IN THE COURT OF APPEALS OF IOWA

No. 9-175 / 98-0648
Filed May 26, 1999

BENJAMIN JOSEPH LANGFORD,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

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

Thomas G. Fisher, Jr. of Hogan & Fisher, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and J. Patrick White, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ. Sackett, C.J., takes no part.

HUITINK, P.J.

Benjamin Langford appeals the district court's denial of his application for postconviction relief. He claims the district court erred in dismissing his application because the State's motion to dismiss was inadequate and the court failed to provide notice it would depart *sua sponte* from the State's motion. We affirm the district court.

Langford was convicted and sentenced for first-degree robbery, second-degree theft as an habitual offender, and possession of a controlled substance. The conviction was affirmed by the court of appeals, and the matter was remanded for resentencing. *State v. Langford,* No. 89-0293 (Iowa App. March 27, 1990). Langford's 1994 application for postconviction relief was denied. We affirmed on appeal. *State v. Langford,* No. 94-0414 (Iowa App. May 30, 1995). Langford was also denied a writ of habeas corpus in federal district court. *Langford v. Thalacker,* No. 4-96-CV-80047 (S.D. Iowa August 30, 1996). Langford filed the present application for postconviction relief.

Langford alleges in his application his due process rights were violated because the State secured his original conviction using a police officer's perjured testimony and postconviction counsel was ineffective for failing to raise the perjury issue. He claimed the perjury allegation was newly-discovered evidence because this was the first time he had this evidence "'come to light' to him." The State moved to dismiss claiming the application was barred by the three-year statute of limitations

contained in Iowa Code section 822.3. The State contended Langford's application raised no newly-discovered evidence. In granting the State's motion, the district court noted Langford's allegation of ineffective assistance by postconviction counsel did not relieve him of the restrictions of the three-year statute of limitation. In addition, because the evidence against him was overwhelming, the court determined the alleged perjurious testimony would not change the result of the criminal case if it were excluded.

On appeal, Langford claims the trial court erred in dismissing his application for postconviction relief on the basis it rejected his ineffective assistance claim. He argues the perjury claim was independent from his ineffective assistance claim and should have been considered by the district court. Furthermore, he interprets the dismissal of his application as an action by the district court on its own initiative without prior notice to him. Langford argues the court erred in dismissing his application on a ground different from that urged by the State, without giving him notice of its intention to dismiss on that ground and an opportunity to amend his application or to respond to the court's reasoning. Langford claims the State failed to plead the statute of limitations as an affirmative defense in its answer.

Iowa Code section 822.6 governs summary dispositions of postconviction actions. Dispositions under that section are analogous to summary judgment procedures. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). We review a grant of summary judgment for errors of law. *Anderson v. Miller*, 559 N.W.2d 29, 31

(Iowa 1997). Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997). We examine the record before the district court to decide whether a genuine issue of material fact existed and whether the court correctly applied the law. *Id.* We review the record in the light most favorable to the party resisting the summary disposition. *Id.*

Langford argues the three-year statute of limitations in Iowa Code section 822.3 does not apply because the evidence is newly discovered.[1] The supreme court has clarified the newly-discovered evidence exception. The alleged newly-discovered evidence must satisfy four criteria: "(1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted." *Summage*, 579 N.W.2d at 822; *Dible v. State*, 557 N.W.2d 881, 883-84 (Iowa 1996). The district court determined Langford could not demonstrate the result of his trial would be different if the relief were granted. Because the claim concerning perjured testimony did not qualify for the exception to the three-year limit on applications for postconviction relief, the court dismissed the application. We determine the district court correctly

---

[1] Section 822.3 reads, in pertinent part:
All 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.

evaluated Langford's newly-discovered evidence claim in dismissing his application for postconviction relief.

Langford next claims the court departed from the State's motion to dismiss, requiring the court to give him notice and an opportunity to respond. Section 822.6 provides two methods for summary disposition of applications for relief. "The first method allows for summary disposition on the court's initiative and the applicant is foundationally entitled to notice of the court's intention to dismiss the application and its reasons for dismissal." *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980). The applicant is to be given an opportunity to respond prior to final disposition. *Id.* In the case *sub judice* the court did not act on its own initiative. It merely recited the statute permitted such action when it discussed its reasoning the State had not waived its timeliness challenge because it did not plead it in its answer. The court based its decision on the State's motion, not on its own initiative. Langford had a hearing on the State's motion. The court did not err in dismissing his application. It is barred by the three-year limitation in section 822.3.

AFFIRMED.

No. 98-0648. [9-175] LANGFORD v. STATE

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Vogel and Mahan, JJ. Opinion by Huitink, P.J. Sackett, C.J., takes no part. (5 pages $2.00)

Benjamin Langford appeals the district court's denial of his application for postconviction relief. Langford alleges in his application his due process rights were violated because the State secured his original conviction using a police officer's perjured testimony and postconviction counsel was ineffective for failing to raise the perjury issue. In granting the State's motion, the district court noted Langford's allegation of ineffective assistance by postconviction counsel did not relieve him of the restrictions of the three-year statute of limitation. In addition, because the evidence against him was overwhelming, the court determined the alleged perjurious testimony would not change the result of the criminal case if it were excluded. Langford argues the three-year statute of limitations in Iowa Code section 822.3 does not apply because the evidence is newly discovered. We determine the district court correctly evaluated

Langford's newly-discovered evidence claim in dismissing his application. Langford next claims the court departed from the State's motion to dismiss, requiring the court to give him notice and an opportunity to respond. The court based its decision on the State's motion, not on its own initiative. Langford had a hearing on the State's motion. The court did not err in dismissing his application.