IN THE COURT OF APPEALS OF IOWA

No. 6-986 / 06-0323
Filed February 28, 2007

KEVIN R. JOHNSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C. Abel, Judge.

Applicant appeals following dismissal of his application for postconviction relief. **AFFIRMED**.

Susan R. Stockdale, Colo, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Matthew Wilber, County Attorney, and Margaret Reyes, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Kevin Johnson appeals from the district court order that granted the State's motion to dismiss his application for postconviction relief. He contends the court erred in concluding that his claims were barred under Iowa Code sections 822.3 and 822.8 (2003), and in denying his discovery requests. We affirm the district court.

I. Background Facts and Proceedings.

In November 1980, Kevin Johnson (Johnson) was convicted of the murder of his two-month-old son, Kevin Jr. (Kevin). Johnson's conviction was affirmed in on appeal. *State v. Johnson*, 318 N.W.2d 417 (Iowa 1982). The denial of a subsequent application for postconviction relief was affirmed by this court in 2003. *Johnson v. State*, No. 01-2013 (Iowa Ct. App. June 13, 2003). As we noted in that decision:

> The State's trial experts testified that Kevin had a large hematoma at the top and back of his head, and that the child's death resulted from intracranial swelling caused by a blow to the head. Testimony from Johnson's wife, Kristi, indicated that physical abuse from Johnson was the sole cause of Kevin's death. The evidence, including Kristi's testimony and Johnson's own pre-trial inculpatory statements, tied Johnson to the disposal of Kevin's body and the baby's things.
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> In addition, trial testimony from Kristi and her family indicated that Johnson had engaged in a pattern of violent abuse towards and severe neglect of Kevin, and had frequently expressed a wish that Kevin would die. The lay testimony regarding Kevin's abuse was supported by testimony from an experienced pediatric radiologist, Dr. Bickers, who opined that Kevin's postmortem x-rays showed signs of multiple healing fractures.
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> Johnson . . . presented only minimal lay testimony . . . aimed at discrediting and implicating Kristi . . . to the point the jury would disregard her testimony . . . then find the remainder of the evidence insufficient to tie Johnson to Kevin's death.

On appeal from the denial of Johnson's postconviction relief application, we addressed his claims of newly discovered evidence and ineffective assistance of counsel. In relevant part, Johnson asserted recently-obtained expert opinions constituted newly discovered evidence. One of those experts, Dr. Plunkett, had opined, based on post-trial science, that the healing fractures identified by Dr. Bickers were in fact "an artifact called physiologic periosteal changes," a "normal variant." We rejected the claim, concluding that even if Dr. Plunkett's opinion constituted newly discovered evidence, Johnson had not shown admission of this evidence would probably change the outcome of the proceeding.

In June 2004, Johnson filed a pro se application for postconviction relief, raising four claims of newly-discovered evidence:

> (1) "[n]ew radiological-forensic principles" would show what Dr. Bicker's identified as healing fractures were in fact the result of decomposition, specifically "ARTIFACTS called periosteal changes which are normal variants";
> (2) "a novel, new scientific procedure known as Brain Fingerprinting,"[1] employed by Dr. Lawrence Farwell, Ph.D., would verify his innocence;
> (3) recently-obtained information that, contrary to his testimony during trial, Dr. Samuel Rosa did not attend Kevin's autopsy; and
> (4) "novel, new scientific procedures . . . can detect and identify congenital, metabolic disorders which have been proven to cause unexplained deaths in infant children."

The application was supported by Johnson's affidavit and limited portions of the trial transcript.

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[1] As the supreme court noted in *Harrington v. State*, 659 N.W.2d 509, 516 n.6 (Iowa 2003), the process purports to "measure[ ] certain patterns of brain activity (the P300 wave) to determine whether the person being tested recognizes or does not recognize offered information. This analysis basically 'provide[s] information about what the person has stored in his brain.'" In that case, the supreme court found the applicant's due process claim to be dispositive, and thus did not address the district court's determination that while brain fingerprinting constituted newly discovered evidence, the postconviction application was nevertheless time barred under section 822.3. *Harrington*, 659 N.W.2d at 516.

Counsel was appointed to assist Johnson, but later moved to withdraw on the basis that he believed Johnson's claims were without merit. Counsel noted he had reviewed relevant documents, spoken with Dr. Plunkett, and contacted counsel for Dr. Farwell. He asserted that Dr. Plunkett had stated "no 'newly discovered evidence' is available to present" at the postconviction hearing, and was advised that Dr. Farwell would contact him if he was interested in employing brain fingerprinting on Johnson, and that no contact had been made. The court granted counsel's motion, and denied Johnson's request for substitute counsel.

The State moved for summary dismissal of Johnson's application. It asserted Johnson had not shown his claims were based on newly discovered evidence and thus were untimely under section 822.3's statute of limitations, and moreover that the claims were barred under section 822.8 because they either had not been raised in, or had been raised and adjudicated in, the direct appeal and prior postconviction proceeding. In resistance, Johnson provided an affidavit that asserted he did not become aware of the newly discovered evidence until some time after the resolution of the first postconviction proceeding.

In December 2005 the district court heard argument on the State's motion, as well as Johnson's motion to compel production of police notes and reports from the original investigation, and his motion for production of various autopsy-related trial exhibits. The court overruled Johnson's production requests, and granted the State's motion for summary dismissal. Johnson appeals, asserting the district court erred in both respects.

II. Scope and Standard of Review.

Our review is for the correction of errors at law. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). The district court's discovery rulings will be upheld absent a demonstrated abuse of discretion. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997). However, a court error is not reversible unless that error was also prejudicial. *See Mercer v. Pittway Corp*., 616 N.W.2d 602, 612 (Iowa 2000).

III. Discussion.

We turn first to the summary dismissal of Johnson's claims. The court may dismiss Johnson's application upon the State's motion if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the [State] is entitled to judgment as a matter of law." Iowa Code § 822.6. As the moving party the State bears the burden of showing the nonexistence of a material fact. *Behr v. Meredith Corp*., 414 N.W.2d 339, 341 (Iowa 1987); *see also Manning*, 654 N.W.2d at 559-660 (noting applicability of summary judgment principles in this context). However, a party resisting a properly supported motion must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5). Reviewing the record in this matter in the light most favorable to Johnson, *Knudson v. City of Decorah*, 622 N.W.2d 42, 48 (Iowa 2000), we agree summary dismissal was appropriate.

Pursuant to that portion of Iowa Code section 822.3 which applies to this case, Johnson's claims are barred[2] unless they are based on "a ground of fact or law that could not have been raised within the applicable time period." Claims based on newly discovered evidence fall within this exception. *See id*. § 822.2(4). However, to prevail on such a claim an applicant must show

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

Jones v. State, 479 N.W.2d 265, 274 (Iowa 1991). A postconviction relief applicant cannot raise a ground for relief that could have been raised in a prior proceeding. Iowa Code § 822.8. Nor may he attempt to relitigate a claim that was finally adjudicated in a prior proceeding. *Id*.

Johnson's first claim, regarding the distinction between periosteal changes and healing fractures, was clearly raised and ruled on in the prior postconviction proceeding. In addition, a supplemental affidavit filed by Johnson indicates that facts supporting both the above claim, and the claim based on the alleged perjury of Dr. Rosa, were known at the time of the prior postconviction relief proceeding. Johnson is accordingly barred from raising these claims in the present postconviction proceeding. *Id*. at §§ 822.3, .8.

Johnson's remaining claims assert that "novel, new scientific procedures," specifically brain fingerprinting and unspecified procedures that detect congenital

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[2] In relevant part, section 822.3 (formerly section 663A.3) imposes a three year statue of limitations on applications for postconviction relief. Because Johnson's appeal was finalized before the 1984 enactment of the limitations period, his application was required to be filed on or before June 30, 1987. *See Whitsel v. State*, 525 N.W.2d 860, 863 (Iowa 1994).

metabolic disorders causing unexplained deaths in infants, constitute newly discovered evidence. Even if we assume these procedures did not exist or were not available until sometime after Johnson's first postconviction proceeding, we would still conclude that summary dismissal was appropriate.

As we have previously noted, to succeed on a claim of newly discovered evidence an applicant must demonstrate that the evidence probably would have changed the result of the trial. *Jones*, 479 N.W.2d at 274. Even viewed in the light most favorable to Johnson, nothing in the record before the district court generated a disputed issue of material fact in this regard. While brain fingerprinting is an existing procedure, nothing in the record indicates its application would reveal information that would assist Johnson in refuting the charges, that the results of a brain fingerprinting analysis of Johnson would be admissible, or that Dr. Farwell is even willing to administer the procedure in this particular case. There is even less support in the record for the alleged procedures that identify congential metabolic disorders causing unexplained infant death, which are not described or specifically identified in any way. Significantly, nothing in the record indicates that proof of these disorders would in any manner refute the evidence that Kevin died as the result of blunt trauma to the head. The district court did not err in summarily disposing of these claims.

We accordingly turn to Johnson's assertion that the district court committed reversible error when it denied his discovery requests. We find this contention to be without merit. Notably, nothing in the record indicates that any of the requested evidence, if produced, would have allowed Johnson to avoid summary dismissal of his claims.

Johnson's motion to compel police notes and records asserted that the evidence was relevant to his first two claims of newly discovered evidence "insofar as they related to probable Brady v. Maryland Due Process violations committed" by the police and the prosecution. We have already determined that the first claim, relating to periosteal changes, is barred under section 822.8. In addition, there is no indication that any information which might be contained in the police records would in any way support the second claim, that a brain fingerprinting analysis would establish Johnson's innocence. Moreover, nothing in the record, other than Johnson's conclusory assertions, indicates that the trial exhibits were necessary to support his claims of newly discovered evidence.

If Johnson believed the evidence was necessary to mount a proper resistance to the State's motion for summary dismissal, he was required to demonstrate the requested evidence was "essential to justify the opposition" to the State's motion. *See* Iowa R. Civ. P. 1.981(5). This he did not do. We find no reversible error in the district court's decision to deny his discovery requests.

IV. Conclusion.

The record does not contain any disputed issue of material fact regarding Johnson's claims of newly discovered evidence. Nor does it appear that Johnson's discovery requests, if granted, would have enabled him to generate a disputed issue of material fact. Accordingly, we affirm the district court's denial of Johnson's discovery requests and its summary dismissal of his application for postconviction relief.

AFFIRMED.