IN THE COURT OF APPEALS OF IOWA

No. 2-956 / 11-0684
Filed January 24, 2013

GERARDO QUIROZ GONZALEZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Allamakee County, Margaret L. Lingreen, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from his conviction for first-degree murder on the ground it was untimely. **AFFIRMED.**

Kevin E. Schoeberl of Story & Schoeberl Law Firm, Cresco, for appellant.

Gerardo Q. Gonzalez, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich and Douglas Hammerand, Assistant Attorneys General, and Jill Jane Kistler, County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

I. Background Facts & Proceedings

Gerardo Quiroz Gonzalez was convicted of murder in the first degree, in violation of Iowa Code section 707.2(1) (1999). The State alleged that Gonzalez was angry about losing in a street fight, went to the apartment of Francisco "Lolito" Costillo, and shot him in the head. On October 2, 2000, he was sentenced to life in prison. His conviction was affirmed on appeal. *See State v. Gonzalez*, No. 00-1689 2002 WL 663591, (Iowa Ct. App. April 24, 2002). Procedendo issued on May 24, 2002.

Gonzalez filed an application for postconviction relief, claiming he received ineffective assistance of trial counsel, appellate counsel, and postconviction counsel. His request for postconviction relief was denied by the district court. That decision was affirmed on appeal. *See Gonzalez v. State*, No. 06-0621 2007 WL 3376790, (Iowa Ct. App. Nov. 15, 2007). Procedendo in that case issued on January 22, 2008.

Gonzalez filed a second application for postconviction relief on October 20, 2010, claiming his conviction was unconstitutional because the trial information was insufficient to put him on notice of the charge against him. The State filed a motion to dismiss claiming Gonzalez's application was untimely under section 822.3. Gonzalez filed a resistance, asserting that due to an inadequate trial information he could not be convicted of the charged offense, and that his conviction was thus void. He thereafter filed additional resistances, asserting that because the trial information had been defective the sentence he received was an illegal sentence, one that could be challenged at any time.

The district court granted the State's motion to dismiss, finding more than three years had elapsed from the final order in the case, and Gonzalez had not established that the case came within an exception to the three-year period. The court found the claim brought by Gonzalez did not "qualif[y] as the type of ground of fact or law that could not be raised within the applicable time period for postconviction relief applications."

Gonzalez then filed a pro se motion asserting that he was claiming an illegal sentence and the statute of limitations in section 822.3 did not apply. The court overruled the motion, finding Gonzalez was not actually challenging an illegal sentence. Gonzalez's counsel then filed a motion to amend or enlarge, also claiming Gonzalez was challenging an illegal sentence. The court overruled this motion as well. Gonzalez now appeals the decision of the district court denying his second application for postconviction relief.

II. Standard of Review

Generally, our review of a district court ruling dismissing a postconviction action as time barred by section 822.3 is for the correction of errors at law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). To the extent Gonzalez raises constitutional claims, however, our review is de novo. *See Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

III. Timeliness of Application

A. A claim of an illegal sentence is not subject to the statute of limitations found in section 822.3. *See Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010). Gonzalez contends his claims are not subject to the three-year time

limitation found in section 822.3, and the district court should not have dismissed his application as untimely.

"Iowa Rule of Criminal Procedure 2.24(5)(a), and our cases, 'allow challenges to *illegal* sentences at any time, but they do not allow challenges to sentences that, because of procedural errors, are illegally imposed.'" *Lopez-Penaloza v. State*, 804 N.W.2d 537, 541 (Iowa Ct. App. 2011) (citation omitted). In discussing illegal sentences, the Iowa Supreme Court has stated:

> [A] challenge to an illegal sentence includes claims that the court lacked the power to impose the sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional. This conclusion does not mean that any constitutional claim converts a sentence to an illegal sentence. For example, claims under the Fourth, Fifth and Sixth Amendments ordinarily do not involve the inherent power of the court to impose a particular sentence. Nor does this rule allow litigants to reassert or raise for the first time constitutional challenges to their underlying conviction.

State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009). An applicant who is not challenging an illegal sentence cannot avoid the restrictions of section 822.3. *Lopez-Penaloza*, 804 N.W.2d at 542.

Gonzalez claims his right to due process was violated because the trial information was defective in that it was not sufficiently specific. *See State v. Hernandez-Lopez*, 639 N.W.2d 226, 241 (Iowa 2002) ("At the very least, due process requires the defendant to receive formal notice of the charges against him and an opportunity to be heard at a meaningful time in a meaningful manner."); *State v. Griffin*, 386 N.W.2d 529, 531 (Iowa Ct. App. 1986) (noting due process requires a defendant to be "apprised of the crime charged with sufficient certainty to enable him to prepare his defense"). He claims that because his due

process rights were violated his conviction was void, resulting in an illegal sentence.

If we were to address Gonzalez's claim on the merits, we would determine he has failed to show the trial information in this case was invalid on due process grounds. An information is sufficient "if it substantially follows the language of the statute." *State v. McConnell*, 178 N.W.2d 386, 388 (Iowa 1970). Furthermore, the information should be considered with any minutes of evidence that are attached. *State v. Dalton*, 674 N.W.2d 111, 120 (Iowa 2004); *State v. Brisco*, 816 N.W.2d 415, 420 (Iowa Ct. App. 2012). Considering the trial information and the attached minutes of evidence, we conclude Gonzales was sufficiently apprised of the charge against him to enable him to prepare a defense.[1] *See Griffin*, 386 N.W.2d at 531 ("If the defendant is apprised of the particulars of the offense sufficiently from whatever source to fairly enable him to prepare a defense, failure to include particulars in the trial information is not fatal.").

We determine, however, that we need not address the merits because we find Gonzalez's claims are not in actuality a challenge to an illegal sentence.

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[1] The trial information accused Gonzalez "of the crime of Murder in the First Degree, in violation of Iowa Code section 707.2(1) committed as follows: Said Defendant, Gerardo Quiroz Gonzalez, on or about January 15, 2000, in Allamakee County did: Kill another person with malice aforethought, and did so willingly, deliberately and with premeditation." The minutes of evidence provide very particular information about the evidence in the case. Santiago Vega, Jose Hernandez, and Juvenal Pena stated Gonzalez had been at the Horseshoe Bar in Postville earlier that evening. There was evidence of a fight Gonzalez had with Jilberto Nunez, in which Francisco Costilla, the victim, intervened. Ricardo Nava, Alejandro Moncada, and Fransico Lemus all stated they saw Gonzalez shoot Costilla. There was evidence that after the shooting Kari Koenig saw Gonzalez "had in his left hand a partially concealed silver handgun, and that there was what appeared to be blood on him." We conclude that considering the trial information and the minutes of evidence Gonzalez was adequately "apprised of the crime charged with sufficient certainty to enable him to prepare his defense." *See Griffin*, 386 N.W.2d at 531.

Gonzalez is raising a constitutional challenge to the underlying conviction of the type the supreme court has determined is not a challenge to an illegal sentence. *See Bruegger*, 773 N.W.2d at 871. The rule providing that an illegal sentence may be corrected at any time, is "not to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence." *Id.* at 871-72.

An applicant who is not challenging an illegal sentence cannot avoid the restrictions of section 822.3. *Lopez-Penaloza*, 804 N.W.2d at 542. Because Gonzalez's claims are not a challenge to an illegal sentence, as discussed in *Bruegger*, 773 N.W.2d at 871, we conclude the three-year statute of limitations found in section 822.3 applies in this case.

B. Having determined section 822.3 applies, we then turn to the issue of whether Gonzalez's application for postconviction relief was timely under that section. 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." There is an exception to this time limitation for "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. Where an application is filed beyond this three-year period, and does not come within the exception, it may be dismissed as time-barred. *See Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994).

Procedendo was filed in regard to Gonzalez's direct appeal from his conviction on May 24, 2002. His current application for postconviction relief was filed more than eight years later, well beyond the three-year time limit found in section 822.3. In order to avoid the time limitation, Gonzalez would need to

assert a ground of fact or law that could not have been raised earlier. *See Perez v. State*, 816 N.W.2d 354, 360 (Iowa 2012). An applicant must additionally "show a nexus between the asserted ground of fact and the challenged conviction." *Harrington*, 659 N.W.2d at 520.

The district court addressed this issue, finding Gonzalez's claims regarding the trial information were not "the type of ground of fact or law that could not be raised within the applicable time period for postconviction relief applications." We agree with the district court's conclusion. Gonzalez would have known at the time of the underlying criminal proceeding if the trial information was not sufficiently specific to apprise him of the crime charged in order to permit him to prepare a defense. *See Griffin*, 386 N.W.2d at 531.

We conclude Gonzalez's claims do not come within the exception found in section 822.3. His claims, therefore, would need to be filed within three years from the date of the writ of procedendo from his direct appeal, which here was on May 24, 2002. Gonzalez's postconviction relief action, filed October 20, 2010, is untimely.

IV. Ineffective Assistance

In his pro se appellate brief, Gonzalez claims he received ineffective assistance because his defense counsel did not raise any constitutional objections to the trial information. A party may not by-pass the three-year time limitation in section 822.3 by claiming ineffective assistance of counsel if the claim is one an applicant would have been aware of during the three-year period. *Wilkins*, 522 N.W.2d at 824. We have already determined Gonzalez would have been aware of any defects in the trial information at the time of his criminal

proceeding. We conclude Gonzalez's claim of ineffective assistance of defense counsel is time barred under section 822.3.

Gonzalez also claims he received ineffective assistance of postconviction counsel at his most recent postconviction relief proceedings, asserting counsel did not do enough to present his pro se claims. Gonzalez's pro se claims, like those addressed by counsel, concern the allegedly defective trial information. We have concluded these claims are barred under section 822.3. Gonzalez cannot show that even if postconviction counsel had done more to advance his pro se claims the result of the postconviction proceedings would have been any different. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (noting that for prejudice prong of a claim of ineffective assistance of counsel, an applicant must show that but for counsel's alleged errors, the result of the proceeding would have been different).

We affirm the decision of the district court finding Gonzalez's second application for postconviction relief was untimely under section 822.3.

AFFIRMED.