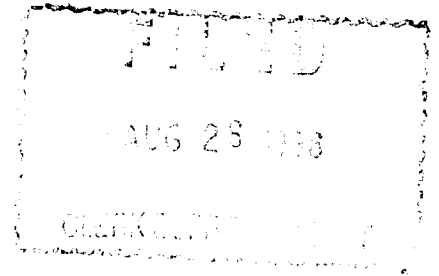


IN THE COURT OF APPEALS OF IOWA

No. 8-259 / 96-1919



THOMAS KANE,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S.
Heckerman, Judge.

Applicant appeals the grant of the State's motion for summary judgment in his
postconviction action. **AFFIRMED.**

Brian S. Rheadine, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Richard Crowl, County Attorney, and Daniel J. McGinn, Assistant County
Attorney, for appellee.

Considered by Cady, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Thomas Kane appeals the dismissal of his postconviction action. As we find Kane's application is barred by the statute of limitations, we affirm.

Background facts. Kane was convicted of first-degree murder in 1981. His conviction was affirmed in an unpublished opinion. *State v. Kane*, No. 66238 (Iowa Feb. 17, 1982). In June 1984 Kane filed an application for postconviction relief claiming ineffective assistance of counsel, which was dismissed by the district court and affirmed by the supreme court on appeal. In April 1995 Kane filed a second application for postconviction relief, this time contending he was denied effective assistance of counsel because his trial attorneys were not licensed to practice in Iowa and did not comply with the provisions of Iowa Code section 610.13 (1979).

The district court granted the State's motion for summary judgment and dismissed Kane's application as untimely. Kane appeals.

Scope of review. We review a district court's ruling granting summary judgment for errors at law. Iowa R. App. P. 4; *Heathman v. Heathman*, 567 N.W.2d 661, 663 (Iowa App. 1997). We uphold a summary judgment when the moving party shows there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Heathman*, 567 N.W.2d at 663. In reviewing Kane's constitutional claim that he was denied effective assistance of counsel, we make an evaluation based on the totality of the circumstances. *See State*

v. Wissing, 528 N.W.2d 561, 563 (Iowa 1995). This is equivalent to a de novo review.

Id.

Statute of limitations. Iowa Code section 822.3 (1997) provides that, with an exception that is inapplicable to this case, applications for postconviction relief:

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.

Prior to July 1, 1984, an application for postconviction relief could be filed at any time. *See* Iowa Code § 663A.3 (1983); *Brewer v. Iowa Dist. Ct.*, 395 N.W.2d 841, 842 (Iowa 1986). In *Brewer*, the supreme court held that all potential applicants whose convictions became final prior to the enactment of the three-year statute of limitations were required to file their applications for postconviction relief on or before three years from enactment of the statute (June 30, 1987) or be barred from relief. *Brewer*, 395 N.W.2d at 844.

Kane first contends section 822.3 does not apply to claims based on violations of Iowa Code section 610.13 (1979). Kane cites specific language of section 610.13 (1979) which provides that if a nonresident attorney fails to comply with its provisions, all papers filed by the attorney “shall be stricken from the files.” Kane contends that all work done by his trial attorneys is void and this requires him to be tried anew. However, Iowa Court Rule 116 (1979) (now rule 113), provided that if a

nonresident failed to comply with section 610.13, then “the court, on its own motion or on motion of the adverse party or parties, may dismiss the action, or strike the pleadings of the noncomplying party from the files” We do not construe this rule to allow a party to strike papers filed by his own counsel nor to rely on the rule as a basis for a new trial.

Kane next contends that because he was convicted in 1981, the postconviction statute which should govern his case is Iowa Code section 663A.3 (1979), which provided that an application for postconviction relief could be filed at any time. However, with this argument Kane is essentially asking us to disregard the express language in section 822.3 and overturn *Brewer*, which we decline to do.

Finally, Kane contends that his trial counsels’ lack of Iowa licenses and failure to comply with Iowa Code section 663A.3 (1979) constitute newly discovered evidence and therefore were grounds of fact that could not have been raised within the applicable time period under section 822.3. To support a claim of newly-discovered evidence, Kane must show:

- 1) that the evidence was discovered after the verdict;
- 2) that it could not have been discovered earlier in the exercise of due diligence;
- 3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and
- 4) that the evidence probably would have changed the result of the trial.

Whitsel v. State, 525 N.W.2d 860, 863 (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)). We have also recognized that motions for new trial on the basis of newly-discovered evidence should be looked upon with disfavor and granted sparingly. See *Cornell v. State*, 430 N.W.2d 384, 387 (Iowa 1988).

Even assuming that criteria one through three are satisfied, we cannot find that the evidence would have changed the result of the trial. In a previous postconviction action, the supreme court upheld the district court's finding that Kane's trial counsel had not rendered ineffective assistance of counsel. Given that finding, and Kane's continued failure to designate specific acts of his trial counsel which he claims were ineffective, we cannot determine that representation of Kane by Iowa-licensed counsel would have changed the outcome of his trial.

Although the issue does not appear to have been addressed in Iowa before, other courts have found that representation of a criminal defendant by an otherwise licensed attorney who is not admitted to practice before a particular court, and who failed to follow procedures in order to appear before that court, does not constitute per se ineffective assistance of counsel. See, e.g., *Derringer v. United States*, 441 F.2d 1140, 1140-41 (8th Cir. 1971) (per curiam); *United States v. Bradford*, 238 F.2d 395 (2d Cir. 1956), cert. denied, 352 U.S. 1002, 77 S. Ct. 558, 1 L. Ed. 2d 546 (1957) & 356 U.S. 927 (1958); *People v. Cornwall*, 277 N.E.2d 766, 767-68 (Ill. 1971).

Finding Kane's arguments to be without merit, we conclude that his application for postconviction relief is barred by section 822.3. We therefore affirm the district court's dismissal of the action.

AFFIRMED.