**IN THE COURT OF APPEALS OF IOWA**

No. 7-279 / 06-0069
Filed June 27, 2007

**BOBBY MORRIS,**
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Defendant appeals the district court ruling dismissing his application for postconviction relief. **AFFIRMED.**

Christopher A. Kragnes, Sr., of Kragnes & Associates, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee State.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

**HUITINK, P.J.**

A Polk County jury convicted Bobby Morris of first-degree murder on July 21, 1998. His conviction was affirmed on appeal by this court on April 12, 2000. *State v. Morris*, 98-1640 (Iowa Ct. App. Apr. 12, 2000).

Morris filed a pro se postconviction relief application in 2001 and his court-appointed postconviction counsel filed an amended application. This court-appointed counsel, and the subsequent court-appointed counsel, eventually withdrew from the case. The district court ordered the third court-appointed counsel to investigate the basis for the postconviction application to determine whether it had merit. Counsel filed a notice with the court indicating that he found no viable or colorable claims in the postconviction relief action. Morris filed a pro se written resistance. On September 23, 2005, the district court held a hearing on the matter. The court gave Morris the opportunity to present the numerous claims set forth in his pro se application for postconviction relief. On December 15, 2005, the district court entered a lengthy ruling addressing Morris's claims and dismissing the application for postconviction relief.

Morris filed a pro se notice of appeal and then filed several pro se motions to the supreme court. Morris first filed a "Motion for Limited Remand" arguing his postconviction counsel had sabotaged his pro se claims. Morris also filed a "Motion to Reverse" asking the supreme court to apply the recent holding in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), to his case because the trial court had ruled that willful injury was a qualifying predicate offense for felony murder. The supreme court denied both pro se motions on December 11, 2006.

Two weeks later, Morris filed another pro se motion to reverse and request for stay based on the supreme court's recent holding in *Gamble v. State*, 723 N.W.2d 443 (Iowa 2006). The supreme court denied this motion on January 10, 2007.

The brief filed in this appeal was filed by Morris's court-appointed postconviction appellate counsel. In this brief, Morris presents four issues,[1] all of which relate to the felony murder/merger rule adopted in *Heemstra*. Morris claims: (1) the district court erred when it ruled his concerns were without merit; (2) appellate counsel was ineffective for not challenging the felony murder/merger rule on direct appeal; (3) he received ineffective postconviction relief counsel because counsel did not claim appellate counsel was ineffective for not raising the felony murder/merger rule; and (4) the Iowa Supreme Court erred when it ruled that *Heemstra* only applied to cases on direct appeal.

**I. Standard of Review**

Iowa appellate courts typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, where the applicant asserts claims of a constitutional nature, our review is de novo. *Id.*

**II. Merits**

Because Morris's claims all involve the *Heemstra* decision, we will briefly address this ruling and its effect on previous binding authority.

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[1] The court's postconviction ruling addressed fifteen issues argued by Morris in his original and amended applications for postconviction relief. On appeal, Morris points to four alleged errors. Because there is no discussion or argument pertaining to the other claims in his application for postconviction relief, we will not address them on appeal. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."). Similarly, we do not address *Gamble* because no such claim was asserted in the brief submitted to this court.

Prior to *Heemstra*, *State v. Beeman*, 315 N.W.2d 770 (Iowa 1982), was the benchmark case addressing whether willful injury[2] could serve as the predicate felony for felony murder. In *Beeman*, the defendant was convicted of first-degree murder after the court submitted a felony murder instruction based on willful injury. *Id.* at 772. On appeal, Beeman argued the application of the felony murder rule was improper because the principle of merger prevented the use of willful injury as the felony underlying a felony-murder instruction. *Id.* at 776. The *Beeman* court declined to adopt an independent felony rule, finding that by including the term felonious assault in its definition of forcible felony the legislature intended that willful injury be used as the basis for a felony-murder charge. *Id.* at 776-77. This ruling was affirmed in numerous subsequent decisions by the supreme court. *See, e.g.*, *State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994); *State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994); *State v. Ragland*, 420 N.W.2d 791, 793 (Iowa 1988); *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983).

In 2006 the Iowa Supreme Court decided *Heemstra* and specifically overruled *Beeman* and its progeny. *Heemstra*, 721 N.W.2d at 558. In so ruling, the court quoted the following passage by Chief Judge Cardozo in *People v. Moran*, 158 N.E. 35, 36 (N.Y. 1927):

> [I]t is not enough to show that the homicide was felonious, or that there was a felonious assault which culminated in homicide. Such a holding would mean that every homicide, not justifiable or

[2] Willful injury is a felony committed when one does an act which is not justified and which is intended to cause and does cause serious injury to another. Iowa Code § 708.4 (2005). "Serious injury" is a disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. Iowa Code § 702.18.

> excusable, would occur in the commission of a felony, with the result that intent to kill and deliberation and premeditation would never be essential. The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape.

*Heemstra*, 721 N.W.2d at 558 (internal citations omitted). In conclusion, the Iowa Supreme Court stated: "We now hold that, if the act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." *Id.* The court went on to state this new rule of law "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 district court." *Id.* (emphasis added).

We reject Morris's initial premise that the present appeal is an "open and pending case" and therefore a direct appeal controlled by *Heemstra*. Our case law is clear that postconviction proceedings are collateral, rather than direct appeals. *See Jones v. State*, 479 N.W.2d 265, 269 (Iowa 1991) ("[P]ostconviction relief proceedings are not 'criminal proceedings' involving 'charges' and a 'defense.' They are collateral actions initiated by an incarcerated individual challenging a prior conviction."). Morris was convicted of first-degree murder in 1998. His direct appeal was resolved when we affirmed the district court's decision in April, 2000. *Heemstra* does not control this collateral proceeding.

***Ineffective Assistance of Appellate Counsel.*** Morris claims his appellate counsel was ineffective for not challenging the ruling in *Beeman* on direct appeal. Morris states,

> If appellate counsel would have argued that the jury instruction[s] were incorrect this issue would have been placed before the Supreme Court prior to the Heemstra case being appealed. The issues in the Heemstra case and present case are the same. The appeal for Appellant's case was decided in 2000; therefore, had the issue of willful injury in his jury instructions been argued in his appeal, the Supreme Court would have had no choice but to reverse his case on the same grounds.

To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). "To prove the first prong, the defendant must overcome the presumption that counsel was competent." *Id.* To prove the second prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). If the defendant is unable to prove either prong, the ineffective-assistance claim fails. *Ledezma*, 626 N.W.2d at 142.

Our first question is whether Morris's appellate counsel failed to perform an essential duty by not raising the felony murder/merger issue on direct appeal. To prove that his appellate counsel failed to perform an essential duty, Morris must show that counsel's performance "fell outside the normal range of competency." *State v. Henderson*, 537 N.W.2d 763, 765 (Iowa 1995). This standard does not require defense counsel to be a "'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999) (quoting *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982)). This standard "only requires counsel to exercise reasonable diligence in deciding

whether an issue is 'worth raising.'" *Id.*; *Schoelerman*, 315 N.W.2d at 72 (indicating the question "is whether a normally competent attorney could have concluded that [this] question . . . was not worth raising."). As stated by our supreme court:

> If a criminal statute has not yet been interpreted by our court *and* the prevailing interpretation of nearly identical statutes in other states is favorable to the defendant, there can be no strategic reason for failing to urge adoption of the favorable interpretation of the statute at trial.

*Westeen*, 591 N.W.2d at 210 (emphasis added). In the present case, the precise issue Morris claims his appellate attorney should have raised on direct appeal was raised and decided by our supreme court in *Beeman*. Twelve years later, in *State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994), the supreme court reaffirmed *Beeman* and noted the legislature's tacit approval of its previous ruling:

> The *Beeman* case was decided in 1982. Since that time, we have been asked to depart from its holding on several occasions. We have steadfastly declined these invitations to disavow the principles established in *Beeman*. We again do so here. The issue presented is entirely one of statutory interpretation. A settled construction of a statute, coupled with the passage of time, invokes the principle that issues of statutory interpretation settled by the courts and not disturbed by the legislature have become tacitly accepted by the legislative branch.

(Internal citations omitted.) Even if we assume other states had interpreted nearly identical felony murder statutes in a manner favorable to the defendant, our case law was clear at the time this case was raised on direct appeal—the act constituting willful injury and also causing the victim's death could serve as a predicate felony for felony murder. *See Beeman*, 315 N.W.2d at 777-78. Morris's appellate counsel had no reason to assume the supreme court would

expressly disavow the principles established in *Beeman.* *See Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("[I]t is not necessary to know what the law will become in the future to provide effective assistance of counsel.").

We would not expect a reasonably competent attorney to raise such a well-settled issue on appeal. Therefore, we certainly do not find an attorney breached an essential duty by choosing not to do so. Accordingly, Morris's ineffective-assistance-of-appellate-counsel claim fails. *See Ledezma*, 626 N.W.2d at 142 (ineffective assistance claim fails if defendant is unable to prove both prongs).

***Ineffective Assistance of Postconviction Relief Counsel.*** Similarly, Morris contends his postconviction counsel was ineffective in not claiming appellate counsel was ineffective for not challenging *Beeman* on appeal. As discussed above, Morris's appellate counsel was not ineffective; therefore, his postconviction relief counsel was not ineffective for failing to claim ineffective assistance of appellate counsel.

***Error by the District Court.*** In his appellate brief, Morris makes the broad argument that "the District Court erred when it ruled that Appellant's concerns were without merit." Morris contends the court erred in that it should have found that Iowa's felony murder rule and alternative theory rule were improper in light of the logic behind the *Heemstra* decision. We are unable to discern whether this argument pertains to the trial court's ruling on Morris's objections to the proposed felony murder jury instructions or the district court's ruling on his application for postconviction relief. Either way, we find this claim meritless.

*Heemstra* was decided eight months after the district court entered its ruling on Morris's application for postconviction relief and eight years after the trial court overruled his objections to the jury instructions. Both courts properly applied the law as it existed at the time of its ruling. Neither court was in a position to overrule *Beeman* or its progeny. *See State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957) ("[I]t is the prerogative of [the supreme court] to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree."). We find no error here.

***Error by the Iowa Supreme Court.*** Morris also argues the supreme court erred when it ruled that *Heemstra* only applied to cases not finally resolved on direct appeal.

"[C]ourts of last resort are not final because they are infallible, but rather are infallible because they are final." *Eichler*, 248 Iowa at 1270, 83 N.W.2d at 577. When questions of state law are at issue, state appellate courts have the authority to determine the retroactivity of their own decisions. *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148, 159 (1990). We find no error here. *See Eichler*, 248 Iowa at 1270, 83 N.W.2d at 578 ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").

**AFFIRMED.**