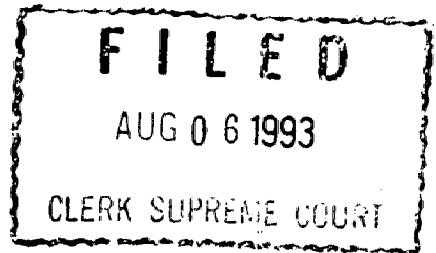


IN THE COURT OF APPEALS OF IOWA

No. 3-295 / 92-597



CHARLES E. CONEY,
Applicant-Appellant,

000117

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County,
M.D. Seiser and Timothy J. Finn, Judges.

Charles Edward Coney appeals from the district court's
denial of his application for postconviction relief.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen,
Assistant Attorney General, Mary E. Richards, County
Attorney, and Dennis Parmenter, Assistant County Attorney,
for appellee.

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

SACKETT, J. 000118

Applicant-appellant Charles E. Coney, who was convicted of burglary in the second degree in violation of Iowa Code sections 713.1 and 713.3 (1983), appeals the trial court's denial of an application for postconviction relief. Coney contends he is entitled to a new trial because after the trial he discovered a transcript of conversations on a tape recording made from a wiretap of one of the perpetrators of the burglary who was at the time acting as an informant for local law enforcement. Coney contends the evidence would have assisted him in establishing an entrapment defense. We affirm.

On January 25, 1991, Coney applied for postconviction relief. On September 18, 1991, the trial court dismissed Coney's application on the ground it was filed beyond the three-year statute of limitation. On September 27, 1991, the trial court reinstated Coney's application because Coney was alleging the discovery, after the date of sentencing, of exculpatory evidence. A hearing was held on February 7, 1992, and on March 25, 1992, the trial court dismissed Coney's application on the basis that the transcript was not newly discovered. Coney appeals this decision.

Coney contends he is entitled to a new trial on the basis of newly discovered evidence.

The State argues Coney's failure to raise his claim within the three-year statute of limitations bars his claim

and he has not shown this claim could not have been raised within the time limit.

When Coney was convicted and sentenced, there was no statute limiting the time for bringing a postconviction relief action. Since Coney's conviction, the Iowa legislature enacted a three-year statute of limitations for postconviction. The legislation provides on convictions that were final prior to July 1, 1984, the time for bringing a postconviction relief action was extended to June 30, 1987. See Brewer v. State, 395 N.W.2d 841, 844 (Iowa 1986). Coney did not file his postconviction action until July 1991. Therefore, to prevail, Coney must rely on Iowa Code section 663A.2(4) (1991)¹ which provides an inmate is entitled to postconviction relief where "there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."

The district court found the wiretap evidence was not newly discovered evidence and said:

[C]oncerning the newly discovered evidence (the tapes or transcripts), the Court notes initially that prior to the time of trial, the Defendant had filed a notice of entrapment. Clearly, prior to the trial he was aware of (1) the theory of entrapment and (2) the factual basis he relied on for entrapment.

The narrow question is whether or not the fact that he was unaware of the existence of a tape recording or a transcript of the tape recording

1. This Code section was transferred to section 822.2(4) by the Code Editor for Code 1993.

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of the conversation he had with Lindsey [confidential informant], is newly discovered evidence. In this regard, the Court notes that the Defendant did not file a motion to produce or any discovery aimed at learning of the existence of the tape. Likewise, he does not complain of this in his application concerning ineffectiveness of counsel. Additionally, another defendant charged in the same incident received a copy of the transcript, presumably because he requested it in pretrial discovery motions.

The truth of the matter is clear. The Applicant was aware at the time of the trial that he could raise the theory of entrapment but elected not to do so. He was aware of the law and the underlying facts. He made a strategic decision to waive that defense and proceed on other theories of defense of the case. He should not now, some ten years later, be allowed to resurrect a theory he discarded at the time of trial.

Likewise, the Applicant also testified that this "new evidence" (the tape and transcript), which he argues would lead to his acquittal, is either inaccurate or incomplete. It is illogical for the Applicant to say on the one hand this new evidence will lead to his acquittal, while on the other hand arguing that it is inaccurate or incomplete.

Finally, it is also worth noting that Defendant Ersland, who was charged in the same burglary and who had possession of the transcript, elected to plead guilty rather than use a defense of entrapment. This is some evidence that the "newly discovered evidence" was not likely to change the result of the trial.

We agree with the trial court's analysis of the issue.

AFFIRMED.