IN THE COURT OF APPEALS OF IOWA

No. 1-167 / 00-584
Filed June 13, 2001

DUANE E. WRIGHT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert, Judge.

Duane Wright appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John Lammers, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Duane Wright, convicted of first-degree murder, appeals the denial of his third application for postconviction relief. He contends newly discovered evidence confirms he was not involved in the murder. We affirm.

I. Background Facts and Proceedings

The State accused Wright and his companion, Rodney Jackson, of robbing and killing a man. Each was tried separately and both were found guilty of first-degree murder. Our court affirmed Wright's conviction. *State v. Wright*, 378 N.W.2d 727 (Iowa Ct. App. 1985). The Iowa Supreme Court reversed Jackson's conviction. *State v. Jackson*, 380 N.W.2d 420 (Iowa 1986).

Wright filed a postconviction relief application, which counsel amended. The amended application alleged as one ground for relief that:

> there exists evidence of material facts, not previously presented and heard, that requires the vacation of the conviction in the interests of justice, to-wit: the testimony of co-defendant Rodney Jackson that petitioner was not involved in the commission of this offense.

The district court ordered Jackson to appear at the originally scheduled hearing on the application and he was transported to the court. However, the hearing was rescheduled and, for reasons not apparent in the record, Jackson was not transported to the court on the rescheduled date. The district court's ruling on the application addressed only a jury apportionment claim raised by Wright, making no mention of Jackson, the reasons for his absence at the rescheduled hearing, or Wright's claim that Jackson would testify Wright was not involved in the crime. The court denied the postconviction relief application "in its entirety."

On appeal, we affirmed the ruling. *Wright-Bey v. State*, 444 N.W.2d 772 (Iowa Ct. App. 1989).

Wright filed a second postconviction relief application that the district court summarily dismissed as time-barred.

Wright then filed his third and present application for postconviction relief, alleging in part that:

> [C[o-defendant Rodney Jackson has, subsequent to the trial in 1984 made statements to Jeffrey Chamberlain to the effect that Applicant was not involved in the commission of the offense. Applicant did not learn of this statement from Jeffrey Chamberlain until the fall of 1997.

Chamberlain's deposition was introduced into the record. In a detailed ruling, the district court rejected Wright's claims and denied his third postconviction relief application. This appeal followed.

II. Contentions on Appeal

Wright claims he is entitled to postconviction relief based on Chamberlain's deposition testimony, which he alleges contains "material facts, not previously presented and heard." Iowa Code § 822.2(4). The State responds that (1) Wright waived his claim under Iowa Code section 822.8 by failing to produce evidence supporting it in an earlier proceeding; and (2) the claim is time-barred under Iowa Code section 822.3. We believe the claim is time-barred. Therefore, we will not address the parties' remaining contentions.

III. Statute of Limitations: Iowa Code § 822.3

Iowa Code section 822.3 states a postconviction relief 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.

There is no question Wright's postconviction relief application was filed more than three years after procedendo issued on his direct appeal. Therefore, the question is whether his application raises a "ground of fact or law that could not have been raised within the applicable time period." Our review of this issue is for errors of law. *Wilkins v. State*, 522 N.W.2d 822, 823 (Iowa 1994).

Wright could have and in fact did raise in an earlier proceeding the precise issue he now raises. His first amended postconviction relief application expressly made reference to Jackson's statement that Wright was not involved in the crime. Because the facts underlying his present claim and the claim itself were raised within the three-year limitations period, the "ground of fact or law" exception to the limitations period does not apply. *See Wilkins v. State*, 522 N.W.2d at 824.

Our conclusion is not altered by the fact Wright now seeks to introduce this exculpatory evidence through a witness other than Jackson. The substance of the evidence is the same as that raised in the first amended postconviction relief application: that Wright was not involved in the murder. Accordingly, we conclude Wright's third postconviction relief application is time-barred.

We affirm the district court's denial of Wright's postconviction relief application.

AFFIRMED.

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