IN THE COURT OF APPEALS OF IOWA

No. 0-2010 / 96-1527
Filed March 14, 2001

MICHAEL HOLMES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Robert Mahan, Judge.

Michael Holmes appeals from the denial of his application for postconviction relief from his conviction for first-degree murder. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Vaitheswaran, JJ. Mahan, J. takes no part.

PER CURIAM

Michael Holmes seeks postconviction relief from his conviction for first-degree murder. He claims he received ineffective assistance because his trial and appellate counsel did not fully challenge the trial court's decision to limit evidence of the victim's violent nature. He also claims he received ineffective assistance from his postconviction counsel before the district court. We affirm.

On November 13, 1991, Patrick Adams and his girlfriend, Dee Johnson, went to a bar, the West Coast Connection, in Waterloo. Adams got into a fist fight with a man known as Big John. Both men were angry. Adams' belligerent mood continued through the evening. Adams and Johnson went to another bar, Goodies. Adams attempted to start a fight with Damon Frazier at this bar. Holmes' friend, DeShone Outlaw, got into a verbal argument with Adams as well. Adams challenged Outlaw to come outside and fight him. Adams was asked to leave the bar.

Holmes went home, got his gun, and returned to Goodies. Outlaw asked to carry the gun, and Holmes gave it to him. Adams was outside, waiting for Holmes and Outlaw to exit the bar. The verbal altercation continued in a parking lot. Outlaw handed Holmes the gun. Holmes started to walk away, when Johnson came up and grabbed his arm. Holmes pushed her away. He testified he then saw Adams reaching behind his body, and he believed Adams had a gun and was preparing to shoot him. Holmes shot Adams. He argued the shooting was done in self-defense. No gun was found on Adams' body. Holmes was charged and convicted of murder in the first degree.

Holmes appealed. He claimed improper procedures were used to establish the master jury list and the case should not have been submitted to the jury on a theory of felony murder. His conviction was upheld on appeal. *State v. Holmes,* 520 N.W.2d 632 (Iowa 1994). Procedendo issued on June 22, 1994.

Holmes filed an application for postconviction relief in June 1994. He raised the following claims: (1) improper procedures were used to establish the master jury list; (2) the case should not have been submitted on a theory of felony murder; (3) the trial court erred in allowing autopsy photographs to be admitted into evidence; (4) the trial court improperly limited the admission of evidence concerning the victim's character; and (5) he received ineffective assistance because appellate counsel failed to raise several issues on appeal.

The case was submitted to the district court on a stipulated record. On July 11, 1996, the district court determined the first two issues had been fully litigated on direct appeal and would not be relitigated in this postconviction action. The court found the trial court did not abuse its discretion in admitting the autopsy photographs. The court also found the trial court made proper rulings concerning the admission of character evidence regarding the victim. Finally, the court concluded Holmes failed to show ineffective assistance of appellate counsel. Holmes appeals.[1]

I. Scope of Review

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Bergmann,* 600 N.W.2d 311, 313 (Iowa 1999). To prevail on a claim of

[1] Holmes' appeal of his postconviction action was dismissed in December 1996 for lack of prosecution, under Iowa Rule of Appellate Procedure 19(a). In July 1998, the supreme court granted his motion to reinstate the appeal.

ineffective assistance of counsel, the applicant must show his counsel failed to perform an essential duty and applicant suffered prejudice as a result of this failure. *State v. Ceaser,* 585 N.W.2d 192, 195 (Iowa 1998).

In proving the first prong, the postconviction applicant faces a strong presumption the performance of counsel falls within a wide range of reasonable professional assistance. *State v. Hepperle,* 530 N.W.2d 735, 739 (Iowa 1995). We will not second guess reasonable trial strategy. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995). The second prong is satisfied if a reasonable possibility exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis v. State,* 520 N.W.2d 319, 321 (Iowa Ct. App. 1994).

II. Evidence of Victim's Character

Holmes asserts he was improperly restricted from presenting a defense under evidentiary and constitutional law. Holmes claims he should have been permitted to present evidence to show Adams was a drug dealer and was known to carry a gun. Holmes and other witnesses were only permitted to testify about Adams' acts on the evening in question, not about any previous incidents. Trial counsel made objections to the trial court's ruling, but did not make a full offer of proof. Appellate counsel did not raise this issue on appeal. Holmes now claims he received ineffective assistance from trial and appellate counsel.

Generally, evidence of a victim's character is inadmissible. *State v. Shearon,* 449 N.W.2d 86, 87 (Iowa Ct. App. 1989). An exception to this general rule applies where the accused asserts he or she acted in self-defense and the

slightest supporting evidence is introduced. *State v. Jacoby,* 260 N.W.2d 828, 837 (Iowa 1977). Where self-defense is raised:

> Then the violent, quarrelsome, dangerous or turbulent character of the deceased may be shown, both by evidence of his or her reputation in that respect and by witnesses who can testify from an actual knowledge of the victim's character.

Id.

Evidence of a victim's character is admissible to show the defendant's state of mind. *State v. Miller,* 359 N.W.2d 508, 510 (Iowa Ct. App. 1984). A decedent's reputation for violence is only admissible for this purpose if the character traits were known to the defendant. *Jacoby,* 260 N.W.2d at 837. Evidence of a victim's character is also admissible as tending to show who was the aggressor in the encounter. *Id.* For this purpose, the evidence is admissible even if the character traits were unknown to the accused. *Id.*

Under most circumstances, the violent or aggressive character of a homicide victim cannot be established by proof of specific acts. *Klaes v. Scholl,* 375 N.W.2d 671, 675 (Iowa 1985). Specific acts to prove a victim's violent character, however, are admissible if they are so closely related to the fatal event as to constitute part of the res gestae. *Jacoby,* 260 N.W.2d at 838.

We find the trial court rulings in the present case were proper. The court properly determined evidence Adams was a drug dealer was inadmissible because it was unduly prejudicial. *See State v. Liggins,* 524 N.W.2d 181, 188 (Iowa 1994). Holmes wanted to show Adams was a drug dealer in order to argue it was likely Adams was carrying a gun. The court did permit Holmes to testify he saw Adams wearing a gun holster one time about two months before the shooting. Other witnesses testified to the question of whether Adams had a gun

on the evening of the shooting. While some witnesses testified Adams did not have a gun that evening, others testified he may have had a gun.

We determine Holmes has not shown he received ineffective assistance of counsel from trial or appellate counsel. The trial court properly applied the law concerning character evidence. Holmes was able to show Adams was in a belligerent mood on the evening in question, and had attempted to start fights with several people. He presented the testimony of witnesses who supported his claim Adams reached behind his back, as if he had a gun. Holmes was not prevented from raising his claim of self-defense. In addition, Holmes has not shown that if additional evidence of Adams' character had been admitted, it would have changed the result of the trial.

III. Postconviction Counsel

Holmes claims he received ineffective assistance from his postconviction counsel before the district court. He believes his postconviction counsel should have raised an issue of prosecutorial or police misconduct, should have taken the deposition of his trial counsel, and investigated whether he received adequate representation during closing arguments of the criminal trial. He admits there is not much evidence on these issues, and asks to have the case remanded for further proceedings. These issues were not raised before the district court.

The State asserts Holmes' new claims are barred by the three-year statute of limitations found in section 822.3. This section provides:

> All [postconviction relief] 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.

Iowa Code § 822.3.

The exception in section 822.3 applies when an applicant had no opportunity to assert the claim before the limitation period expired. *Cornell v. State,* 529 N.W.2d 606, 610 (Iowa Ct. App. 1994). An example would be newly discovered evidence. *See Wilkins v. State,* 522 N.W.2d 822, 824 (Iowa 1994). Our focus is not on the form of the evidence, but on the opportunity to present the claim. *Cornell,* 529 N.W.2d at 611.

The ineffective assistance of postconviction counsel does not constitute a claim which could not have been brought within the applicable time period. *Whitsel v. State,* 525 N.W.2d 860, 864 (Iowa 1994). The supreme court has stated:

> The effect of the ineffective assistance of appellate or postconviction counsel is to prevent the defendant from adequately presenting any errors by trial court, including any errors by trial counsel, and thereby obtaining relief from the conviction or sentence. Because the "ground of fact" exception . . . is limited to grounds that would likely have changed the result of the criminal case, such grounds may include the ineffectiveness of trial counsel, but cannot include the ineffectiveness of appellate or postconviction counsel.

Dible v. State, 557 N.W.2d 881, 884 (Iowa 1996).

An assertion of ineffective assistance of postconviction counsel does not save an application from being barred under section 822.3 when the applicant knew of the underlying claim before it became time barred. *Whitsel,* 525 N.W.2d at 864-65. In the present case, Holmes was aware of his claims before the three-year period expired. He was aware of defense counsel's closing arguments during the trial. He was aware depositions of defense counsel were

not taken at the time other postconviction depositions were taken in August and October 1995. Also, at the time those depositions were taken he became aware of his claim of prosecutorial or police misconduct. We conclude Holmes' claims are barred by the three-year statute of limitations in section 822.3.

We affirm the decision of the district court which denied Holmes' application for postconviction relief.

AFFIRMED.