IN THE COURT OF APPEALS OF IOWA

No. 9-435 / 88-1328

FILED
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CLERK SUPREME COURT

FRED L. BUBAN,

Appellant,

vs.

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STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, A. M. Critelli, Judge.

The defendant appeals the district court's dismissal of his application for postconviction relief. The defendant asserts he was denied effective assistance of counsel when the attorney appointed to represent him on his first postconviction application failed to file an application within the statute of limitations provided by Iowa Code section 663A.3. **REVERSED.**

Raymond E. Rogers, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; James Smith, Polk County Attorney; and Joseph P. Weeg, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J. 51

On July 8, 1983, Fred Buban pleaded guilty to two separate charges of second-degree sexual abuse. The district court entered judgment and sentenced Buban to two consecutive twenty-five year prison terms. Buban appealed both judgments. By order dated May 23, 1984, Justice Wolle dismissed both appeals as being frivolous. The procedendo for both appeals was filed on June 4, 1984.

In September 1985 the district court appointed Tim Duffy to represent Buban in a postconviction relief action. Duffy filed his appearance in October 1985. On August 28, 1987, Duffy filed a postconviction relief action based on the grounds that Buban's original trial counsel had been led by the trial court to believe Buban would receive concurrent, not consecutive, twenty-five year terms. On October 2, 1987, the district court dismissed the application, ruling the application was barred by the three-year statute of limitations pursuant to Iowa Code section 663A.3 (1987).

The district court subsequently appointed Roger Owens as new counsel for Buban. Owens filed a new postconviction action alleging Buban's original guilty pleas were involuntary and Duffy had provided ineffective assistance of counsel with regard to the first application for postconviction relief. In an attached affidavit to the second application, Duffy admitted his tardiness in filing the first application. The State moved to dismiss on the

ground allegations of ineffective assistance of counsel do not bypass the section 663A.3 limitation. The district court ruled the second postconviction action was barred by the statute of limitations. Buban has appealed.

Buban contends his claim of ineffective assistance of counsel could not have been raised within the three-year statute of limitations. Buban believes that even though the underlying issues giving rise to his claim could have been raised within the statutory period, ineffective assistance of his counsel precluded him from doing so.

This case presents an issue of first impression for this court. Does an attorney's failure to file a timely application for postconviction relief deprive an applicant of review of his claims? This court concludes it does not.

The pertinent statutory language with regard to this issue provides:

> An application 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 § 663A (1989).

Our supreme court has referred to the language creating an exception to the three-year period as an "escape clause." Davis v. State, 443 N.W.2d 707, 708 (Iowa 1989). This court recently attempted to explain what types of circumstances would bring a case outside of the three-year

statute of limitations. See State v. Edman, 444 N.W.2d 103, 106 (Iowa App. 1989).

The mere fact that an applicant is not aware of the statute of limitations does not excuse his failure to file a timely application for postconviction relief. Id. at 106. However, the "escape clause" may encompass a "justifiable excuse" for delay in filing. See Davis, 443 N.W.2d at 710.

Buban sought and was appointed counsel in September 1985. His counsel had until July 1, 1987, to file Buban's application for postconviction relief. Brewer v. Iowa District Court for Pottawattamie County, 395 N.W.2d 841, 844 (Iowa 1986) (All potential postconviction applicants whose convictions became final prior to July 1, 1984, must file such applications by July 1, 1988, or be barred from relief.).

For unexplained reasons, Buban's counsel failed to file the application until August 28, 1987. Buban's right to appointed counsel, Iowa Code § 663A.5 (1989), encompasses the right to effective counsel. Patchette v. State, 374 N.W.2d 397, 398-99 (Iowa 1985). It is without question the failure of Buban's attorney to timely file Buban's application rendered him ineffective and prejudiced Buban by denying him the opportunity to have judicial consideration of the merits of his claim.

The fact that Buban specifically sought and was appointed counsel for the purpose of seeking postconviction relief and it was his counsel who missed the filing deadline, distinguishes this matter from our language in Edman which indicates an applicant's ignorance of the time limitation does not excuse a delay in filing. Edman, 444 N.W.2d at 106. Buban was allowed to rely on his attorney's expertise to see that his application was timely filed.

The failure of Buban's attorney to file his application for postconviction relief was certainly not foreseeable, and it would be contrary to the policies underlying our postconviction relief statutes to penalize Buban because of the ineffective assistance rendered by his attorney. While technically Buban's claim with regard to the voluntariness of his guilty plea could have been raised within the three-year period, the ineffective assistance of his counsel constitutes a justifiable excuse for the delay. The decision of the trial court dismissing Buban's application for postconviction relief is hereby reversed.[1]

REVERSED.

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1. The State contends our decision today will render the three-year statute of limitations "virtually meaningless," resulting in an evidentiary hearing for every untimely postconviction application which simply alleges postconviction counsel rendered ineffective assistance. Our decision affects only those cases in which it is claimed postconviction counsel was ineffective because he or she failed to timely file an application for postconviction relief. To rule otherwise would render "virtually meaningless" the postconviction applicant's right to effective counsel.