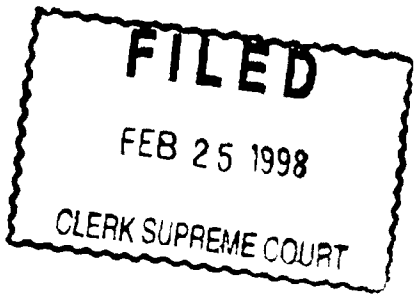
IN THE COURT OF APPEALS OF IOWA

No. 7-726 / 95-1949

000175



IRVIN JOHNSON,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Irvin Johnson appeals from the dismissal of his postconviction relief application. **AFFIRMED.**

Robert A. Wright, Sr. of Wright and Wright, Des Moines for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven Foritano, Assistant County Attorney, for appellee.

Considered by Cady, C.J. and Huitink, and Mahan, JJ.

000176

CADY, C.J.

This is an appeal by an applicant claiming the district court erred in determining it was without jurisdiction to consider his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Irvin Johnson was convicted of first-degree sexual abuse, in violation of Iowa Code section 709.2 (1983). Johnson stabbed and sexually assaulted his fifteen-year-old stepdaughter. Johnson's conviction was upheld on appeal. *State v. Johnson*, No. 5-576/84-1801 (Iowa App. Jan. 29, 1986). Procedendo issued on April 4, 1986.

Johnson filed an application for postconviction relief in 1986, in which he claimed he received ineffective assistance of counsel. The district court denied the application. Johnson appealed, but later voluntarily dismissed his appeal.

Johnson filed a second application for postconviction relief on November 1, 1988, again alleging ineffective assistance of counsel. On August 6, 1990, the application was dismissed for lack of prosecution under Iowa Rule of Civil Procedure 215.1.

On August 13, 1990, Johnson filed a pro se "motion for arrest of judgment," which stated his counsel would file a motion within thirty days, and asked the court to allow his counsel to proceed with the case. No further motions were filed by Johnson or his counsel. No ruling was made on the pro se motion.

On July 27, 1992, Johnson filed a motion to reinstate his postconviction relief action. He also filed an amended application, alleging new grounds for relief. Thereafter, a series of attorneys were appointed to represent Johnson in his postconviction relief action.

On October 9, 1995, the State filed a motion to dismiss. The district court determined it did not have jurisdiction to consider Johnson's amended application for postconviction relief because the action had been dismissed in 1990. Johnson appeals.

A postconviction proceeding is a civil action triable at law and ordinarily this court reviews for errors at law. *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996).

We concur in the district court's conclusion there was nothing for it to consider. The time for appeal or reinstatement of the dismissal had long since passed. Under rule 215.1, an application for reinstatement must be made within six months from the date of dismissal. We find Johnson's pro se motion was not an application for reinstatement, but rather was a statement he intended to file such an application at a later time. Johnson's application for reinstatement, filed in 1992, was untimely. In addition, Johnson could have appealed the dismissal within thirty days, but did not do so. *See* Iowa R. App. P. 5(a).

Johnson claims his postconviction action should be reinstated because he received ineffective assistance from his postconviction relief attorneys, and their

failure to act led to the dismissal of his case for lack of prosecution. He also claims the court failed to follow proper procedure when dismissing his action in 1990.

Johnson's claims could constitute a valid reason to reinstate his case, *if* he had filed a timely motion to reinstate. Once the six-month period passes, however, Iowa courts do not have jurisdiction to reinstate a case which has been dismissed pursuant to rule 215.1. *Greif v. K-Mart Corp.*, 404 N.W.2d 151, 155 (Iowa 1987).

Furthermore, if we were to consider Johnson's amended application for postconviction relief, which was filed in 1992, as a new application, it would be untimely because it was filed more than three years after procedendo issued in his criminal appeal. *See* Iowa Code §822.3. The supreme court has held ineffective assistance of prior postconviction counsel is not a valid reason to exceed the three-year statute of limitations in section 822.3. *Dible v. State,* 557 N.W.2d 881, 885 (Iowa 1996).

Johnson contends the principles of equitable estoppel should apply in this case. He asserts the court led him to believe his action was still pending because attorneys were appointed to represent him. Even when a court has mistakenly ruled upon motions, this will not revive a case which has actually been dismissed pursuant to rule 215.1. *Greif,* 404 N.W.2d at 155. We determine Johnson's case should not be revived based on equitable estoppel.

We conclude the district court properly concluded it did not have jurisdiction to consider Johnson's motion to reinstate his application for postconviction relief. Costs of this appeal are assessed to Johnson.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 7-726 / 95-1949

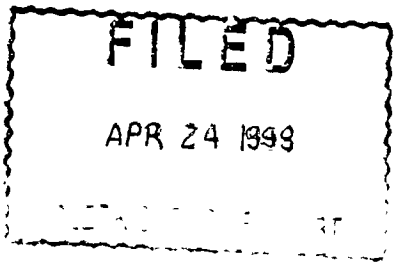
IRVIN JOHNSON,

Appellant,

vs.

STATE OF IOWA,

Appellee.



Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Irvin Johnson appeals from the dismissal of his postconviction relief application. **AFFIRMED.**

Robert A. Wright, Sr. of Wright and Wright, Des Moines for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven Foritano, Assistant County Attorney, for appellee.

Considered by Cady, C.J. and Huitink, and Mahan, JJ.

CADY, C.J.

This is an appeal by an applicant claiming the district court erred in determining it was without jurisdiction to consider his application for postconviction relief. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9 following a petition for rehearing.

Irvin Johnson was convicted of first-degree sexual abuse, in violation of Iowa Code section 709.2 (1983). Johnson stabbed and sexually assaulted his fifteen-year-old stepdaughter. Johnson's conviction was upheld on appeal. *State v. Johnson*, No. 5-576/84-1801 (Iowa App. Jan. 29, 1986). Procedendo issued on April 4, 1986.

Johnson filed an application for postconviction relief in 1986, in which he claimed he received ineffective assistance of counsel. The district court denied the application. Johnson appealed, but later voluntarily dismissed his appeal.

Johnson filed a second application for postconviction relief on November 1, 1988, again alleging ineffective assistance of counsel. On August 6, 1990, the application was dismissed by the court without prejudice.

On August 13, 1990, Johnson filed a pro se "motion for arrest of judgment," which stated his counsel would file a motion for reinstatement of the petition within thirty days, and asked the court to allow his counsel to proceed with the case. No further motions were filed by Johnson or his counsel. No ruling was made on the pro se motion.

In July 1992, Johnson filed a motion to reinstate his postconviction relief action. He also filed an amended application, alleging new grounds for relief. Thereafter, a series of attorneys were appointed to represent Johnson in his postconviction relief action.

On October 9, 1995, the State filed a motion to dismiss. The district court determined it did not have jurisdiction to consider Johnson's amended application for postconviction relief because the action had been dismissed in 1990. Johnson appeals.

A postconviction proceeding is a civil action triable at law and ordinarily this court reviews for errors at law. *Jones v. State,* 545 N.W.2d 313, 314 (Iowa 1996).

We concur in the district court's conclusion there was nothing for it to consider. The time for appeal or reinstatement of the dismissal had long since passed. We find Johnson's pro se motion was not an application for reinstatement, but rather was a statement he intended to file such an application at a later time. Johnson's application for reinstatement, filed in 1992, was untimely. In addition, Johnson could have appealed the dismissal within thirty days, but did not do so. *See* Iowa R. App. P. 5(a).

Johnson claims his postconviction action should be reinstated because he received ineffective assistance from his postconviction relief attorneys, and their failure to act led to the dismissal of his case for lack of prosecution. He also claims the court failed to follow proper procedure when dismissing his action in 1990.

First, Johnson failed to timely challenge the dismissal of the case in 1990. Nor did he attempt to obtain a ruling on his motion in arrested judgment.

Second, if we were to consider Johnson's amended application for postconviction relief, which was filed in 1992, as a new application, it would be untimely because it was filed more than three years after procedendo issued in his criminal appeal. *See* Iowa Code §822.3. The supreme court has held ineffective assistance of prior postconviction counsel is not a valid reason to exceed the three-year statute of limitations in section 822.3. *Dible v. State,* 557 N.W.2d 881, 885 (Iowa 1996).

Johnson contends the principles of equitable estoppel should apply in this case. He asserts the court led him to believe his action was still pending because attorneys were appointed to represent him. The appointment of counsel does not amount to an endorsement of the underlying claim. We determine Johnson's case should not be revived based on equitable estoppel.

We have considered all the issues raised. We conclude the district court properly concluded it did not have jurisdiction to consider Johnson's motion to reinstate his application for postconviction relief. Costs of this appeal are assessed to Johnson.

AFFIRMED.