

IN THE COURT OF APPEALS OF IOWA

No. 1-736 / 10-1615
Filed November 23, 2011

TIMOTHY PALMER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink
(summary judgment) Robert B. Hanson (trial), Judges.

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

Gary Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant
County Attorney, for appellee State.

Heard by Sackett, C.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Timothy Palmer appeals the district court's dismissal of his postconviction relief (PCR) application. Palmer requests a new trial based on prosecutorial misconduct for alleged failure to disclose: (1) juvenile records (Orchard Place/CINA) of accomplice/State's witness Amanda Payne and (2) Payne was promised a parole board letter for her testimony at Palmer's trial.

The district court found Palmer's first claim barred by the statute of limitations. Additionally, the district court concluded Palmer failed to prove the existence of a promise. We affirm.

I. Background Facts and Proceedings.

In December 1994, seventeen-year-old Amanda Payne began dating Palmer. On June 19, 1995, Yuval Kedem's body was found in the "Lost Planet" area of Des Moines. On June 22, 1995, Jamie Strasser offered information regarding Kedem's death and implicated several people. In July 1995, the State charged Strasser, Palmer, Payne, Akbar Choudry, and Robert Wright with first-degree murder and first-degree robbery.

Both young women, Payne and Strasser, reached plea agreements with the State. Palmer, Choudry, and Wright were tried separately—Palmer in October 1995, Choudry in November 1995, and Wright in January 1996. Payne's plea and sentencing occurred one week before Palmer's trial, and Payne testified for the State at all three trials. Palmer and Choudry were convicted, and Wright was acquitted.

Payne was represented by attorneys Rick Olson and Martha Johnson when she entered her October 17, 1995 *Alford* plea to first-degree robbery and

voluntary manslaughter. During the lengthy plea/sentencing hearing there was no discussion of a letter to be written by prosecutor Steve Foritano to the parole board. Prosecutor Foritano and Payne's attorneys informed the court of the plea agreement: "Miss Payne would essentially go to prison for twenty-five years. Both counts would run concurrently." Thereafter:

THE COURT: Miss Payne, under the plea agreement that you have agreed to, if you plead guilty to these two charges, I will be entering an order that sentences you to a prison term of up to twenty-five years on the robbery in the first degree charge, and I will be issuing a prison term on the Class C felony . . . not to exceed ten years. They will both run at the same time. So, in essence . . . you will be imprisoned under the order for a period not to exceed twenty-five years. Understand?

. . . .

PAYNE: Yes.

THE COURT: And you're willing to plead guilty on that basis, is that correct?

PAYNE: Yeah. Yes.

. . . .

In essence, under an *Alford* plea of guilty you would be admitting to me that . . . if you went to trial . . . there would be a substantial likelihood that you would be found guilty of the greater offense, that being murder in the first degree, and you're willing to plead guilty to the lesser charge here, voluntary manslaughter, in order to take advantage of the plea agreement offered by the State.

PAYNE: Yes.

. . . .

THE COURT: And are you entering a plea of guilty to this voluntary manslaughter, then, in order to avoid the possible consequences of having to go to trial on the murder in the first degree charge?

PAYNE: Yes.

THE COURT: And also, then, to take advantage of the plea agreement that's been offered here by the State, and that is to allow you to plead guilty to . . . the robbery charge, which is still the same, but the voluntary manslaughter, which has been reduced—

PAYNE: Yes

THE COURT: from the murder charge down to the voluntary manslaughter, is that correct?

PAYNE: Yes.

After Payne entered her guilty plea, she was sentenced. As in the plea portion of the hearing, at no point in the sentencing portion of the hearing was a letter from the prosecutor to the parole board discussed:

THE COURT: Miss Payne, do you have anything you would like to say before I impose sentence in your case?

PAYNE: The charges that they're concurrent, that means they're together?

THE COURT: That's right.

PAYNE: So I have to serve twenty-five years? It doesn't get lowered or anything?

ATTORNEY JOHNSON: No, it gets lowered.

PAYNE: He said they're separate charges, but they're concurrent or whatever.

ATTORNEY JOHNSON: Yes. The sentences are concurrent, correct, Your Honor?

THE COURT: That is correct The ten-year term and the twenty-five year term will run at the same time. So, in essence, you will complete the ten-year term and that one will be done. You'll still be serving the twenty-five year term.

PAYNE: So how many years do I have to serve mandatory? Isn't there a mandatory thing?

ATTORNEY FORTIANO: I don't believe there's a mandatory minimum. Your Honor. But she will be doing up to a maximum of twenty-five years.

THE COURT: The actual time that you serve will be determined by the parole board. The order that I enter simply orders that you serve or that you be imprisoned for a period not to exceed twenty-five years

PAYNE: So does that mean I have to do the ten years?

ATTORNEY JOHNSON: No, It's up to the parole board.

After Payne's plea and sentencing, on October 23, 1995, Palmer's trial commenced. Payne described the crime and also testified:

Q. How long have you known Akbar Choudry? A. I met him when I was probably about 12 or 13 and then I hadn't seen him. First time I saw him was this year, about May or June.

Q. Where had you met him when you were 12 or 13? A. At Orchard Place.

Q. Orchard Place? A. Uh-huh.

Q. That is a juvenile residential facility on the south side? A. Right.

As Payne's trial testimony continued, a juror stated: "I'm sorry to interrupt, but I just realized there may be a chance that I may know Amanda." In chambers, the juror explained: Amanda Payne "has mentioned she had been at Orchard Place. I was listening to the testimony and all of a sudden it kind of clicked. I think I may have worked with her when I did an internship in '91." After questioning, the juror admitted she wasn't "sure if it is the same person, but the face looks familiar and the name somewhat." After the juror returned to the jury box, the court stated:

If I understand it, the juror was interning at Orchard Place five years ago and thinks that she recognized [Amanda Payne] might have been one of the youths involved there. The juror has indicated it will not have an effect on her ability to continue as a juror in this case.

The State informed the court it did not see any reason to remove the juror or pursue it further. Palmer's trial counsel, attorney Feuerhelm, agreed:

No. I don't think it's, with the vagueness of her recollection, it might not be [Amanda Payne]. My suspicion is pretty strong that Amanda didn't recognize her either from that. And I think we would unduly emphasize some point if we were to put an alternate in or question further. So I would just like to proceed.

The jury convicted Palmer, he appealed, and we affirmed his convictions. *State v. Palmer*, 569 N.W.2d 614, 617-18 (Iowa Ct. App. 1997) (ruling sufficient independent evidence corroborated Payne's accomplice testimony).¹

¹ We also affirmed Choudry's conviction on appeal. See *State v. Choudry*, 569 N.W.2d 618 (Iowa Ct. App. 1997). We stated:

During cross-examination . . . [d]efense counsel attempted to show . . . that because Payne was still in love with Timothy Palmer, she had motive to minimize his involvement and lie about defendant Choudry's part in the murder and robbery of the victim. Payne admitted she was Palmer's girlfriend at the time of Kedem's death and that she hated Choudry.

Ten years later, in 2007, Palmer filed an application for postconviction relief. Palmer's amended application was filed in January 2008 and included allegations of prosecutorial misconduct. In June 2008, the State moved for partial summary disposition. In September 2008, the district court dismissed all claims "except those relating to prosecutorial misconduct."

After hearing, in September 2009, the district court dismissed Palmer's PCR application. The court ruled Palmer's claim based on the State's alleged failure to disclose Payne's juvenile records was time barred by the statute of limitations.

Palmer's second claim alleged failure to disclose a promise of a parole board letter in exchange for testimony at Palmer's trial. In August 2000, five years after Payne's plea, attorney Olson wrote to attorney Foritano on behalf of Palmer, stating:

Martha Johnson and I represented Amanda Payne in 1995 on Murder, First Degree, and Robbery, First Degree, charges. Ultimately, the Murder, First Degree, charge was dismissed and she was sentenced to 25 years on the robbery charge.

At that time there was an indication by your office that you would author a letter to the parole board on Amanda's behalf because of the cooperation she provided in this case as it concerns her co-defendants. Amanda has yet to have her first parole board hearing, but she would like to have your recommendation on file by that time.

....

Any assistance that you could provide would be appreciated.

Olson testified there was no response to this letter, so he sent the identical letter one year later. In August 2001, approximately six years after Payne's

Id. at 620. We affirmed the trial court's dismissal of Choudry's application for postconviction relief alleging ineffective assistance of counsel. See *Choudry v. State*, No. 00-1891 (Iowa Ct. App. Feb. 20, 2002).

plea/sentencing, attorney Foritano wrote a letter to the Iowa Board of Parole stating:

Ms. Payne's role was to lure Mr. Kedem down to an area of Des Moines known as the Lost Planet, where he was attacked by the three males who were in the group.

. . . .

Ms. Payne was not involved in the actual physical attack on Mr. Kedem and I do not believe that she [was] aware of any intention other than to rob Mr. Kedem Ms. Payne did cooperate with the prosecution of the men that killed Mr. Kedem by testifying against those responsible.

In dismissing this claim for relief, the district court ruled:

Palmer has not met his burden of establishing the existence of a promise. While the record shows that Attorney Foritano wrote a letter to the parole board on Payne's behalf, the record does not show that this letter resulted from a promise made to Payne as a part of her plea agreement or in exchange for her plea and testimony. Because Palmer has not met his burden, his due process claim must fail.

Palmer now appeals.

II. Scope of Review.

Our review of the district court's "ruling on the State's statute-of-limitation defense is for correction of errors of law." *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). We will affirm the decision if the court's factual findings are supported by substantial evidence and the law was correctly applied. *Benton v. State*, 199 N.W.2d 56, 57 (Iowa 1972). However, "when the basis for relief is a constitutional violation, our review is de novo." *Harrington*, 659 N.W.2d at 519.

III. Statute of Limitations.

Palmer argues the district court erred in ruling the claim based on the State's failure to disclose Payne's juvenile records was time barred. See Iowa Code § 822.3 (2007).

Section 822.3 contains a statute of limitations for postconviction relief actions requiring the applications to “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.” *Id.* See *Cornell v. State*, 529 N.W.2d 606, 610 (Iowa Ct. App. 1994) (noting “legislative intent . . . to conserve judicial resources, promote substantive goals of criminal law, foster rehabilitation, and restore a sense of repose”). On its face, Palmer’s application was filed beyond the three-year time period.

To avoid this problem, Palmer relies on the statutory exception created for “a ground of fact or law that could not have been raised within the applicable time period.” Iowa Code § 822.3. Palmer contends his claim qualifies under the ground-of-fact exception and he “need only show that he could not have discovered Payne’s medical records earlier in the exercise of due diligence as well as a nexus between the records and his challenged conviction.” Palmer argues “Payne’s mental health records were not obtained by Palmer until [Payne] provided an authorization for Orchard Place to release them to his PCR counsel in 2008.”

While we agree with Palmer’s statement of the applicable law, we disagree with his conclusion the court’s factual findings are not supported by substantial evidence. The applicable law provides: “In addition to the obvious requirement [of showing] the alleged ground of fact could not have been raised earlier, [Palmer] must also show a nexus between the asserted ground of fact and the challenged conviction.” See *Harrington*, 659 N.W.2d at 520. The asserted ground of fact must be relevant. *Id.* at 520-21 (stating statute not tolled

for “discovery of a trivial fact that could not possibly affect the challenged conviction”). In order to meet the statutory ground-of-fact exception, Palmer is *not* required to “show the ground of fact would likely or probably have changed the result of the underlying criminal case.” See *id.* at 521. Rather, a “determination of that issue must await an adjudication . . . on the applicant’s substantive claim for relief.” *Id.*

“The objective of the escape clause . . . is to provide relief from the limitation period when an applicant had ‘no opportunity’ to assert the claim before the limitation period expired.” *Cornell*, 529 N.W.2d at 611. “[T]he focus of our inquiry has been whether the applicant was or should have been ‘alerted’ to the potential claim before the limitation period expired.” *Id.* Therefore, the exception applies to “claims that ‘could not’ have been previously raised because they were not available.” *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994). Examples of claims that would not be time-barred include “newly discovered evidence or a ground that the applicant was at least not alerted to in some way.” *Id.* When an applicant is aware of a claim before it is time-barred, the claim is not one that “could not” have been raised within the applicable time period. *Whitsel v. State*, 525 N.W.2d 860, 864-65 (Iowa 1994). Therefore, this exception only applies where “there would be no opportunity to test the validity of the conviction” within the three-year time period. *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989).

The dispositive issue of fact is whether Palmer could have raised the Orchard Place/juvenile records issue before the three-year limitation period expired. The district court found:

Even though Palmer discovered the evidence more than three years after the writ of procedendo was issued in his case, the evidence could have been discovered earlier in the exercise of due diligence. When deposed, Attorney Feuerhelm, Palmer's trial counsel, testified that, at the time of Palmer's trial, he was aware that Payne had a juvenile history either as a child in need of assistance or as a delinquent. When deposed, Palmer admitted that he had visited Payne in the hospital after her suicide attempt which occurred before the murder. He also admitted that one of his trial jurors, who worked at Orchard Place, told him that Payne had been treated at that facility. Palmer and Attorney Feuerhelm were alerted to Payne's juvenile history and mental health issues and could have exercised due diligence to obtain Payne's records within the three year statutory period

We conclude substantial evidence supports the district court's ruling the factual underpinnings of Palmer's claims were in existence during the three-year limitation period and were available to be addressed in a timely-filed postconviction proceeding.² Thus Palmer's claim could have been raised within the three-year time period. It was not, and is time barred.

IV. Promise of a Parole Board Letter.

Palmer argues "the prosecution violated due process when it suppressed its promise to Amanda Payne of a letter of recommendation to the board of parole." See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963) (holding failure of prosecution to disclose evidence that may be favorable to the defendant is a violation of due process).

² In 2009, Wright's attorney, Monty Brown, was deposed. Brown testified at some point before Wright's 1996 trial, Brown believed Payne had "some prior history of mental health issues." Further, Brown "knew she was in Orchard Place because it was referenced in either the depositions or the reports that [Payne] had been there" Brown explained before Wright's trial, he filed a motion to produce Payne's juvenile records and, after hearing, the court denied the motion. The court ruled Wright was not entitled to Payne's CINA file because it is confidential under Iowa Code section 232(1) (1993).

In January 2009, Payne testified as a part of the written plea agreement prosecutor Steve Foritano promised to write a letter. Payne did not produce a written plea agreement containing the alleged promise. She stated:

Q. I want to go back and talk with you about your guilty plea. Were there any promises that were made by the State of Iowa and the county attorney in order to get you to plead guilty? A. Yes.

Q. What were those promises? A. That I would only do four years in prison, and then after four years, [Steve Foritano] would write a letter of recommendation for me to get out.

....

Q. So Steve Foritano promised to write you a letter of recommendation? A. Yes.

Q. And was that one of the reasons why you decided to plead guilty? Yes.

Q. So you were looking at a life sentence, and the State had told you that you would expect to be out in four, and in order to do that, Steve would write you a letter of recommendation? A. Right.

Payne's testimony in 2009 contradicts her testimony in 1995 during Choudry's trial:

Q. Why did you take the deal? A. I took the deal because if I didn't get it somebody else would—Robert. That was my understanding. That it was going to be offered to Robert Wright.

....

Q. So you thought, well, I better get it before anybody else takes it. A. No. Jamie [Strasser] was offered it; she passed it up. And I said no. I told my attorney I did not want it. And then my attorney told me that if I didn't take it that it would be offered to Robert. And I didn't want Robert to have it because he could come in here . . . and lie.

....

Q. So you are in Oakdale right now; is that correct? A. Yes.

....

Q. What have you been told about how long you are going to serve? A. I haven't asked. I mean, they told me that once you get there it gets out to twelve and a half years.

....

Q. So out of the twelve and a half, how many years have you been told that you will probably do? A. I don't know. He said it depends on me.

Q. Okay. It depends on how well you do? A. Right.

....

Q. And were you also told, in regards to it depends on you, that you get credit for good and honor time for behaving yourself?

A. Right.

.....

Q. Okay. So has anyone given you . . . just a guesstimate about how much time you think you will have to do? A. My other lawyer. My other lawyer told me maybe six, seven years; it depends on how I am.

.....

Q. And you were given a deal. And if you behave yourself, you will be out of prison in about seven years, right? A. I said up to 25 years. My lawyer told me that. My other lawyer told me an estimate.

Q. That you will get out in about seven years if you behave yourself? A. Right.

Wright's trial was after Choudry's trial. Payne's description of her plea agreement during Wright's trial is consistent with her testimony at Choudry's trial and inconsistent with her 2009 PCR testimony. Payne told Wright's jury:

Q. You took the plea to the reduced charge of Voluntary Manslaughter because you knew they could convict you, right? A. I took the plea because if I didn't, it [was] going to be offered to Akbar [Choudry] and Robert [Wright]. That was my understanding. And they could come up here and say whatever they wanted which would probably be lies.

.....

Q. And you also know that the minute you got into the prison system, that 25 is halved down to twelve and a half. You know that, too, correct? A. Uh-huh.

Q. And then that twelve and a half can be chewed off or broken down with more good time, correct? A. Right.

.....

Q. So you thinking what? When will you be back joining us? A. I don't know. I'm in college courses now and I work. I'm going to some classes.

Q. When do you expect you will be rejoining us? A. I don't know. Whenever they say I can leave.

Q. Five, six, seven years? Isn't that what you have been told? A. Yes.

Q. You will be how old then? A. Twenty-three, twenty-four.

Attorney Johnson, one of Payne's defense attorneys, testified:

A. . . . I don't recall Steve Foritano discussing anything with [Payne]—with us about the length of her prison. I can recall very vividly [attorney Olson] and I meeting with Steve in Steve's office talking about the plea agreement, which Steve would do concurrent for [Payne] in addition to the reduced charges.

. . . .
Q. . . . No question that Steve Foritano as part of the plea agreement made an oral promise to you and [attorney Olsen] to write a letter of recommendation to the Board of Parole?

A. Correct.

. . . .
Q. And so as an expectation of some favorable treatment with the Board of Parole, that was part of her reasoning for pleading guilty? A. Yes.

. . . .
Q. But I am struck by this promise by Steve is not included anywhere in the written statement of the plea or sentencing or in the transcript of the plea or sentencing, and I guess my concern is if that was the case, was it not considered part of the plea bargain? A. You know, I can't really answer that for sure. I can tell you Rick [Olson] and I were working on the theory we had to get her somewhere where she wasn't going to go to prison forever and ever and ever, and that was our inducement to Amanda to take the plea agreement.

. . . I don't think it was an entire promise we saw as being in writing. I know he made the promise. I know he followed through with it.

. . . .
Q. Do I draw the conclusion that you and Rick [Olson] did not see it as part of the plea bargain? A. No. I don't think we did. Our plea bargain was solely to get them to agree to give her something she could plea to that wasn't going to put her away forever.

Q. The statement by Steve you did not see as part of that negotiation? A. No. It was just a little—it was not how we convinced Amanda to take the plea agreement.

Q. You convinced Amanda because she was looking at life? A. Yes.

Attorney Olson, Payne's other defense attorney, testified:

Q. . . . [I]t seems like no one really saw this as part of the plea bargain because it's certainly not brought up that way in any legal discussion.

Assuming this event occurred, and your letter in 2000 would indicate that you have memory of that event . . . if it was part of the plea bargain, why didn't it come up in 1995? A. . . . [I]t would seem

to me that it's more of a side rather than the plea bargain. . . . If it wasn't mentioned [at the plea]—and that's reinforced by the fact that you told me that's not mentioned. When we go through the plea colloquy; I would have mentioned it if that would have been one of the deciding factors.

Candidly, I've dealt with Foritano before and he doesn't make those types of promises of "I'm going to get you out of prison early." He just doesn't.

Q. So if it would have been part of the plea bargain, it would have come up in that '95 statement of what is the plea bargain in the colloquy? A. Without a doubt. I mean I wouldn't miss that, but that's not to say that there wasn't conversation.

Q. Right. A. About "Yeah, I'll send a letter to just apprise the parole board as to what was going on."

Q. That's reflected in your 2000 letter in fact? Right.

Palmer's defense counsel, attorney Feuerhelm testified:

Q. . . . Amanda Payne was trying in every way she could to help Tim Palmer in this case. And is that your understanding? A. Yes. . . . [T]hat was a factor throughout the case.

. . . .

Q. And in regard to Mr. Wright and his case, there was a big difference with Amanda Payne in the Tim Palmer trial versus the Richard Wright trial; is that correct? A. Yes.

Q. Could you tell us . . . what that difference was? A. Well, I think clearly in the Palmer case [Payne] had done her best to—I guess I would use the word extract or separate [Palmer] out from the activities of the others, and in doing so, laid blame at [Wright] and Choudry's feet.

Prosecuting attorney Foritano testified:

A. . . . Had there been some promise made prior to the plea as part of the negotiations, I think that would have been on the record. And certainly she was represented by Martha Johnson and Rick Olson, and [Olson] certainly wouldn't have let a concession from me go by without putting that on the record, if that was the case, so no, never have I done any type of side agreement. I don't think it was part of any plea agreements.

Q. . . . Are you saying that you didn't make the promise or you just don't recall that you made the promise. A. I don't recall making any promise. Like I said, if I would have it would have been on the record. Like I said, if you look at her testimony in each of those subsequent proceedings, she clearly doesn't talk about it. . . . [W]hen I look at that, it's clear she has no conscious awareness of any kind of promise by me to write a letter on her behalf.

....
Q. . . . If you made no promise to her to write the letter, then why did you write the letter? A. Like I said . . . the only scenario that makes any sense to me is that at some point after the trials [Olson] asked me if I would write a letter saying that she testified and I did.

It's just real clear to me that we would not have made any kind of promise at the time of the plea that wouldn't have been on the record

Attorney Hunter assisted attorney Foritano in prosecuting Palmer. Hunter testified he was "quite aware of the plea agreement" and he didn't recall Foritano made any promise about writing a letter to the parole board on Payne's behalf prior to Palmer's trial. Attorney Brown, Wright's attorney, attended Payne's plea/sentencing hearing. Brown testified he did not remember a promise of a parole letter being made to Payne.

Payne was questioned about her plea bargain during all three trials: Palmer, Choudry, and Wright. We quoted her testimony at Choudry's and Wright's trials above. At no time did Payne state a parole board letter was a part of her plea bargain.

Upon our de novo review, we conclude Palmer has not established the existence of a promise. Rather, the record as a whole shows the State did not make a promise to Payne to write a letter to the parole board on her behalf in exchange for her guilty plea and testimony at Palmer's trial. Palmer's PCR claim therefore fails.

We have considered all arguments raised by Palmer and those not specifically addressed are deemed to be without merit.

AFFIRMED.