IN THE COURT OF APPEALS OF IOWA

No. 3-336 / 11-1982
Filed May 30, 2013

JAMES MAYBERRY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

A postconviction relief applicant appeals a district court order denying him relief. **AFFIRMED.**

Mark C. Meyer, of Kinnamon, Kinnamon, Russo, Meyer & Keegan, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Janet M. Lyness, County Attorney, and Andrew Chappell, Assistant County Attorney, for appellee State.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

James Mayberry appeals the district court's decision denying this second application for postconviction relief, stemming from his 1985 conviction for first-degree murder. Mayberry frames his claim in a creative manner—Iowa has an "actual innocence" exception to Iowa Code section 822.3 (2005), and he can therefore raise his constitutional claims over a decade beyond the normal statute of limitations period. Even if Mayberry's approach were to be an exception under Iowa law, he has failed to prove he is actually innocent, and all of his claims are without merit. We therefore affirm.

I. Background Facts and Proceedings

We adopt the district court's recitation of the facts and proceedings from its December 15, 2010 order:

> The history of this case shows that on December 18, 1985, a judgment of guilt and sentence was entered on Applicant James L. Mayberry's conviction after jury trial of Murder in the First Degree. He was sentenced to a life term in prison and remains incarcerated. Mayberry was charged in the stabbing death of Julia Wise in her mobile home that allegedly occurred on or about July 2, 1985. Mayberry was convicted under the alternative theories of premeditated murder and/or murder while participating in the forcible felony of Assault with the Intent to Commit Sexual Abuse with Serious Injury. On appeal, Mayberry raised the following issues: (1) Sufficiency of the evidence as to his identity as the perpetrator; (2) Sufficiency of evidence of the elements of First Degree Murder; (3) Voluntariness of Statements made to police; (4) Failure to instruct on a favorable inference from failure to flee; (5) Admissibility of rebuttal evidence; (6) Failure to grant a mistrial due to a witness's reference to Mayberry refusing a polygraph examination; (7) Ineffective assistance of trial counsel with regard to failure to request certain jury instructions. On July 22, 1987, the Iowa Supreme Court affirmed Mayberry's conviction and rejected each of the above claims. [*State v*. *Mayberry*, 411 N.W.2d 677, 686 (Iowa 1987).]
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> Mayberry filed an application for postconviction relief on June 28, 1988. There, among others, he raised claims of

> ineffective assistance of trial counsel that included challenging trial counsel's failure to call two lay witnesses, a forensic pathologist and crime scene reconstruction expert or object to certain evidence. He also challenged counsel's failure to rebut the reference to the polygraph issue by showing that Mayberry has passed an examination while incarcerated. He also sought a new trial based on new evidence that trace blood had been found on a "rusty knife" located near the scene that was not detected by the State's investigation prior to trial and disclose that a witness that testified at trial was the confidential informant whose information was relied on in securing the search warrant. On May 6, 1992, the Honorable Larry Conmey overruled Mayberry's request for postconviction relief. Mayberry appealed that ruling and, on December 29, 1993, the Iowa Court of Appeals affirmed the ruling of Judge Conmey. [*Mayberry v*. *Smith*, No. 92-0847 (Iowa Ct. App. Dec. 29, 1993).] The Iowa Supreme Court denied further review.
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> Mayberry's current Application for Postconviction Relief, as amended and as developed by the record, seeks a new trial based on: (1) the retroactive application of *State v*. *Heemstra*, 721 N.W.2d 549 (Iowa 2006); (2) the State presenting false evidence as to the time of the victim's death especially in light of non-disclosure of evidence contradicting that false evidence; (3) use of false evidence involving the testimony of witness John Lee; (4) prosecutorial misconduct with regard to a statement made to Mayberry during cross-examination; (5) due process violation based on the police failing to seize a screwdriver found at the scene; (6) due process violation/prosecutorial misconduct based on admission of a buck knife at trial; (7) due process violation based on failure to grant a new trial because of new polygraph evidence; (8) use of false evidence as to the discovery of a towel and beer can under the victim's trailer.

One of the main issues Mayberry argues is the State presented false evidence as to the time of the victim's death, particularly in light of the non-disclosure of evidence allegedly contradicting what Mayberry asserts to be false evidence. Wise's body was found on July 4, 1985, and the autopsy was performed by a pathologist, William J. Powers, M.D., between 4:00 and 5:00 p.m. that day. The autopsy report estimated death occurred "more than 24 hours and less than 48 hours before the time of the autopsy."

V.G. Edwards, M.D., the acting medical examiner, estimated the time of death was in the late evening of July 2. At the first postconviction hearing, a third doctor retained as an expert for Mayberry, former Iowa State Medical Examiner and forensic pathologist Thomas Bennett, M.D., testified he concurred with Dr. Edwards's opinion the time of death was twenty-four to forty-eight hours before the autopsy. At this postconviction hearing, other pathology experts however, disagreed with Drs. Edwards, Powers, and Bennett and found there was no valid scientific or medical reason to place the time of death in the evening of July 2.

On March 24, 2010, in response to a discovery subpoena in this current postconviction relief action, the records' custodian of the Johnson County Medical Examiner's Office provided Mayberry's counsel with a certified copy of the medical examiner's file. The file included a previously undisclosed note on a small piece of paper bearing the logo of a prescription drug company. The note contains rather cryptic jottings, the words "Wise—(Trailer)" "autopsy status" "occurred lastwk" "337-9688" "death 7-3-85 "Kay- —@ Co. Atty's office," and "OK. Dr. Edwards." Dr. Edwards testified he did not sign this note, nor did he authorize anyone to put his name on it nor had he ever seen the note before. The county attorney testified he too had never seen the note before but did employ a secretary named Kay in 1985 and the phone number was the number to his private office.

Mayberry claims the alleged discrepancy in the time of death jotted on this note is significant because he was with Wise during the evening of July 2, but not anytime after.

The district court granted summary disposition on all of Mayberry's claims except the claims based on "newly discovered evidence as to [the] note and its impact on the verdict in conjunction with the use of false or discredited medical evidence with regard to the time of Julia Wise's death." The district court specifically found "procedurally barring a claim that established actual innocence is considered a fundamental miscarriage of justice, it is clear that a claim of actual innocence is a fundamental part of Iowa's Postconviction Relief Act." The district court also found Mayberry was unable to articulate why any contradiction between the testimony of Detective Gerald Knock and Christian Wise about the location of a bloody towel would make any difference to the outcome of the case as it has no bearing on the time of death nor does it point to anyone else as the perpetrator.

After a factual hearing on the remaining claim based on newly discovered evidence, the district court denied and dismissed Mayberry's application for relief because the record did not provide a legal basis to find Mayberry was denied a fair trial, nor could the court find by clear and convincing evidence that no reasonable juror would have found Mayberry guilty. He now appeals.

II. Standard of Review

"Generally, an appeal from a denial of an application for postconviction relief is reviewed for correction of errors at law." *Goosman v*. *State*, 764 N.W.2d 539, 541 (Iowa 2009). We must "affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied." *Perez v*. *State*, 816 N.W.2d 354, 356 (Iowa 2012). Where the applicant alleges constitutional error, our "review is de novo 'in light of the totality of the

circumstances and the record upon which the postconviction court's rulings w[ere] made.'" *Id.* (quoting *Goosman*, 764 N.W.2d at 541).

III. Direct Appeal 1987 Supreme Court Decision

Before we address the merits of Mayberry's claim, it is useful to review our supreme court's opinion from Mayberry's direct appeal. The court found sufficient evidence from the criminal trial record to sustain the jury's guilty verdict. For Mayberry to now establish his "actual innocence" he must discount these and other findings affirmed on appeal. *State v*. *Mayberry*, 411 N.W.2d 677, 681-82 (Iowa 1987). The supreme court held:

> Included in the evidence presented are several circumstances tending to connect defendant with the perpetration of the crime. His fingerprint was found on the victim's eyeglasses, which were on the floor near the body. A bruise on the victim's face indicated that she had been struck in a manner which jammed the glasses into the bridge of her nose.
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> A bloodstained towel belonging to the victim was found under the Berger mobile home where defendant had been present on the evening of July 2. Defendant's insistence on washing his work uniform upon returning home on the evening of July 2 rather than availing himself of his employer's laundry service is another factor suggesting guilty knowledge. Finally, the three separate statements made by defendant to the police evidence a pattern of withholding important information and changing the facts only when confronted with inconsistencies between his story and the physical evidence.

Id. Based on all the evidence presented, our supreme court concluded the jury could logically infer Mayberry was the perpetrator of the crime.

IV. Actual Innocence Exception

We now turn to Mayberry's asserted path to overturn his conviction. Mayberry argues Iowa has an "actual innocence" exception to the three-year time limitation found in Iowa Code section 822.3. He argues the exception based on

federal habeas corpus cases should apply to state postconviction relief actions. *See Schulp v*. *Delo*, 513 U.S. 298, 320 (1995) (providing in a habeas case a claim of innocence does not by itself provide a basis for relief, but instead allows an otherwise barred constitutional claim to be considered on the merits, including claims previously decided and claims procedurally defaulted). The State argues the exception does not exist in Iowa, and even if it does, Mayberry is not actually innocent so as to avail himself of the exception.

Assuming without deciding whether Iowa has an actual innocence exception in our postconviction relief scheme, Mayberry has not been able to prove by clear and convincing evidence he is actually innocent.[1] Therefore, his claim fails.

Claims of constitutional error to prove actual innocence must be proved with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Actual innocence does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather "that no reasonable juror would have found the defendant guilty." *Id.* at 329. "Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* This standard is higher than that required for prejudice, which requires only "a reasonable probability that, absent the errors, the factfinder would have had a

[1]His counsel asserted multiple times at oral argument Mayberry is "probably" innocent.

reasonable doubt respecting guilt." *Id.* at 332-33 (O'Connor concurring) (quoting *Strickland v*. *Washington*, 466 U.S. 668, 695 (1984)).

For Mayberry, the only new evidence that has not been the subject of any of his prior litigation that could now possibly prove his actual innocence is the cryptic note found in the medical examiner's file. We agree with the district court the note is new evidence in the sense it was not found for over two decades; however, it does not amount to the type of evidence that would prove Mayberry's innocence. Even if one could ascertain who wrote the note and what information was actually being conveyed, a date of death asserted in the note of "7-3-85" falls within the time frame provided to the jury in the original criminal trial. The note does not raise a reasonable probability the result would have been different, nor does it meet the high burden announced in *Schulp* "that no juror, acting reasonable would have voted to find him guilty beyond a reasonable doubt." 513 U.S. at 329. We agree with the district court, merely because this information may have given an attorney a "fresher trail to investigate what precipitated the note and who wrote it" does not render it result changing. *See State v*. *Hall*, 249 N.W.2d 843, 848 (Iowa 1977) (concluding withholding evidence from a defendant is permissible if it only "might arguably have provided a few investigatory leads of highly speculative value").

Related to this claim we find to any minimal extent Mayberry argues his due process rights were violated because of prosecutorial misconduct for not producing this note is without merit. To constitute a due process violation under *Brady v*. *Maryland*, 373 U.S. 83, 87 (1963), the suppressed information must be material either to the guilt or punishment of the defendant, not merely potentially

or inferentially helpful to the defense. *Hall*, 249 N.W.2d 846. Even if the county attorney had known about the note—which he denied—and failed to provide it to Mayberry, the newly discovered note is not material to Mayberry's guilt or innocence.

In addition to the newly discovered note, Mayberry claims new expert testimony regarding the time of death proves he is actually innocent. This is not "new" forensic evidence but rather at least his second attempt to attack the jury's acceptance of the time of death, as opined at trial. The "new" testimony is rather somewhat differing opinions based on the same evidence that was available in the criminal trial, direct appeal, and the first postconviction relief action. Nothing Mayberry offers exonerates himself. Even if we were to accept his theory that Iowa has an exception to our statutory time limitation period for cases of actual innocence, Mayberry has failed to prove no reasonable juror could convict him.

V. Other Claims

The district court granted summary disposition on all other claims. Again, assuming we accept the "actual innocence" exception, Mayberry cannot prove his actual innocence so we therefore cannot address these claims beyond the three-year statute of limitations found in Iowa code section 822.3. It is only after a petitioner has proved actual innocence can we address substantive claims.[2]

[2] We find the following claims are time barred: (1) prosecutorial misconduct with regard to a statement made to Mayberry during cross-examination; (2) due process violation based on the police failing to seize a screwdriver found at the scene; (3) due process violation/prosecutorial misconduct based on admission of a buck knife at trial; and (4) due process violation based on failure to grant a new trial because of new polygraph evidence. Each of these issues has been raised and rejected before in prior litigation. The actual innocence exception only allows substantive claims if actual innocence is proved, and because it was not, we will not address these claims.

To the extent Mayberry argues *Heemstra* is retroactive and therefore applicable to him, even if this issue were preserved and not time barred it clearly fails. 721 N.W.2d at 558 ("The rule of law announced in this case regarding the use of willful injury as a predicate felony for felony-murder purposes shall be applicable only to the present case and those cases not finally resolved on direct appeal in which the issue has been raised in the district court.").

To the extent Mayberry argues the exception for newly discovered evidence exempts him from the statute of limitations, Iowa Code section 822.2(1)(d) requires an applicant to establish four elements before a new trial will be granted based on newly discovered evidence. *See Summage v*. *State*, 579 N.W.2d 821, 822 (Iowa 1998). The applicant must show: (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *Id.* As discussed above, although the recently discovered note is new, it is immaterial and provides no game-changing information. Mayberry also claims the State used false evidence involving the testimony of a witness and used false evidence as to the discovery of a towel and beer can under the Berger trailer. Even assuming this information is new, he is unable to prove this information would change the result. In that same regard, his assertion that Detective Knock gave perjured testimony simply because it was not completely consistent with Christian Wise's statements to the police is without merit.

Lastly, Mayberry makes two freestanding arguments that his due process rights were violated because his interrogation was not recorded and his sentence

is illegal because it violates the principles in *Apprendi v*. *New Jersey*, 530 U.S. 466, 489 (2000). On the first claim, procedures such as recording questioning are not mandated by the Iowa Constitution, and we refuse to create constitutional rights that are not mandated by the constitution. *See State v*. *Morgan*, 559 N.W.2d 603, 609 (Iowa 1997).

On the second claim, an illegal sentence that can be corrected at anytime is one not authorized by law or that is unconstitutional. *State v*. *Bruegger*, 773 N.W.2d 628, 672 (Iowa 2009); *Tindell v*. *State*, 629 N.W.2d 357, 359 (Iowa 2001). Our Supreme Court has interpreted the *Apprendi* holding as "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *State v*. *Helmers*, 753 N.W.2d 565, 568 (Iowa 2008). To the extent Mayberry is challenging how the jury was instructed on an element of the crime, we do not re-examine trial errors. The jury was properly instructed as to the law at the time he was convicted, and the jury was required to find each element of the offense by proof beyond a reasonable doubt. *Apprendi* is not applicable to the facts of this case, and Mayberry's sentence is not illegal.

VI. Conclusion

Mayberry has provided us with an interesting question of whether Iowa has an "actual innocence" exception to our postconviction relief scheme. We can, however, leave this determination to another day because even if we accept his proposition, he has not proved he is actually innocent, and therefore, he has not opened the gate for us to address his constitutional claims. The newly

discovered cryptic note does not rise to the level of new evidence that would allow us to grant a new trial because it is not likely to change the result of the case. All of Mayberry's other claims are without merit, and we therefore affirm the district court.

AFFIRMED.