

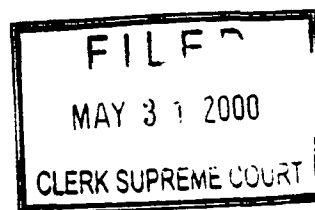
IN THE COURT OF APPEALS OF IOWA

No. 0-220 / 99-0383
Filed May 31, 2000

STEVEN RAY WYCOFF,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Lee (North) County, R. David Fahey, Judge.

Petitioner-Appellant, Steven Ray Wycoff, appeals after the district court sustained the State's motion for summary judgment and dismissed his application for postconviction relief from his 1976 conviction of first-degree murder. Wycoff was convicted for the stabbing death of prison inmate Cecil Polson. Wycoff claims on appeal his discovery of an ambulance driver's observation that blood and mustard dripped from Polson's body as it was moved from the prison entitles him to a new trial. Evidence Wycoff had the victim's blood and mustard on his shoes and clothing was used by the State to show with other evidence Wycoff had stabbed the victim. Wycoff advances that a new trial is justified because the evidence was (1) exculpatory and not divulged by the state and (2) it was newly discovered. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

000214

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael Short, County Attorney, and Robert J. Glaser, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

000115

SACKETT, C.J.

Petitioner-Appellant, Steven Ray Wycoff, appeals after the district court sustained the State's motion for summary judgment and dismissed his application for postconviction relief from his 1976 conviction of first-degree murder. Wycoff was convicted for the stabbing death of prison inmate Cecil Polson. Wycoff claims on appeal his discovery of an ambulance driver's observation that blood and mustard dripped from Polson's body as it was moved from the prison entitles him to a new trial. Evidence Wycoff had the victim's blood and mustard on his shoes and clothing was used by the State to show with other evidence Wycoff had stabbed the victim. Wycoff advances that a new trial is justified because the evidence was (1) exculpatory and not divulged by the State and (2) it was newly discovered. We affirm.

The application for relief that brings this appeal was filed on April 30, 1997. Earlier claims for post conviction relief filed by Wycoff were denied. See *Wycoff v. State*, 382 N.W.2d 462 (Iowa 1986); *Wycoff v. Nix*, 869 F. 2d 1111 (8th Cir.1989); *Wycoff v. State*, 507 N.W. 2d 417 (Iowa 1993) (unpublished).

In this application Wycoff claims the State withheld exculpatory evidence that would have allowed him to explain why a pair of pants, that evidence at trial showed could have been his, and his shoes were stained with blood of the victim's type and mustard of the same type found in a broken jar in the victim's cell. The jar of the mustard allegedly had been broken when the victim was stabbed. Wycoff contends that the alleged exculpatory and newly discovered evidence would show that the blood and mustard on his clothing came when he walked through an area where Lavern Prough, who at the time of the murder

owned an ambulance company in Fort Madison, had transported the victim's body following the event. Wycoff claimed Prough, who subsequently became employed by the State of Iowa, told him the victim's body was covered with blood and mustard when it was removed from the cell house and had dripped as it was transported through the area where Wycoff was to walk a short time later. The statement was to have been made to Wycoff shortly before August 23, 1992. Prough filed an affidavit alleging he reviewed the allegation in Wycoff's affidavit regarding his telling Wycoff about blood and mustard dripping from the victim's body. Prough said Wycoff's allegation was false. Prough also stated he did not recall blood and mustard dripping from the body when it was removed or the body having any mustard on it.

Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). When summary judgment is granted in a postconviction relief action, we examine the record to determine if a genuine issue of fact exists and whether the moving party is entitled to a judgment as a matter of law. *Id.*; Iowa R. Civ. P. 237(c) (1997). A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). Disposition under Iowa Code section 822.6 is analogous to the summary judgment procedure provided in Iowa Rules of Civil Procedure 237-240. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

Pursuant to Iowa Code section 822.2(4) a person may seek postconviction relief from his or her conviction if "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." *Summage*, 579 N.W.2d at 822; Iowa Code § 822.2(4) (1997).

The district court determined that the alleged "newly discovered" evidence offered by Wycoff was barred by Iowa Code sections 822.3 and 822.8. The district court further reasoned Wycoff's application for postconviction relief should be denied because the alleged evidence could have been discovered within the statutory time frame through the exercise of due diligence. Furthermore, the district court determined the affidavit submitted by Wycoff was not based on the personal knowledge of Wycoff and any testimony regarding the contentions made in Wycoff's affidavit would be hearsay under Iowa Rule of Evidence 801.¹ Therefore, the district court concluded Wycoff would not be competent to testify as to the allegations made in his own affidavit.

The district court did not err in dismissing Wycoff's application for postconviction relief.

¹ The relevant portions of Iowa Rule of Evidence 801 provide:

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if-

(1) *Prior Statement by Witness.* "The declarant testifies . . ."

(2) *Admission by a Party-Opponent.* "The statement is offered . . ."

The only evidence that Prough saw blood and mustard drip from the victim's body is Wycoff's claim of what Prough told him. Wycoff has no personal knowledge of these facts. Additionally, Prough by affidavit denies both making the statement to Wycoff or remembering that blood and mustard dripped from the victim's body. To resist a summary judgment one must show facts as would be admissible in evidence. Iowa Rule of Civil Procedure 237 (e) (1997) provides:

Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth such facts as *would be admissible in evidence*, and shall show affirmatively that the affiant is *competent* to testify to the matters stated therein.

(emphasis added)

The most Wycoff's affidavit shows is an out-of-court statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted (Polson's body was covered in blood and mustard; and Polson's body dripped blood and mustard as it was removed from the cell house). See Iowa R. Evid. 801(c) (1997); *State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980). Wycoff's testimony to the facts in the affidavit would be inadmissible at trial because it is hearsay and there is no showing it meets any of the many exceptions to the hearsay rule.

Even if Wycoff could show the evidence admissible, we agree with the district court that Wycoff could have discovered it earlier through the exercise of due diligence.

Iowa Code section 822.2(4) requires the postconviction relief applicant to establish four elements before a new trial will be granted. *Summage*, 579 N.W.2d at 822. The applicant must show: (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the

exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997); *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 32-33 (Iowa 1979). Furthermore, the postconviction court has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result. *Adcock v. State*, 528 N.W.2d 645, 647 (Iowa App. 1994); *State v. Flock*, 325 N.W.2d 368, 377 (Iowa 1982). The reviewing court will not interfere unless there is a clear abuse of discretion. *Adcock*, 528 N.W.2d at 647.

The alleged evidence could have been discovered by Wycoff or his attorney. They both had access to Prough before and during the original trial. They had the opportunity to question Prough about any blood and mustard dripping from the victim's body. They were aware that the State would use the blood and mustard on Wycoff's shoes and clothing as evidence against him. Viewing the facts in a light most favorable to Wycoff, we agree with the district court's finding that Wycoff failed to exercise due diligence and the alleged evidence if it had existed could have been discovered during the original trial.

Furthermore, Wycoff cannot show that the State withheld exculpatory evidence. A defendant's due process rights are violated when the prosecution fails to produce upon request evidence favorable to the accused "where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct.

1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963); *see also State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996).

To establish a *Brady* violation, Wycoff must prove (1) the prosecution suppressed evidence, (2) the evidence was favorable to his defense, and (3) the evidence was material to the issue of guilt. *See Cornell v. State*, 430 N.W.2d 384, 385 (Iowa 1988). Because Wycoff's contentions implicate his constitutional rights, we review the record de novo examining the totality of the circumstances. *Conner v. State*, 362 N.W.2d 449, 458 (Iowa 1985).

The *Brady* rule applies when the evidence is discovered after trial "which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342, 349 (1976). Exculpatory evidence is not "suppressed" if the defendant knew or should have known of the essential facts permitting him to take advantage of the evidence. *Cornell*, 430 N.W.2d at 385 (citing *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir.1982)).

Wycoff has failed to show the prosecution had any knowledge the alleged evidence existed or that he did not have the essential facts to allow him to take advantage of the evidence.

In addition, Wycoff's application for postconviction relief is time barred under Iowa Code section 822.3 unless he establishes that there is "a ground of fact or law that could not have been raised within the applicable time period." *Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994). Newly discovered evidence would constitute a "ground of fact" under the statute. *Id.*; *Hogan v. State*, 454 N.W.2d 360, 361 (Iowa 1990). For purposes of postconviction relief, the newly

discovered evidence must be relevant and likely to change the result of the case. *Whitsel*, 525 N.W.2d at 863.

We examine the language of Iowa Code section 822.3 in light of its purpose and objectives. *Cornell*, 529 N.W.2d at 610. The legislative intent of Iowa Code section 822.3 was to conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of repose in our criminal judicial system. *State v. Edman*, 444 N.W.2d 103, 105-06 (Iowa App.1989).

The objective of the escape clause of Iowa Code section 822.3 is to provide relief from the limitation period when an applicant had “no opportunity” to assert the claim before the limitation period expired. *Wilkens v. State*, 522 N.W.2d 822, 823-24 (Iowa 1994) (emphasis added). We have never inquired into the strength or form of the evidence to support a claim in considering whether the claim could be raised, nor have we constructed any artificial barriers requiring evidence to be supported by affidavits. *Cornell*, 529 N.W.2d at 611. To the contrary, the focus of our inquiry has been whether the applicant was or should have been “alerted” to the potential claim before the limitation period expired. *Id.*; *Wilkens*, 522 N.W.2d at 824; see also *Hogan*, 454 N.W.2d at 361 (emphasis added).

Wycoff by his own admission was “alerted” to what he claims is “newly discovered” evidence nearly five and one-half years prior to bringing this application for postconviction relief. His failure to act within the time frame mandated by section 822.3 upon being “alerted” to his claimed “newly discovered” evidence results in his claim being barred by section 822.3.

We have considered Wycoff's other claims and find them to be without merit.

We affirm the district court's dismissal of Wycoff's application.

AFFIRMED.

000323