IN THE COURT OF APPEALS OF IOWA

No. 2-542 / 11-1383
Filed July 25, 2012

MARCO ANTONIO ALVAREZ MENDOZA,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

RAYMUNDO RIOS AGUILAR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Darrell J. Goodhue, Judge.

Applicants appeal from the dismissal of their applications for postconviction relief. **AFFIRMED ON BOTH APPEALS.**

Benjamin D. Bergmann of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellants.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Wayne Reisetter, County Attorney, for appellee State.

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

DOYLE, J.

In these consolidated appeals from the dismissal of applications for postconviction relief invoking the United States Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), we are asked to decide whether the discovery rule applied in medical malpractice cases should toll the statute of limitations for postconviction relief actions. We conclude it should not, and affirm the judgment of the district court.

I. Background Facts and Proceedings.

Raymundo Rios Aguilar filed a written guilty plea to lascivious acts with a minor in July 2003. His sentence was suspended, and he was placed on probation for two years, which he successfully discharged. In 2010, Aguilar was detained by immigration officials and placed into deportation proceedings. Neither the written guilty plea, nor the judgment entered by the district court, informed Aguilar that a criminal conviction could affect his status under federal immigration laws.[1]

Marco Antonio Alvarez Mendoza filed a written guilty plea to identity theft and third-degree fraudulent practices in January 2007. Like Aguilar, he received suspended sentences and completed his term of probation. In May 2010, Mendoza consulted with an immigration attorney about his status in the United States. She informed him that he could not become a lawful permanent resident and was subject to deportation because of his criminal convictions. Although

[1] Iowa Rule of Criminal Procedure 2.8(2)(b)(3) was amended effective February 15, 2002, to require the district court to inform a defendant that "a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws."

Mendoza's written guilty plea informed him that a conviction could affect his status under federal immigration laws, he says trial counsel advised him that his guilty plea "would have little effect" on his immigration status.

Aguilar and Mendoza filed separate applications for postconviction relief in March 2011, alleging their trial attorneys failed to advise them about the immigration consequences of their guilty pleas, as now required by *Padilla*. *See Padilla*, 130 S. Ct. at 1486 (holding the Sixth Amendment demands that counsel inform a defendant if a plea subjects the defendant to the risk of deportation).

The State filed motions to dismiss, arguing the applications were time-barred under Iowa Code section 822.3 (2011) because they were filed more than three years after the applicants' convictions became final. In response, the applicants argued, among other things, that the discovery rule used in medical malpractice cases should apply to toll the statute of limitations because they had only recently discovered the ineffectiveness of their trial counsel.

The district court rejected this argument and entered a ruling dismissing the applications as time-barred. Aguilar and Mendoza filed notices of appeal, which were consolidated by the Iowa Supreme Court and transferred to our court.

II. Scope and Standards of Review.

An appeal from a denial of an application for postconviction relief is generally reviewed for correction of errors at law. *See Perez v. State*, ___ N.W.2d ___, ___, 2012 WL 2052399, at *2 (Iowa 2012); *see also Lopez-Penaloza v. State*, 804 N.W.2d 537, 540 (Iowa Ct. App. 2011). "However,

applications that allege ineffective assistance of counsel raise a constitutional issue that must be reviewed de novo." *Lopez-Penaloza*, 804 N.W.2d at 540.

III. Discussion.

Iowa Code section 822.3 requires applications for postconviction relief to 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. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period.

The applicants do not dispute that their applications were not filed within the applicable three-year period. Instead, they assert they are "claim[ing] a ground of fact that could not have been raised within three years: that they were unaware they had received ineffective assistance of counsel." The applicants request "this Court [to] apply the same rule to postconviction relief cases that it already applies to medical malpractice cases: the statute of limitations tolls until the injured party discovers his injury." *See, e.g.*, *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 460–61 (Iowa 2008) (stating the statute of limitations for medical malpractice claims does not begin to run until the plaintiff knew, or should have known through reasonable diligence, of both the physical or mental harm and its cause in fact).

The language of section 822.3 is not ambiguous, nor do the applicants claim that it is. *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 125 (Iowa 2011) (Wiggins, J. dissenting) ("If the statute is not ambiguous, we must apply it as written."). Instead, they ask us to add another exception to the already clear language of the statute. This we may not do. *See Schultze v. Landmark Hotel*

Corp., 463 N.W.2d 47, 49 (Iowa 1990) ("Ordinarily, we may not, under the guise of judicial construction, add modifying words to the statute or change its terms."). Thus, in *Schultze*, the Iowa Supreme Court declined to apply "a discovery rule that supersedes a statutorily imposed discovery rule." *Id.* at 50; *see also Rock v. Warhank*, 757 N.W.2d 670, 675 (Iowa 2008) (refusing to incorporate common law notions of inquiry notice into the statute of limitations for medical malpractice actions). We believe the same reasoning should apply here.

The medical malpractice discovery rule would be of no help to the applicants in any event, as they are simply alleging the statute of limitations should be tolled "because neither was aware he had a claim to make." *See Franzen v. Deere & Co.*, 377 N.W.2d 660, 662 (Iowa 1985) (stating, for purposes of discovery rule, it "is sufficient that the facts would support a cause of action. It is not necessary that the person know they are actionable"); *see also Rock*, 757 N.W.2d at 673 (noting "it is not necessary for the plaintiff to discover the medical professional was negligent in order to trigger the statute of limitations"). "Knowledge of the facts and knowledge they are actionable are distinct and unrelated issues for purposes of the discovery rule." *Franzen*, 377 N.W.2d at 662.

This brings us to the express language of the statute—whether the applicants have alleged "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. Abandoning the claim made in district court that *Padilla* was a change in law, the applicants now focus on their attorneys' ineffectiveness as a ground of fact that could not have been

raised earlier. Similar claims have been rejected by the Iowa Supreme Court and by this court.

In *Perez*, a postconviction relief applicant argued *Padilla* was "a ground he could not have raised within the three-year time bar" of section 822.3. ___ N.W.2d at ___, 2012 WL 2052399, at *7. Our supreme court disagreed, stating that while its precedents before *Padilla* "rejected the notion that counsel had a constitutional duty to advise clients about deportation consequences," the court had "acknowledged there was 'some merit' in the contrary position." *Id.* at ___, at *6 (citing *State v. Ramirez*, 636 N.W.2d 740, 746 (Iowa 2001) and *Mott v. State*, 407 N.W.2d 581, 583 (Iowa 1987)).

> Furthermore, at any time our precedents could have been overturned by the United States Supreme Court, which is in fact what happened when *Padilla* was decided. And shortly after our decision in *Ramirez*, we amended rule 2.8 to require defendants pleading guilty to be informed that "a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws." *See* Iowa R. Crim. P. 2.8(2)(b)(3) (effective February 15, 2002). Hence, if *Padilla* does not embody a new rule of constitutional criminal procedure, we believe the matter could have been raised by Perez, as that term is used in section 822.3, within the applicable time period.

Id. at ___, at *6.

And in *Lopez-Penaloza*, this court rejected an applicant's claims that her attorney's misadvice and the applicant's subsequent discovery of the deportation consequences of her guilty plea were grounds of fact that could not have been raised within the time bar of section 822.3. *Id.* With respect to the first ground, we stated that claims of misadvice were recognized at the time of the applicant's plea and could have been raised within the three-year time period. *Lopez-Penaloza*, 804 N.W.2d at 542 (citing *Mott*, 407 N.W.2d at 583 ("[I]f a defendant

has been affirmatively *mis*led by an attorney concerning the consequences of a plea, the plea may be held to be invalid, even though the consequences are characterized as collateral.")). We conclude the same is true here, to the extent the applicants are claiming their attorneys misadvised them about the immigration consequences of their pleas.[2]

That the applicants were unaware of the deportation implications of their guilty pleas until recently is also unavailing, as "those consequences were in existence during the three-year period of section 822.3 and thus available to be addressed then." *Id.* The statutory exception applies only where "it is obvious that there would be no opportunity to test the validity of the conviction" within the limitations period. *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989). As we explained in *Lopez-Penaloza*, a "claimed lack of knowledge 'is not provided as a ground for exception from the effects of the statute of limitations.'" 804 N.W.2d at 542 (quoting *Edman*, 444 N.W.2d at 106); *see also Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994) (stating the focus of our inquiry under section 822.3 "has been whether the applicant was or should have been 'alerted' to the potential claim before the limitation period expired").

For the foregoing reasons, we affirm the district court's dismissal of the applications for postconviction relief.

AFFIRMED ON BOTH APPEALS.

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[2] In an affidavit filed in resistance to the State's motion to dismiss, Mendoza claimed his attorney "advised me that if I would plead guilty, it would have little effect on my immigration status." He learned that was not true after visiting with an immigration attorney several years later. An affidavit filed by Aguilar similarly claimed his attorney told him "that if I would plead guilty, it would not affect my immigration status."