IN THE COURT OF APPEALS OF IOWA

No. 0-235 / 99-0870
Filed June 14, 2000

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CLERK SUPREME COURT

DANIEL JOHNSON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Black Hawk County, Thomas Bower, Judge.

Daniel Johnson appeals the district court's dismissal of his application for postconviction relief. **AFFIRMED.**

Michael Lanigan of Law Office of Michael Lanigan, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

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

VOGEL, P.J.

Daniel Johnson appeals the district court's dismissal of his application for postconviction relief. Because we find Johnson failed to file his postconviction relief application in a timely manner or to preserve error on his double jeopardy claim, we affirm.

Background facts. Johnson pled guilty to a federal charge of Conspiracy to Distribute Methamphetamine on November 5, 1993. On April 15, 1994, Johnson entered a plea of guilty in a Black Hawk county court to a charge of Possession of a Controlled Substance with the Intent to Deliver – Methamphetamine. Johnson filed an application for postconviction relief on November 21, 1998. The State filed a motion to dismiss the application on the grounds that it was filed after the three-year time limitation had run. The trial court sustained the State's motion and Johnson filed a motion to enlarge or amend the trial court's ruling. The trial court subsequently dismissed this motion without further addressing the issues. Johnson appeals, alleging the state conviction violated his constitutional right against double jeopardy and the subsequent sentence was illegal. He contends he was convicted of the same offense in both a federal and a state court proceeding.

Scope of review. Whether the court improperly denied postconviction relief proceedings is a law action and ordinarily is reviewed only on error. *Hahn v. State*, 306 N.W.2d 764, 768 (Iowa 1981).

Statute of limitations and double jeopardy. Johnson contends the trial court erred in dismissing his postconviction relief application. The State argues

the trial court was correct in its action as Johnson filed the application beyond the applicable three-year time limit. Iowa Code section 822.3 provides:

> [A]ll other 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.

Johnson filed his application for postconviction relief approximately four and one half years after his sentencing on the state conviction, well beyond the statutory time period. Johnson does not allege his application is based on a new ground of fact or law that he could not have raised within the three-year limit but rather that section 822.3 does not apply to a double jeopardy claim. The State argues Johnson failed to preserve error as to a double jeopardy violation.

"As a rule, a defendant must preserve error by making an objection at the earliest opportunity after the grounds for the objection become apparent. This rule applies equally to constitutional issues." *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995) (citations omitted). Johnson had the opportunity to raise a double jeopardy claim before the trial court. He was convicted and sentenced in federal court of conspiracy to distribute methamphetamine prior to his conviction and sentencing in Iowa for possession of methamphetamine with intent to deliver. Johnson alleges the Iowa charges were based on the same act for which he had already pled guilty and been sentenced in federal court. Iowa Code section 124.405 provides:

> If a violation of this chapter is a violation of a federal law or the law of another state, the conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

Johnson claims the State was precluded, under this statute, which codified the Fifth Amendment of the United States Constitution, to try him for the same offense he had already been convicted of under the federal statute and hence his sentence was illegal. This argument, however, was available to Johnson at the time he pled guilty to the state charges. He failed to raise the claim before the district court, denying it an opportunity to compare the facts and charges associated with the two convictions and rule on the merits. Furthermore, there was no direct appeal of his conviction and sentence and his application for post conviction relief was clearly outside the three-year time period. Therefore, he failed to preserve error as to a double jeopardy claim. *See Halliburton, 539 N.W.2d at 343* (finding double jeopardy claim, raised for first time on appeal, was waived). Having found no double jeopardy claim survives, Johnson's allegation of an illegal sentence must fail.

For these reasons, we find the trial court was correct in dismissing Johnson's application for postconviction relief. No further ruling was required on the motion to enlarge. Accordingly, we affirm.

AFFIRMED.