IN THE COURT OF APPEALS OF IOWA

No. 2-1066 / 12-0261
Filed January 24, 2013

HATSADY LEUTFAIMANY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

An applicant for postconvicton relief appeals the district court's grant of summary judgment to the State. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and Nan Horvath and Jim Ward, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

A postconviction relief applicant, Hatsady Leutfaimany, appeals the district court's order granting the State's motion for summary judgment. He claims the district court erred because the newly discovered evidence makes the three-year statute of limitations inapplicable to his case, and *State v*. *Heemstra*, 721 N.W.2d 549 (Iowa 2009) should be retroactively applied based on the constitutional principles of equal protection and separation of powers. Because Leutfaimany's claims are either not preserved or without merit, we affirm the district court's summary dismissal of the application for relief.

I. Background Facts and Proceedings

In the spring of 1997, Leutfaimany was convicted of the offenses of murder in the first degree, robbery in the first decree, and willful injury, for the robbery and death of a store owner. He was sentenced to life imprisonment, without the possibility of parole, plus thirty-five years. This conviction and sentence was affirmed by the Iowa Supreme Court on September 23, 1998. *State v*. *Leutfaimany*, 585 N.W.2d 200, 209 (Iowa 1998).

More than eleven years later, Leutfaimany filed this application for postconviction relief on January 12, 2010, claiming affidavits executed by his codefendants constituted newly discovered evidence and principles of due process required the court to examine the validity of his murder conviction under the predicate felony rule promulgated in *Heemstra*. The State filed a motion for summary judgment asserting Iowa Code section 822.3 (2009) time bars the application, as more than three years had passed since procedendo was issued following the direct appeal. The district court agreed and found the application

was time barred and found "[a]n affidavit of a defendant or codefendant is not new evidence merely because an applicant now regrets not testifying at trial." The district court also held the due process claim could have been raised within the three-year limitations period.

II. Standard of Review and Error Preservation

Postconviction relief actions are generally reviewed for errors at law. *Goosman v. State*, 764 N.W.2d 539, 541 (Iowa 2009). When an applicant alleges a constitutional violation, the review is de novo in light of the totality of the circumstances. *Id.*

Iowa Code section 822.6 provides the court may grant a motion for summary judgment "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits" there is "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Disposition under section 822.6 is analogous to the summary judgment procedure provided in Iowa Rules of Civil Procedure 1.981-1.983. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). Summary disposition of a postconviction relief application is not proper if a material issue of fact exists. *See* Iowa Code § 822.6. A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *See Summage*, 579 N.W.2d at 822.

The State claims Leutfaimany has not preserved error on his claims that failing to apply *Heemstra* retroactively violates his equal protection rights as well

as principles of separation of power. We do not review issues that have not been raised or decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

In the district court, Leutfaimany raised ten issues.[1] However, the only constitutional question raised and decided regarding *Heemstra* was whether due process principles required retroactivity to Leutfaimany's conviction. Leutfaimany never argued equal protection or separation of powers before the district court. As they were not raised prior to this appeal, we have nothing to review on these newly formulated constitutional claims.[2]

III. Newly Discovered Evidence

The only issue raised before the district court, decided, and properly before us, is Leutfaimany's argument the district court erred in declining to find an exception to the three-year limitation period in bringing post conviction claims. Iowa Code section 822.3 provides applications for postconviction relief must be filed within three years from the final decision, or issuance of procedendo in the

[1] Leutfaimany filed a pro se application for postconviction relief containing nine issues. However, in the resistance to the State's motion for summary judgment, Leutfaimany, through his attorney, lists ten issues: (1) violation of due process in failing to apply *Heemstra*; (2) the jury instruction regarding willful injury as a predicate felony was erroneous; (3) his sentence was illegal because the willful injury merged into the murder; (4) the trial information was insufficient; (5) violation of double jeopardy clause lead to failing to merge robbery and willful injury into the first degree murder charge; (6) ineffective assistance of counsel in failing to object to the erroneous jury instruction regarding aiding and abetting; (7) erroneous jury instruction regarding joint criminal conduct; (8) newly discovered evidence; (9) the conviction was a miscarriage of justice; and (10) actual innocence.

[2] While not directly raised on appeal we affirm the district court's rejection of Leutfaimany's due process claim. *Heemstra* does not apply retroactively based on due process principles, as our supreme court has already rejected that argument. *See Goosman*, 764 N.W.2d at 588 (holding federal due process did not require retroactivity of *Heemstra* because *Heemstra* involved a change in the law not a mere clarification).

event of an appeal. This time "limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period." *Id.*

Iowa Code section 822.2(1)(d) requires an applicant to establish four elements before a new trial will be granted based on newly discovered evidence. *See Summage*, 579 N.W.2d at 822. The applicant must show: (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. *Id.*

Leutfaimany's "newly discovered evidence" consists of three affidavits submitted by his three codefendants, stating there was no plan to rob the store before they entered, and to a varying degree, the others did not know the "trigger man" was armed. Leutfaimany claims the affidavits supported his theory of the case and reasonable efforts were made to obtain the "newly discovered evidence." However, Leutfaimany claims the information was not available because the codefendants asserted their right against self-incrimination and did not testify at trial. The district court held the new "self-serving statements in affidavits tendered a decade after the trial is not new evidence."

We agree with the district court and find these affidavits fail the first two elements of newly discovered evidence. Just because the codefendants did not testify, does not mean their current versions of what transpired is now newly discovered evidence. When exculpatory evidence is unavailable, but known, at the time of trial, it is not newly discovered evidence. *Jones v. Scurr*, 316 N.W.2d 905, 908-10 (Iowa 1982) (holding a recanted statement given by person after

judgment, where the person was unavailable at trial due to the exercise of a Fifth Amendment right against self-incrimination, was not "newly discovered evidence").

Leutfaimany entered the store with the three codefendants when the activity mentioned in their affidavits occurred. His codefendants' recent versions of the incident would have been known to Leutfaimany at the time of trial. This information is not "new" to Leutfaimany. Merely because the others chose not to testify at trial and have since regretted that decision, does not make their information "new." The district court properly found the exception to the three-year limitation period for postconviction proceedings was not applicable and there were no genuine questions of fact for the court to review.

IV. Conclusion

Because he did not raise the constitutional claims before the district court, we find error was not preserved on Leutfaimany's equal-protection and separation-of-powers arguments. The district court was also correct in finding no newly discovered evidence and dismissing the application as untimely.

AFFIRMED.