IN THE COURT OF APPEALS OF IOWA

No. 8-266 / 06-2119
Filed May 29, 2008

BENJAMIN EDWARD SCHREIBER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Dan F. Morrison, Senior Judge.

Applicant appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Ryan J. Mitchell, Orsborn, Milani & Mitchell, L.L.P., Ottumwa, for appellant.

Benjamin E. Schreiber, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Mark Tremmel, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Benjamin Edward Schreiber (Schreiber) appeals from the district court's denial of postconviction relief. Schreiber had filed a motion to correct an illegal sentence but the court determined the claim should be treated as an application for postconviction relief. Finding Schreiber's claims void of any grounds for relief, the court denied the application. On appeal Schreiber contends, among other things, (1) the court erred in treating the motion as a postconviction relief application, and (2) the court erred in finding *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006) inapplicable to Schreiber's case.

I. BACKGROUND AND PROCEEDINGS.

Schreiber was charged with first-degree murder under Iowa Code sections 707.1 (1995) and 707.2 on September 3, 2006. A jury found Schreiber guilty and he was sentenced to life in prison pursuant to Iowa Code section 902.1. The Iowa Court of Appeals upheld the conviction on direct appeal. *See State v. Schreiber*, No. 97-1999 (Iowa Ct. App. Mar. 3, 1999). On August 2, 1999, Schreiber filed a postconviction relief application asserting numerous claims of ineffective assistance of counsel. This application was dismissed after it was determined the claims lacked merit and the dismissal was upheld on appeal. *See Schreiber v. State*, No. 01-1481 (Iowa Ct. App. Jan. 28, 2004). Schreiber also sought a writ of habeas corpus in federal court contending the state court unreasonably applied federal constitutional law in addressing his claims. The petition was denied. *See Schreiber v. Ault*, 419 F. Supp.2d 1089, 1112 (S.D. Iowa 2006).

On October 2, 2006, Schreiber initiated the present action by filing a pro se "Motion for Correction of Illegal Conviction And Sentence" under Rule of Criminal Procedure 2.24(5)(*a*). In the motion Schreiber argued *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006), a recent Iowa Supreme Court case reversing prior precedent on the felony-murder rule, demanded reversal of his conviction. After a hearing on the motion was held, the judge determined that the motion sought to challenge Schreiber's conviction rather than modify his sentence and thus should be treated as a postconviction relief application. The judge also found *Heemstra* inapplicable because Schreiber was not prosecuted under a felony-murder theory and the jury was not instructed on a felony-murder theory. Schreiber appeals the court's ruling denying relief. We affirm.

II. STANDARD OF REVIEW.

"Our review of challenges to the illegality of a sentence is for errors at law." *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). We review postconviction proceedings for errors at law also although claims of constitutional violations are reviewed de novo. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). Schreiber asserts the district court erred in treating his motion for correction of an illegal sentence as a postconviction relief application.

III. TYPE OF PROCEEDING.

Schreiber first argues the court erred in treating his motion for correction of illegal sentence as an application for postconviction relief. "The court may correct an illegal sentence at any time." Iowa R. Crim. P. 2.24(5)(*a*). An illegal sentence is one not authorized by statute and one the court had no authority to impose. *Tindell*, 629 N.W.2d at 359. Schreiber does not argue the court was

unauthorized to impose the sentence. In fact, the court was mandated by statute to impose a life sentence. *See* Iowa Code § 902.1. Schreiber argues that his sentence is automatically illegal if his conviction is illegal under Iowa and United States Supreme Court case law. This type of challenge is to be made by initiating a postconviction relief proceeding. *See* Iowa Code § 822.2(1)(a) (stating postconviction relief procedures are to be followed by those claiming "[t]he conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state). We find the court did not err in treating Schreiber's motion as an application for postconviction relief. However, even if the court had not treated the motion as a postconviction relief application, the result is the same because Shreiber's claims fail substantively.

IV. FELONY-MURDER & *HEEMSTRA* DECISION.

Schreiber claims his conviction must be reversed under the supreme court's decision in *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). In *Heemstra*, the jury was instructed on two alternative ways of committing first-degree murder. *Heemstra*, 721 N.W.2d at 552-53. The jury could have found the defendant guilty of first-degree murder if the State proved, among other things, that the defendant either (1) was participating in willful injury, a forcible felony, or (2) acted willfully, deliberately, premeditatedly, and with specific intent to kill the victim. *Id.* Under the felony-murder rule, the willful, deliberate and premeditated intent to kill is "presumed to exist if the State proves participation in the underlying forcible felony." *Id.* at 554. In *Heemstra*, the Iowa Supreme Court, in overruling prior case law, held "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.* at 558.

The holding of *Heemstra* is inapposite to Schreiber's case. As the district court correctly found, the jury in Schreiber's case was not instructed on multiple alternatives of first-degree murder. Schreiber was not charged with a forcible felony and the jury was not instructed on felony-murder. The jury could only find Schreiber guilty of first-degree murder if it found the State proved Schreiber "acted willfully, deliberately, premeditatedly and with a specific intent to kill John Terry." Since Schreiber was not convicted under the felony-murder rule, *Heemstra* is inapplicable.

Even if the jury was instructed as to the felony-murder alternative of first-degree murder, *Heemstra* does not apply retroactively to Schreiber. The court announced in *Heemstra* that the new rule would only apply to "those cases not finally resolved on direct appeal in which the issue has been raised in the district court." Schreiber's direct appeal ended upon the date of the issuance of procedendo, on July 19, 1999, years before the *Heemstra* decision. Schreiber contends *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) demands we apply the *Heemstra* decision retroactively to Schreiber. *Griffith* concerned the retroactive application of cases construing criminal procedure principles of the United States Constitution. *See Griffith*, 479 U.S. at 322-25, 107 S. Ct. at 713-14, 93 L. Ed. 2d at 658-60. This case concerns the retroactive application of state law, not federal law. "When questions of state law are at issue, state courts generally 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). The court in *Heemstra* made clear the decision would be applied prospectively only.

V. REMAINING CLAIMS.

Schreiber's pro se brief also contends he received ineffective assistance of counsel when his trial counsel did not have all of the trial proceedings recorded for appellate review and that some jury instructions are unconstitutional. The issue of counsel's failure to make a record of trial proceedings has been previously adjudicated and cannot be relitigated. *See Wycoff v. State*, 382 N.W.2d 462, 465 (Iowa 1986) ("Issues that have been raised, litigated, and adjudicated on direct appeal cannot be relitigated in a postconviction proceeding."). Issues concerning the jury instructions were not presented to the district court and will not be considered for the first time on appeal. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002). The district court correctly denied relief and found the *Heemstra* decision inapplicable.

AFFIRMED.