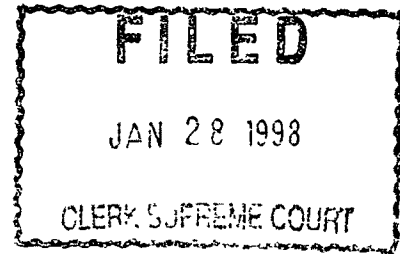


IN THE COURT OF APPEALS OF IOWA

000289

No. 7-597 / 96-2114
Filed January 28, 1998



WILLIAM NIMS, JR.,
Appellant,

vs.

STATE OF IOWA,
Appellee.

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

Applicant appeals from the district court's denial of his postconviction relief application. **AFFIRMED.**

Kellyann M. Lekar of Randall, Griffin, Nelson & Hawbaker, P.L.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

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

STREIT, J.

Defendant appeals the trial court's denial of his second application for postconviction relief based on alleged juror misconduct. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court rule 9.

Defendant William Nims was found guilty, following a jury trial, of first-degree kidnaping for the kidnaping and rape of an eight-year-old girl. Nims was sentenced to life imprisonment. His direct appeal, first application for postconviction relief, and appeal were unsuccessful.

We review postconviction proceedings de novo. *See Webb v. State*, 555 N.W.2d 824, 826 (Iowa 1996). Nims was convicted of first-degree kidnaping on May 27, 1983. His current application for postconviction relief was filed August 4, 1994. Thus, his application is barred by the statute of limitations in Iowa Code section 822.3¹ unless he can establish "a ground of fact or law that could not have been raised within the applicable time period."

Nims' contention is based on evidence discovered in a deposition taken on September 9, 1992, in the course of Federal Habeas Corpus proceedings. In the deposition of Lowell Jorge, a member of the jury who convicted Nims in 1984, Nims contends he discovered evidence that Jorge determined Nims' guilt prior to hearing

¹ That statute reads: 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 (1997).

and Jorge had discussed the case with his wife while it was pending. Nims contends Jorge's behavior was juror misconduct. He contends his postconviction challenge on this issue is not barred because the ground was not discovered until 1992.

Nims could have raised Jorge's alleged pretrial determination of Nims' guilt within the statute of limitations. In Jorge's voir dire answers in 1983 he was asked "can you be fair?" He answered "yes." He was then asked "will you be fair?" He answered "no." If Nims wanted to assert Jorge determined his guilt before trial he could have done so, based on the voir dire answer, within the statute of limitations. He did not. The issue is waived because it was not raised within the limitation period. See *Hogan v. State*, 454 N.W.2d 360 (Iowa 1990); *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996)(legislative intent underlying the limitations period of section 822.3 is to reduce injustices as a result of lost witnesses necessary to resolve factual issues in postconviction hearings, to conserve judicial resources, and restore a sense of repose to our criminal justice system). The postconviction court was convinced Jorge intended to be a fair juror despite the inconsistent statements he made during voir dire. Jorge clarified the statements during the 1992 deposition. He testified although he said "no" in response to the question "Will you be fair?" that was not his true feeling at the time, and he intended to be fair at all times during the trial.

Nims' contention that Jorge discussed the case with his wife, although not discovered until 1992, does not constitute a "ground of fact" within the meaning of the section 833.2. The statute requires the exonerating ground of fact be, like newly

discovered evidence, “relevant and likely [to] change the result of the [original] case.” *Dible*, 557 N.W.2d at 883. Even if Nims had credible evidence Jorge discussed the case with his wife, he has no evidence the discussions changed the result of the trial. All information exchanged between the two was from Jorge to his wife. Jorge received no information from his wife about Nims or evidence of his guilt. Further, the evidence the State presented at trial made Nims’ guilt clear. On direct appeal, the Iowa Supreme Court found the State’s evidence of Nims’ guilt overwhelming, classifying it as “ironbound.” Because Nims cannot establish exceptions to the three-year statute of limitations, his claims are barred by section 822.3 of the Iowa Code.

AFFIRMED.