IN THE COURT OF APPEALS OF IOWA

No. 2-486 / 10-0739
Filed September 6, 2012

JUSTEN FAGAN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Iowa County, Nancy A. Baumgartner, Judge.

A postconviction relief applicant contends that his application should not have been dismissed as untimely and argues his late filing should be excused based on (1) the doctrine of equitable tolling, (2) ineffective assistance provided by postconviction counsel, and (3) claimed newly discovered evidence. **AFFIRMED.**

Philip B. Mears of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, until withdrawal, and Kevin Cmelik, Assistant Attorney General, and Tim McMeen, County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Potterfield and Tabor, JJ., take no part.

VAITHESWARAN, P.J.

In 2001, a jury found Justen Fagan guilty of first-degree robbery. In 2002, this court affirmed his judgment and sentence, and a writ of procedendo was issued. *State v. Fagan*, No. 01-1363, 2002 WL 1842415 (Iowa Ct. App. Aug. 14, 2002). Approximately seven years later, Fagan filed a second application for postconviction relief challenging his robbery conviction.[1] The district court dismissed the application as untimely. The court relied on Iowa Code section 822.3 (2009), which states 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," unless there exists a ground of fact or law that could not have been raised within the limitations period.

On appeal from the dismissal order, Fagan concedes he filed his second application well outside the three-year statute of limitations, but argues his late filing should be excused based on (1) the doctrine of equitable tolling, (2) ineffective assistance provided by postconviction counsel, and (3) claimed newly discovered evidence.

Fagan acknowledges that no published Iowa opinion has invoked the equitable tolling doctrine to excuse a late filing of a postconviction relief application. He also acknowledges that this court has issued unpublished opinions expressly declining to apply the doctrine. *See Lawrence v. State*, No. 10-1238, 2011 WL 768785, at *2 (Iowa Ct. App. Mar. 7, 2011) ("[W]e decline the invitation to apply 'equitable tolling' here."); *Stringer v. State*, No. 08-0188, 2008

[1] His first application for postconviction relief is not at issue in this appeal.

WL 5235491, at *2 (Iowa Ct. App. Dec. 17, 2008) ("We conclude the equitable tolling doctrine is unavailable to Stringer, as it has not been recognized in Iowa."). In the absence of Iowa authority authorizing the application of the equitable tolling doctrine in this context, we decline to apply it to excuse Fagan's late filing of his postconviction relief application. *See Feaker v*. *Bulicek*, 538 N.W.2d 662, 664 (Iowa Ct. App. 1995) (declining to adopt an interpretation of an attorney's lien statute that had no support under Iowa case law).

Turning to the ineffective-assistance-of-counsel exception to the three-year bar, Fagan again concedes that Iowa Supreme Court precedent stands in his way. Specifically, in *Dible v*. *State*, 557 N.W.2d 881, 886 (Iowa 1996), *abrogated on other grounds by Harrington v*. *State*, 659 N.W.2d 509 (2003), the court held that "ineffective assistance of postconviction relief counsel is not a 'ground of fact' within the meaning of section 822.3." Fagan asks us to overrule *Dible* on several grounds, including an equal protection ground. We are not convinced this is our prerogative. *See State v*. *Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) (stating it was prerogative of the supreme court, rather than the lower court, to determine the law and stating if "previous holdings are to be overruled, we should ordinarily prefer to do it ourselves"). But, even if we were inclined to take this bold step, we find no legal basis for doing so. *Dible* is controlling, and Fagan cannot escape the time bar by asserting ineffective assistance of postconviction counsel.

Remaining is Fagan's final assertion that this case falls within an exception to the three-year time bar for claims involving newly discovered evidence. Fagan concedes the "traditional newly discovered evidence standard

does include a requirement that the evidence could not have been discovered earlier in the exercise of due diligence." *See Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991) (setting forth the elements necessary to prevail on a newly-discovered evidence claim). He also concedes this requirement "does present a problem in that the evidence" on which he relies "mostly was already in the possession of [his] postconviction counsel." These concessions are dispositive. As the district court found, the evidence on which Fagan relies was not newly discovered. Accordingly, Fagan could not avail himself of the newly-discovered evidence exception to the three-year statute of limitations.

We affirm the dismissal of Fagan's second postconviction relief application.

AFFIRMED.