IN THE COURT OF APPEALS OF IOWA

No. 3-751 / 12-1700
Filed September 18, 2013

JOHN BUENAVENTURA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Stephen B. Jackson Jr., Judge.

A postconviction relief applicant contends the district court erred in dismissing his application as time-barred. **AFFIRMED.**

Caitlin L. Slessor of Nazette, Marner, Nathanson & Shea, L.L.P., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Robert Hruska, Assistant County Attorney, for appellee State.

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

VAITHESWARAN, J.

We must decide whether a postconviction relief application is time-barred.

I. Background Proceedings

The State charged John Buenaventura with first-degree murder in connection with the death of his sister-in-law. At his trial, two jail mates, Herlie Johnson and Lamont Brandon, testified that he confessed to the crime. A jury found Buenaventura guilty as charged and the Iowa Supreme Court affirmed his judgment and sentence. *See State v*. *Buenaventura*, 660 N.W.2d 38, 52 (Iowa 2003). Procedendo issued in 2003.

In the intervening years, Buenaventura filed an application for postconviction relief and a habeas corpus petition. The district court denied the postconviction relief application, and this court affirmed the ruling. *See Buenaventura v*. *State*, No. 05-1493, 2006 WL 2419194, at *8 (Iowa Ct. App. Aug. 23, 2006). The habeas corpus petition was also denied. *Buenaventura v*. *Burt*, No. 07-CV-34-LRR, 2010 WL 1250920, at *2–3 (N.D. Iowa Mar. 23, 2010).

Buenaventura filed a second application for postconviction relief in 2010. Following an evidentiary hearing, the district court denied the application on several grounds, including that it was untimely.

On appeal, Buenaventura raises the following arguments: (1) "the court improperly dismissed the application as time barred" and (2) "newly discovered letters were material and probably would have changed the result of trial." We find the first issue dispositive.

II. Timeliness of Application

Iowa Code section 822.3 (2011) states, in part, that applications for postconviction relief "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." As noted, procedendo issued in 2003, and the second postconviction relief application was not filed until 2010. Accordingly, the application was time-barred unless it fell within a statutory exception for "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3.

Buenaventura contends two letters discovered after trial established a "ground of fact" that could not have been raised within the applicable time period. The first letter, dated 2002, was from the state prosecutor to the U.S. Attorney's office. The prosecutor commended Johnson "for coming forward with this evidence and cooperating fully at every step in the process of bringing John Buenaventura to justice." The prosecutor recommended "appropriate consideration . . . based on [Johnson's] valuable service." The letter said nothing about Brandon.

The second letter, dated 2009, was also from the prosecutor's office and was addressed to an attorney in Buenaventura's habeas corpus proceeding. The letter referred to unnamed "witnesses" and the prosecutor's agreement to "write a letter to the U.S. Attorney's Office detailing [the witnesses'] cooperation." The letter ended by stating, "Whether they actually received any leniency would be a matter for the records of the U.S. Attorney's office." This letter also said nothing about Brandon.

The district court concluded "[t]he evidence presented by Buenaventura is all evidence that could have been obtained during the statute of limitations." The court reasoned:

> While the letter introduced as Plaintiff's Exhibit 2 was dated January 16, 2002, which would have been after the verdict was rendered in his trial but prior to the judgment and sentence being entered, Buenaventura certainly had an opportunity to discover this information within the three years after the issuance of the procedendo on his appeal from his conviction. Further, Buenaventura had an opportunity to examine evidence relating to any potential agreements as evidenced by the fact that his trial attorneys took depositions of both the witnesses Buenaventura claims had an agreement with the State and also based upon the questions asked of those witnesses during the actual trial. Accordingly, the Court finds that Buenaventura has not provided evidence that an exception to the normal limitations period exists in that he did not present evidence that he did not have an opportunity to assert the claim before the limitations period expired.

We concur in this reasoning. The 2002 letter could have been discovered with due diligence within the applicable time period. *See Harrington v*. *State*, 659 N.W.2d 509, 520 (Iowa 2003) (stating that "an applicant relying on section 822.3 must show the alleged ground of fact could not have been raised earlier"). While the 2009 letter could not have been discovered within the applicable time period because it was written after that period expired, the district court correctly pointed out that the subject matter of that letter, an agreement to inform federal authorities about witness cooperation, could have been discovered within the applicable time period.

Indeed, Buenaventura's trial attorney questioned Johnson and Brandon on this very topic. After Johnson denied that sentencing concessions were made in exchange for his testimony, Buenaventura's attorney delved into the nature of Johnson's contacts with a federal prosecutor and elicited admissions that

Johnson began negotiating a plea bargain in a pending federal matter, he had yet to be sentenced in that matter, and "it might be a possibility" that he could get a break on his sentence for talking to authorities.

Similarly, Buenaventura's attorney asked Brandon whether he had met with a federal prosecutor and made a deal or signed a proffer. Brandon denied he had.

The 2009 letter added little, if anything, that Buenaventura's attorney did not already know or could not have gleaned within the applicable time period. The letter implied Johnson may not have been the only witness on whose behalf a cooperation letter was written, but nothing specific was said about Brandon. For that reason it would have been of little value in impeaching Brandon's denial of a sentencing concession.

Notably, Brandon did not fully cooperate with the State. While he was initially listed as a State witness, his deposition testimony undermined the State's case against Buenaventura. Based on that testimony, the defense elected to call him as a trial witness. At trial, Brandon did an about-face and testified that Buenaventura confessed to the murder of his sister-in-law. Given Brandon's equivocation, it is unclear whether the State intended to include him among the "witnesses" who would benefit from a letter affirming their cooperation.

In sum, we are persuaded the district court did not err in concluding that none of the evidence proffered by Buenaventura raised a "ground of fact . . . that could not have been raised within the applicable time period." Iowa Code § 822.3.

Our analysis cannot end here, because Buenaventura alternately argues that "if evidence could have or should have been discovered within [the] 3 year statute, first postconviction counsel was ineffective for failing to do so and second postconviction counsel was for failing to raise the ineffectiveness of first postconviction counsel."

In *Dible v. State*, 557 N.W.2d 881, 886 (Iowa 1996), the Iowa Supreme Court held that "the ineffective assistance of postconviction relief counsel is not a 'ground of fact' within the meaning of section 822.3." That holding was premised on a belief that the "ground of fact" exception was "limited to grounds that would likely have changed the result of the criminal case." *Dible*, 557 N.W.2d at 884. The court reasoned that ineffective assistance of appellate or postconviction counsel "cannot have this type of impact because their involvement postdates the defendant's conviction." *Id*.

Dible was partially abrogated by *Harrington*, 659 N.W.2d at 521, in which the court stated that an applicant seeking to invoke the "ground of fact" exception did not need to "show the ground of fact would likely or probably have changed the outcome of the underlying criminal case." *Harrington*, 659 N.W.2d at 521. This partial abrogation calls into question *Dible*'s reasoning for holding ineffective assistance of postconviction counsel is not a ground of fact within the meaning of section 822.3. For that reason, we will assume, without deciding, that

Buenaventura could argue first postconviction counsel was ineffective in not discovering the letters within the applicable time period. [1]

To prove ineffective assistance, Buenaventura must establish a breach of an essential duty and prejudice. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). Buenaventura cannot establish *Strickland* prejudice.

As noted, Buenaventura's trial attorney questioned Johnson and Brandon about any agreements affording them sentencing concessions in exchange for their testimony. The first letter was not at odds with Johnson's trial testimony that he received no sentencing concessions as a quid pro quo for his testimony. If anything, the letter confirmed this fact. Accordingly, it was cumulative of Johnson's trial testimony and first postconviction counsel's failure to discover it was non-prejudicial. *See State v*. *Schaer*, 757 N.W.2d 630, 638 (Iowa 2008). As for the substance of the second letter, it is clear from the cross-examination of Johnson and Brandon that Buenaventura's trial attorney was well aware of the possibility those witnesses might get a break in their federal sentences by virtue of their testimony. The second letter added little to this understanding. For that reason, we conclude Buenaventura was not prejudiced by his first postconviction attorney's failure to discover the substance of that letter within the applicable time period. Accordingly, second postconviction counsel also could not have been ineffective.

[1] We will focus on the conduct of first postconviction counsel because the claim with respect to second postconviction counsel is premised on first postconviction counsel's conduct.

We affirm the district court's denial of Buenaventura's second application for postconviction relief.

AFFIRMED.