IN THE COURT OF APPEALS OF IOWA

No. 2-594 / 11-0837
Filed October 31, 2012

RAYMOND BRODENE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Raymond Brodene appeals the district court's dismissals of his request for DNA testing of evidence from his 1992 conviction and his application for postconviction relief. **AFFIRMED.**

Christine E. Branstad of Branstad Law, PLLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John Sarcone, County Attorney, and Nan Horvath, Assistant County Attorney, for appellee State.

Heard by Doyle, P.J., and Mullins and Bower, JJ. Tabor, J. takes no part.

DOYLE, P.J.

Raymond Brodene appeals the district court's dismissals of his request for DNA testing of evidence from his 1992 conviction and his application for postconviction relief. We affirm.

***I. Background Facts and Proceedings*.**

In 1990, Raymond Brodene was convicted of murder in the first degree for killing a gas station attendant during a robbery. *See State v*. *Brodene*, 493 N.W.2d 793, 795 (Iowa 1992). His conviction was affirmed by the Iowa Supreme Court. *See id.*

In 2008, Brodene filed his fourth application for postconviction relief (PCR), seeking a new trial and an evidentiary hearing. He alleged he was denied due process and his counsel was ineffective, the result of which prevented him from presenting DNA evidence to the court in his defense. In his amended application, Brodene requested DNA testing pursuant to Iowa Code section 81.10 (2005)[1] upon various items of evidence admitted in his trial, including bloody currency Brodene gave a witness. The currency could not be located by the State for purposes of his current PCR application.

Ultimately, the district court dismissed Brodene's application, finding that except for the requested DNA testing, his claims were time-barred. Additionally, it found that the DNA tests would not raise a reasonable probability that Brodene would not have been convicted, explaining:

[1] Iowa Code section 81.10 was enacted in 2005, after Brodene was convicted and his three prior applications for PCR were dismissed. *See* 2005 Iowa Acts ch. 158, § 10. The statute has not been amended since.

> As the Iowa Supreme Court stated, "other clear evidence overwhelmingly established Brodene's guilt." [*Brodene*, 493 N.W.2d at 796.] DNA testing is requested by [Brodene] because he believes the blood will be identified as his, rather than that of the victim. This would be cumulative to the defense he already presented at trial. This evidence would not exonerate him, rather it would further implicate his involvement in the crime.
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> Iowa Code Section 81.10(1) does not support the requested DNA testing, as at best, it is cumulative.

Brodene now appeals.

II. Scope and Standards of Review.

We review Brodene's challenges the district court's application of the provisions of Iowa Code section 81.10 to the facts of this case for errors of law. *State v*. *Tong*, 805 N.W.2d 599, 601 (Iowa 2011). "We are not bound by the trial court's determination of law." *Id.* To the extent Brodene's constitutional rights are implicated, our review is de novo. *State v*. *Bumpus*, 459 N.W.2d 619, 622 (Iowa 1990).

III. Discussion.

On appeal, Brodene contends the district court erred in dismissing his PCR application[2] and DNA testing request because (1) section 81.10 authorized

[2] "Iowa Code section 822.3 provides the statute of limitations for [PCR] applications." *Perez v. State*, 816 N.W.2d 354, 360 (Iowa 2012). Section 822.3 bars PCR applications filed after three years from the date the conviction or final decision; "[h]owever, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period." *See also* Iowa Code § 822.2(1)(d) (stating a PCR application may be filed where "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice").

The State points out that our supreme court approved the use of DNA testing before Brodene's conviction became final, *see State v. Brown*, 470 N.W.2d 30, 31-33 (Iowa 1991), and that Brodene failed to explain why he did not seek DNA testing within the three-year statute of limitations or in his three previous applications for postconviction relief. We agree with the State that under the circumstances of Brodene's current claim, if it were just a claim for postconviction relief, it would be time-

the DNA testing that Brodene requested; (2) he had a liberty interest, protected by the United States and Iowa Constitutions, in conducting DNA testing; and (3) the State, acting in bad faith, lost or destroyed the bloodstained money Brodene sought to test, thus depriving him of his constitutional right to exculpatory evidence. We address his arguments in turn.

A. Application of section 81.10.

Iowa Code section 81.10(7) provides the district court shall grant a defendant's request for DNA testing if all of these apply:

> a. The evidence subject to DNA testing is available and in a condition that will permit analysis.
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> b. A sufficient chain of custody has been established for the evidence.
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> c. The identity of the person who committed the crime for which the defendant was convicted was a significant issue in the crime for which the defendant was convicted.
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> d. The evidence subject to DNA analysis is material to, and not merely cumulative or impeaching of, evidence included in the trial record or admitted to at a guilty plea proceeding.
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> e. DNA analysis of the evidence would raise a reasonable probability that the defendant would not have been convicted if DNA profiling had been available at the time of the conviction and had been conducted prior to the conviction.

The essence of Brodene's argument is this: Favorable evidence from the DNA testing of the evidence *could* put the whole case in a different light and undermine confidence in the verdict. He explains:

> Brodene's hand was bleeding the night of the robbery and murder. Brodene testified that he cut his finger working on his vehicle. Forensic evidence at trial was consistent with Brodene handling a gun but not firing one. The requested DNA testing can show whether or not Brodene held any of the items taken from the convenience store, or the gun used in the murder by determining whether his blood is found. Establishing a lack of Brodene's blood

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barred by section 822.3. However, we choose to address the denial of his request for DNA testing.

> on the requested items provides direct evidence that Brodene did not handle any of the items in the time period shortly after the murder, thus supporting his testimony that he did not have anything to do with the murder.

However, "DNA testing which could have been exculpatory is equivalent to saying such testing is merely potentially helpful to the defense." *Whitsel v*. *State*, 525 N.W.2d 860, 864 (Iowa 1994) (internal quotation marks).

Here, we agree with the district court that regardless of whether DNA testing was available and could have been raised within the applicable time period, Brodene has not demonstrated that DNA testing would likely change the results of his case. In affirming his conviction, the supreme court found the evidence overwhelmingly established Brodene's guilt:

> Brodene admitted he was at the gas station on Southwest 9th Street when the attendant was shot. A witness observed Brodene's car at the gas station about one hour before the victim was discovered, and he saw a man inside the vehicle. Another witness stopped by the station that evening between 6:30 and 7:30 p.m. She left when the attendant failed to respond to her attempt to activate the self-service gas pump. This witness heard something that sounded like firecrackers and saw a man in a black coat running from the back of the station with a noticeable limp. Brodene, who walks with a limp, was arrested wearing a black coat.
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> A cab driver testified he had picked Brodene up outside a business establishment called Tattoo Ted's Parlor at approximately 9:00 or 10:00 p.m. that night. Tattoo Ted's Parlor is located in the 4200 block of Southwest 9th Street. Brodene had told the cab driver he called for a cab because the transmission in his car had ceased functioning. The cab driver initially drove Brodene to the back of the lot in the rear of the tattoo parlor, where Brodene's car was parked, and Brodene locked his car. The cab driver then took Brodene to an apartment house on Southwest 9th Street.
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> The apartment house was the residence of Vicki Butler, a female friend of Brodene. Brodene stayed at Vicki Butler's residence for a short period of time before returning to the tattoo parlor in a second cab so he could arrange for his car to be towed to his home. Brodene had a police scanner with him and was listening to it intently. Brodene brought a jar of change with him to

> Butler's apartment. The jar was later identified as the coin jar taken from the station.
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> After returning to the tattoo parlor in a second cab, Brodene rode with the tow truck driver when he towed Brodene's car home. The tow truck driver testified Brodene acted "pretty nervous" and listened to a police scanner during the trip. Brodene said he had purchased the scanner the same day.
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> The charge for the tow was thirty-two dollars. Brodene paid the charge in one dollar bills which he drew from a large wad of bills he was carrying. When the tow truck driver counted the money, he discovered many of the bills were covered with blood. The blood was later determined to be human. The money bag which had been taken from the gas station was found the next day outside the tattoo parlor.
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> When a police officer approached Brodene at approximately 5:00 the next morning and asked "who he was" Brodene replied, "I'm the one you're looking for." Gunshot residue later taken from Brodene's hands was consistent with him having held a gun. Brodene admitted he had hidden the gun used to shoot the attendant at Vicki Butler's apartment. He claimed he had given his gun to Jeff Gunter when he was at the gas station working on his car because he was worried a police officer might stop by. Brodene testified he heard the sound of firecrackers when Gunter was in the station and Gunter had told him he accidentally shot the attendant and asked Brodene to take the gun. Brodene testified Gunter had gone to Butler's apartment to retrieve the gun on his own initiative.
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> Gunter testified he lives across the street from Brodene, and on the evening of the shooting, Brodene had come to his home, stated he was wanted for questioning, and offered Gunter twenty dollars to retrieve the gun from Butler's apartment. Gunter went to Butler's home and obtained the gun and a small pouch of ammunition. When Gunter returned home, he and Brodene watched the police search Brodene's home and car. Brodene then asked Gunter to keep the gun, and Gunter placed the gun outside in a doghouse. Later that afternoon, Gunter contacted the police and gave them the gun. The gun was later found to match bullets discovered at the gas station and recovered from the attendant's body. On the day of the robbery and murder, Brodene had told a friend he owed $1600 to drug dealers.

Brodene, 493 N.W.2d at 797-89.

Assuming for the sake of argument the blood on the money was determined to match Brodene's DNA profile, it would merely be cumulative

evidence because he argued at trial the blood on the money was his. Additionally, the absence of his DNA on the other items of evidence simply would not establish that he did not handle those objects. This is not a case where the evidence Brodene seeks to have tested will point to the actual killer; the DNA or lack of DNA on the various items of evidence cannot show Brodene did not shoot and murder the victim. The DNA evidence establishing the blood on the money was Brodene's would not demonstrate his actual innocence.

Here, the evidence against Brodene was so strong that even if the evidence was tested for DNA and its results are as Brodene hopes, those results would not change the outcome of the trial. Given the overwhelming evidence against him, we agree with the district court that Iowa Code section 81.10 does not support his requested DNA testing.

B. Liberty Interest in Conducting DNA Testing.

The federal due process clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Iowa Constitution describes the protection in similar language: "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. Our courts have traditionally considered these provisions to be equal in import, scope, and purpose. *In re Det. of Garren*, 620 N.W.2d 275, 284 (Iowa 2000). We opt here to apply the same analysis to both constitutional claims.

In asserting his rights were violated because his DNA testing request was denied, Brodene relies upon a recent United States Supreme Court case, *District Attorney's Office for Third Judicial Distict v. Osborne*, 557 U.S. 52 (2009). In that

case, Alaska, the state involved, had not at that time enacted any "legislation specifically addressing the issue of evidence requested for DNA testing." *Osborne*, 557 U.S. at 62. Osborne, through a section 1983 action, argued Alaska's postconviction relief statutes violated his procedural and substantive due process rights because they did not provide him a freestanding right to DNA evidence. *Id.* at 72. The Court concluded there was no such substantive due process right to DNA evidence. *Id.* Additionally, although the Court found Osborne had "a liberty interest in demonstrating his innocence with new evidence under state law," it recognized "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man." *Id.* at 68.

> When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume. [A convicted defendant's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief.

Id. (internal citations, quotation marks, and alterations omitted). The Court determined the relevant question for considering Osborne's constitutional claim, "within the framework of [Alaska's] procedures for postconviction relief," was whether the procedures offended "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or if they transgressed "any recognized principle of fundamental fairness in operation." *Id.* at 69. Because it found that Alaska's postconviction relief statutes generally provided a procedure for those seeking access to DNA evidence, *id.* at 70, the Court concluded Alaska's existing procedures were adequate to satisfy Osborne's liberty rights. *Id.* at 71-73.

Brodene acknowledges the Court did not recognize the DNA testing as a substantive due process right. *See id.* at 73. As to his procedural due process rights, our legislature has specifically enacted statutes to provide him and convicted defendants access to DNA testing. *See* Iowa Code § 81.10. Considering Brodene's claim within the framework of section 81.10 and our postconviction relief statutes, the procedures simply do not offend any principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" nor do they transgress "any recognized principle of fundamental fairness in operation." Even if the DNA results were as Brodene hopes, given the overwhelming evidence against him, there is no reasonable probably those results would change the outcome of his trial. Consequently, there is no unfairness to Brodene in denying his request under the requirements of section 81.10. Due process requires no additional rights beyond what is already provided in section 81.10 and the various postconviction procedures found in Iowa law. We conclude Brodene's procedural and substantive due process rights were not violated by the district court's denial of his request for DNA testing.

C. Right to Exculpatory Evidence.

Finally, Brodene argues he has a due process right to preservation of potentially exculpatory evidence, and the right was violated because the State could not locate the money evidence from trial. We agree with the State that even if DNA testing of the money showed what Brodene said it would show—that Brodene's blood was on the money—that result would not be exculpatory. For purposes of these proceedings, Brodene has not lost any right by the fact that

the money was not available to be tested. Under these circumstances, we find this due process claim is moot. *See Maghee v*. *State*, 773 N.W.2d 228, 233 (Iowa 2009) ("A case is moot when the contested issue has become academic or nonexistent and the court's opinion would be of no force or effect in the underlying controversy.").

***IV*. *Conclusion*.**

Because Brodene has no constitutional right to further DNA testing and has failed to satisfy the requirements section 81.10, we affirm the district court's dismissals of his PCR application and his request for DNA testing.

AFFIRMED.