment privilege against self-incrimination at a

defendant's criminal trial, where that testimony was known to the defendant, may not be considered newly discovered evidence so as to warrant the grant of a new trial." *Id.*; *Jones v. Scurr*, 316 N.W.2d 905 (1982).[1]

We first note no evidence—new or otherwise—has even been presented by Lamar. The district court requested an affidavit concerning the testimony Lamar claims is newly-discovered. The affidavit was never offered despite a three-month opportunity to do so.

Furthermore, even if the affidavit had been provided, it would not contain newly-discovered evidence. Based on our review of the record, we do not believe it can be said Lamar did not know of the general nature of the testimony he now seeks to present. We agree with the district court if the matters the co-defendant was willing to assert are indeed true, they were likely known to Lamar at the time of trial.

We affirm the district court's dismissal of the claim of newly-discovered evidence.

IV. CONCLUSION. We conclude Lamar's claims of ineffective assistance of postconviction relief counsel are time-barred. We further conclude Lamar has not offered newly-discovered evidence that will support granting a new trial.

AFFIRMED.

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[1] Lamar asks us to reconsider this ruling. We decline to do so.