IN THE COURT OF APPEALS OF IOWA

No. 3-856 / 12-1197
Filed November 20, 2013

ERIC PEPPERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Eric Peppers appeals the district court's dismissal of his second application for postconviction relief. **AFFIRMED.**

Lars G. Anderson of Holland & Anderson, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Janet M. Lyness, County Attorney, and Susan Nehring, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

Eric Peppers appeals the district court's dismissal of his second application for postconviction relief. Peppers contends his speedy trial rights were violated and his first postconviction attorney was ineffective in failing to raise the claim.

I. Background Proceedings

In 1999, a jury found Peppers guilty of second-degree sexual abuse, false imprisonment, and domestic abuse assault while displaying a dangerous weapon. Peppers filed a direct appeal from his judgment and sentence in which he contended that his trial attorney was ineffective in failing to assert a violation of his right to a speedy trial. *See* Iowa R. Crim. P. 2.33(2)(b). This court preserved the claim for possible postconviction relief proceedings. *State v. Peppers*, No. 00-283, 2001 WL 810740, at *3 (Iowa Ct. App. July 18, 2001).

Peppers filed a postconviction relief application raising several issues, including the claimed speedy trial violation. An attorney subsequently appointed to represent him filed a document waiving the speedy trial issue. The attorney mailed a copy of the document to Peppers. Following an evidentiary hearing, the district court filed an order noting, in part, that the speedy trial claim appeared to have been waived. The court denied the application and this court affirmed. *See Peppers v. State*, No. 07-0865, 2008 WL 2042504, at *2-3 (Iowa Ct. App. May 14, 2008).[1]

[1] Peppers also filed a habeas corpus petition, which was dismissed. The dismissal was affirmed.

In 2012, Peppers filed a second postconviction relief application alleging that first postconviction counsel was ineffective in failing to raise the speedy-trial claim. The State moved to dismiss the application on the ground that it was time-barred. The district court granted the motion and this appeal followed.

II. Statute of Limitations

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." Procedendo issued in 2001 and Peppers' second postconviction relief application was not filed until 2012. Therefore, 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.

The Iowa Supreme Court addressed this exception in *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994). There, the State was granted permission to appeal the denial of its motion asserting that Wilkins' second application for postconviction relief was time barred. Wilkins, who had raised a claim that his attorneys were ineffective in failing to preserve a shirt for ballistics testing, argued that his claim was not time barred because it fell within the statutory exception to the three-year time limit. *Wilkins*, 522 N.W.2d at 823.

The court defined the parameters of that exception as follows:

> Section 822.3 creates an exception for untimely filed applications if they are based on claims that "could not" have been previously raised because they were not available. In other words, the exception applies to situations in which there "would be no opportunity to test the validity of the conviction in relation to [the

> ground of fact or law that allegedly could not have been raised within the time period]." A reasonable interpretation of the statute compels the conclusion that exceptions to the time bar would be, for example, newly-discovered evidence or a ground that the applicant was at least not alerted to in some way.

Id. at 824 (citations omitted). With respect to Wilkins' claim, the court stated, "Wilkins labels his claim ineffective-assistance-of-postconviction-counsel in the hope that the court will reach the merits of his contention that his trial counsel was ineffective" but "his claims neither involve new evidence nor are they new legal claims." *Id.* The court continued,

> Wilkins had three opportunities to claim ineffectiveness of trial counsel before the time bar became enforceable against him. He could have raised it on appeal, in his postconviction action, and on appeal from denial of postconviction relief. Wilkins cannot assert ignorance of the claim because he should have at least been alerted to trial counsel's failure to raise the shirt issue and appellate and postconviction counsels' failure to raise ineffectiveness claims.

Id. The court found "Wilkins' second postconviction application time barred under section 822.3."

Wilkins is directly on point. Peppers raised a claim—violation of his right to a speedy trial—that he knew about before, during, and after trial, on direct appeal, and at the time of his first postconviction relief application. Indeed, he raised the claim in his first, timely-filed postconviction relief application. After his first postconviction attorney sent him a copy of the document informing the court that the issue would not be pursued, Peppers did not lodge an objection. And, when the first postconviction court ruled that Peppers appeared to have waived the speedy trial issue, Peppers did not ask his attorney to challenge that statement in his motion for expanded findings and conclusions.

In sum, Peppers, his direct appeal attorney, and his first postconviction attorney were aware of the claimed speedy trial violation and had an "opportunity to test the validity of the conviction" on that basis. *See id.* The fact that Peppers' postconviction counsel did not pursue the issue was a matter Peppers could have taken up with him at the time. *See Nguyen v. State*, 829 N.W.2d 183, 188-189 (Iowa 2013) (stating that *Wilkins* related "to facts that the defendant knew about the entire time (but whose legal consequences his allegedly ineffective counsel failed to pursue)"). He elected not to do so. We conclude he cannot revive the speedy trial issue by belatedly repackaging it as an ineffective-assistance-of-counsel claim.

The district court did not err in concluding "[t]he [speedy trial] issue could easily have been raised by the Applicant within the three-year period. It is not a new fact or a newly-discovered fact. . . . [T]he 'escape clause' contained in [section 822.3] does not apply to the facts of this case." We affirm the court's dismissal of Peppers' second postconviction relief application.[2]

AFFIRMED.

[2] Peppers asks this court to overrule *Dible v. State*, 557 N.W.2d 881, 886 (Iowa 1996). The Iowa Supreme Court abrogated that opinion in *Harrington v. State*, 659 N.W.2d 509, (Iowa 2003). To the extent Peppers seeks additional relief from "ground of fact" discussion in *Dible*, we are not in a position to grant his requested relief. *See State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990) ("We are not at liberty to overturn Iowa Supreme Court precedent").