

IN THE COURT OF APPEALS OF IOWA

No. 3-852 / 11-1703
Filed October 23, 2013

MARSHAL RAY ADCOCK,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

The applicant appeals the district court decision dismissing his third application for postconviction relief. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Andrew C. Abbott of Abbott Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim A. Griffith, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Doyle, J., and Huitink, S.J.*

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

HUITINK, S.J.**I. Background Facts & Proceedings.**

On October 22, 2007, Marshal Ray Adcock entered a guilty plea to criminal mischief in the second degree, in violation of Iowa Code section 716.4 (2007), and to being a habitual offender, as defined in section 902.8. He was sentenced to a term of imprisonment not to exceed fifteen years. His direct appeal was dismissed as frivolous by the Iowa Supreme Court, and procedendo was issued August 1, 2008. See Iowa R. App. P. 6.1005.

Adcock filed his first postconviction relief application April 10, 2008, claiming there was an insufficient factual basis to show he caused damage exceeding \$1000, as required for a charge of second-degree criminal mischief, and his plea was not knowing and voluntary. He also claimed he received ineffective assistance because defense counsel: (1) did not advise him of his right to file a motion in arrest of judgment; (2) did not object when the State was permitted to withdraw from the plea agreement due to his actions between the plea proceedings and sentencing;¹ (3) did not file a motion to reconsider sentence; (4) did not spend enough time consulting with him; and (5) failed to present a defense that there were no eyewitnesses to the offense.

After a hearing, the district court granted the State's motion to dismiss, finding there was no genuine issue of material facts and the State was entitled to judgment as a matter of law. See Iowa Code § 822.6; *Manning v. State*, 654 N.W.2d 555, 559-60 (Iowa 2002) (finding disposition under the third paragraph of

¹ In the interim between his guilty plea and sentencing, Adcock was charged with additional criminal offenses.

section 822.6 was analogous to summary judgment). The court found Adcock's challenges to the sufficiency of the evidence did not survive the entry of the guilty plea. The court rejected Adcock's related claim that his plea was not knowing and voluntary. The court also determined Adcock was unable to show he received ineffective assistance of counsel. The district court's decision was affirmed on appeal. *Adcock v. State*, No. 09-0657, 2010 WL 446513 (Iowa Ct. App. Feb. 10, 2010).

Adcock filed a second application for postconviction relief June 15, 2009. In granting the State's motion to dismiss, the district court found "all issues raised in the present matter have previously been raised and adjudicated." Adcock appealed the denial of his second application for postconviction relief. The Iowa Supreme Court dismissed the appeal as frivolous on August 1, 2011. See Iowa R. App. P. 6.1005.

Adcock filed his third, and present, application for postconviction relief January 14, 2011. He raised a multitude of claims, primarily asserting he received ineffective assistance of counsel. The State filed a motion to dismiss, asserting the issues raised in this third application for postconviction relief had already been adjudicated. The State asserted, "Res Judicata applies and the applicant is prohibited from filing a post-conviction action." Adcock then raised four additional claims of ineffective assistance of counsel.

A hearing on the motion to dismiss was held October 6, 2011. The district court granted the State's motion to dismiss the third application for postconviction relief. The court stated it did "not note any differences in the issues raised by Petitioner in the first two actions and the current action." Additionally, the court

stated it was concerned the second postconviction action was still pending on appeal at the time of the present action, thereby limiting the court's jurisdiction. The court then went on to find that even if Adcock were raising new issues, those issues would be barred by the three-year statute of limitations in section 822.3. Adcock has appealed the decision of the district court.

II. Record on Appeal.

The Iowa Supreme Court, in a ruling dated April 18, 2013, determined the issues of whether the records from Adcock's prior criminal case and postconviction actions were part of the record in the present postconviction action and whether the records were properly considered by the district court and should be submitted with the appeal.

At the postconviction hearing on October 6, 2011, the district court stated, "I'll read through all four files and make a written determination." Thus, the parties were aware the court was going to rely on the records from the previous cases, and no objections were made at that time. Furthermore, in order to adequately consider the issue raised in the State's motion to dismiss—whether the claims raised by Adcock in the present action had been adjudicated in previous actions—the district court needed to be able to review the records of those earlier actions to determine if the issues raised in the present case were the same. We determine the trial court records from Adcock's criminal action and his two previous postconviction actions were properly considered by the district court.

III. Postconviction Relief.

A. We first note Adcock's third application for postconviction relief is not barred by the three-year statute of limitations found in section 822.3. *Procedendo* was issued on his direct appeal on October 1, 2008. The present action was filed January 14, 2011, within three years after *procedendo* was issued. See Iowa Code § 822.3 (providing that in the event of an appeal, an application for postconviction relief must be filed within three years from the date the writ of *procedendo* is issued).

B. We next note Adcock's appeal of the denial of his second application for postconviction relief was dismissed by the Iowa Supreme Court on August 1, 2011, and *procedendo* was issued on August 18, 2011. Although the appeal of the second application was still pending at the time Adcock filed this third application for postconviction relief, that appeal had been resolved prior to the time the district court entered its ruling dismissing the third application on October 10, 2011.

C. We determine most of the issues raised in this third application for postconviction relief have already been determined adversely to Adcock. The following claims of ineffective assistance have already been adjudicated: (1) failure to file a motion in arrest of judgment; (2) failure to adequately explain the plea agreement; (3) failure to seek to enforce the plea agreement at sentencing; (4) failure to object to the guilty plea on the ground there was not a sufficient factual basis for the plea; and (5) failure to present a defense for him. An issue finally adjudicated in other proceedings may not be the basis for an

application for postconviction relief. *Id.* § 822.8; *Hall v. State*, 360 N.W.2d 836, 839-40 (Iowa 1985).

Furthermore, claims that Adcock received ineffective assistance due to defense counsel's failure to object to prosecutorial misconduct and failure to conduct an investigation of the charges against him and that he received ineffective assistance from appellate counsel, are actually restated arguments on the same issues that have already been adjudicated. He claims there was prosecutorial misconduct because of: (1) the lack of eyewitness identification; (2) the lack of a factual basis to show the amount of damage exceeded \$1000; and (3) the State's withdrawal from the plea agreement. Also, the claim defense counsel failed to investigate harkens back to claims of lack of eyewitnesses identification and the lack of a factual basis to show the amount of damage exceeded \$1000. The claim of ineffective assistance from appellate counsel asserts appellate counsel should have pursued his claims of ineffective assistance of defense counsel.

As noted, these issues have already been decided in the previous postconviction actions and therefore may not be relitigated. "A post-conviction proceeding is not intended as a vehicle for relitigation, on the same factual basis, of issues previously adjudicated, and the principle of *res judicata* bars additional litigation on this point." *Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009). We conclude the district court properly granted the State's motion to dismiss these claims.

D. Adcock raises the following claims that have not been previously adjudicated: (1) he was denied due process; (2) he was denied equal protection;

(3) the criminal mischief statute is unconstitutional; and (4) he received ineffective assistance because his defense counsel did not investigate his mental health status.

The State asserts that under section 822.8, Adcock must show a sufficient reason why he did not raise all of his claims in his first postconviction relief action.² Iowa Code section 822.8 provides:

All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted for which sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

A party must show the grounds raised in a subsequent postconviction application were not raised in an earlier application due to ineffective assistance of postconviction counsel. *Rivers v. State*, 615 N.W.2d 688, 689-90 (Iowa 2000); see also *Arnold v. State*, 540 N.W.2d 243, 246 (Iowa 1995) (“Arnold was required to show that his newly stated grounds for relief were not raised in his prior application because counsel representing him at that time acted below the range of normal competency.”). Here, Adcock has not claimed he received ineffective assistance from postconviction counsel in either his first or second postconviction

² The State's written motion to dismiss did not rely on its arguments concerning section 822.2. The issue was, however, discussed by counsel for both parties at the postconviction hearing, and the district court was clearly aware of it. We, therefore, conclude the issue has been preserved for our review. See *DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002).

relief actions.³ He has not alleged a “sufficient reason” for not raising these issues in his earlier postconviction applications, and these claims may not be the basis for a subsequent application for postconviction relief. See Iowa Code § 822.8.

E. Finally, Adcock claims he received an illegal sentence because the sentence imposed by the district court constituted cruel and unusual punishment. An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a). “A claim that the sentence is unconstitutional because it constitutes cruel and unusual punishment is a claim of an illegal sentence and may therefore be raised at any time.” *Bonilla v. State*, 791 N.W.2d 697, 699 (Iowa 2010).

We determine the district court improperly granted the State’s motion to dismiss the applicant’s claim of an illegal sentence. We therefore reverse the decision of the district court dismissing Adcock’s application for postconviction relief on this one issue and remand back to the district court for further proceedings. We make absolutely no findings on the merits of the issue, and do not retain jurisdiction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

³ We note that under section 814.7 a claim of ineffective assistance of counsel does not need be raised on direct appeal from criminal proceedings in order for it to be preserved for postconviction relief proceedings. The issue here, however, is not whether Adcock raised his claims of ineffective assistance of counsel on direct appeal, but whether he raised them in previous postconviction relief actions.