IN THE COURT OF APPEALS OF IOWA

No. 8-273 / 07-1116
Filed May 29, 2008

JIMMY LEE ALLEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Petitioner appeals from the district court's summary disposition of his application for postconviction relief. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Patrick O'Bryan of O'Bryan Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Joe Weeg, Assistant County Attorney, for appellee State.

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

VAITHESWARAN, J.

Jimmy Lee Allen, sentenced in 1982 for the crime of first-degree murder, appeals the district court's summary dismissal of his second application for postconviction relief, filed in 2003. His sole contention is that he was entitled to an evidentiary hearing.

I. Background Proceedings

This appeal comes with a lengthy procedural history, detailed in Allen's second application for postconviction relief. After Allen was sentenced, he filed a notice of appeal with the Iowa Supreme Court. The court affirmed the district court judgment and preserved certain issues for postconviction relief proceedings. *See State v. Allen*, 348 N.W.2d 243 (Iowa 1984). Allen filed his first postconviction relief application in 1984, but a ruling was not issued until 1990. Allen appealed the ruling and our court affirmed. *See Allen v. State*, No. 90-711 (Iowa Ct. App. Jan. 29, 1992). Allen next filed a petition for a writ of habeas corpus. A federal district court denied the petition and Allen appealed the ruling to the Eighth Circuit Court of Appeals. That court affirmed the district court. *See Allen v. Nix*, 55 F.3d 414 (8th Cir. 1995).

Eight years later, Allen filed the application for postconviction relief that is the subject of this appeal. The State moved for summary disposition of the application on the following grounds: (1) the application was barred by the three-year statute of limitations set forth in Iowa Code section 822.3 (2003) and (2) Allen failed "to assert **any** additional ground that has not been litigated in multiple courts." (Emphasis in original). *See* Iowa Code section 822.8.

Allen filed a pro se response to the motion; his attorney filed a report recommending summary disposition of the application.[1] Allen then filed a detailed pro se response to his attorney's report. He also amended his postconviction relief application to allege an additional ground for relief.

Citing Iowa Code sections 822.3 and 822.8, the district court summarily denied Allen's application. Allen moved for reconsideration and for an evidentiary hearing. He recognized the lapse of time posed a significant hurdle to consideration of his application on the merits, but argued he fell within an exception to the three-year bar for "a ground of fact or law that could not have been raised within the applicable time." Iowa Code § 822.3. Additionally, he argued that he "inadequately raised" certain grounds for relief in prior proceedings, giving him "sufficient reason" to raise them in this proceeding. *See* Iowa Code § 822.8. The district court denied the motion to reconsider its ruling. Although the court did not separately rule on Allen's request for an evidentiary hearing, its denial of the motion to reconsider left the court's summary dismissal order intact. That ruling amounted to a denial of an evidentiary hearing.

II. Analysis

Summary disposition of a postconviction application is authorized

> when 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 moving party is entitled to judgment as a matter of law.

[1] Appointed counsel often provides the district court with an evaluation of their client's case, but this practice has been called into question. *See Gamble v. State*, 723 N.W.2d 443, 445-46 (Iowa 2006).

Iowa Code § 822.6. Disposition under this provision is similar to the summary judgment procedure set forth in Iowa Rule of Civil Procedure 1.981(3). *Manning v. State*, 654 N.W.2d 555, 559-60 (Iowa 2002).

Allen essentially argues that summary disposition was inappropriate because his filings generated issues of material fact that entitled him to an evidentiary hearing. The State counters that an evidentiary hearing is not required where the claims are "outside the statute of limitations." We begin and end with the State's argument. Our review of this issue is for errors of law. *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).[2]

Section 822.3 requires the filing of most postconviction relief applications "within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued" unless the applicant has raised "a ground of fact or law that could not have been raised within the applicable time period." Procedendo on Allen's direct appeal was issued in 1984 and his second application was not filed until 2003. For convictions and appeals that became final before the effective date of section 822.3, the legislature provided a deadline of June 30, 1987 to seek postconviction relief. *See Harrington*, 659 N.W.2d at 520. Allen's second postconviction relief application was filed well outside this deadline. Therefore, Allen had to show he raised "a ground of fact or law that could not have been raised within the applicable time period." *Id.* With respect to the ground of fact, he also had to show a nexus with the challenged conviction. *Id.* at 520.

[2] We find it unnecessary to address section 822.8, as that provision "presumes a timely filed application for postconviction." *Wilkins v. State*, 522 N.W.2d 821, 823 (Iowa 1994).

Allen pled six grounds for relief in his second application and raised a seventh ground in a subsequent filing. We will address each of the grounds in the context of the "ground of fact or law" exception to the statute of limitations bar.

Count I. Allen alleged his conviction and sentence "is in violation of the Constitution of the United States and/or the Constitution or laws of the State of Iowa." This allegation does not raise a ground of fact and the ground of law could have been and was raised within the applicable time period. On direct appeal, Allen asserted a violation of his Sixth Amendment rights under the United States Constitution. In his first postconviction relief action, he asserted violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. Both these filings were made "within the applicable time period." Iowa Code § 822.3. His present application raises no additional constitutional grounds. Therefore, the district court did not err in summarily dismissing this count.

Count II. Allen alleged "There exists evidence of material facts, not previously presented or heard, that requires vacation" of the conviction and sentence. This language comes directly from Iowa Code section 822.2(4) and is a claim of newly discovered evidence. *Harrington*, 659 N.W.2d at 516. Allen's pro se response to his attorney's report cited the following evidence that was not produced at trial: (1) a material witness complaint and arrest warrant, claimed to have only been produced in December 1987, (2) 141 pages of materials requested and obtained from the Des Moines Police Department in 2001, and (3) the transcript of one "Shaklee's" testimony from the later trial of Allen's brother on charges arising from the same incident. In his pro se filing, Allen appeared to

argue that none of this material could have been discovered earlier in the exercise of due diligence. *See Harrington*, 659 N.W.2d at 517. He asserted the material witness complaint and warrant were sealed in a separate court file, the 141 pages were only produced in response to his 2001 request for materials, and Shaklee's testimony was only discovered after his first postconviction attorney advised the court that there was no second trial transcript volume in his trial but only in his brother's trial.

While Allen claims to have received these materials after "the applicable time period," we conclude Allen could have discovered the material witness complaint, the arrest warrant, and Shaklee's trial testimony within the applicable time period had he exercised due diligence. Allen conceded in his pro se filing that "the material witness complaint and arrest warrant were sent to Clerk of Court's office where they were filed under their own separate case file." Although he claimed neither he nor his attorneys immediately saw the contents of this file, he alleges no impediments to requesting and obtaining those contents during the applicable time period. With respect to Shaklee's trial testimony, Allen asserted it did not become available to him until sometime after his first postconviction hearing. However, he conceded his brother's trial also took place in 1982, well within the applicable time period. Therefore, the "ground of fact" exception to the statute of limitations did not apply to the material witness complaint, arrest warrant and Shaklee's trial testimony, the statute of limitations barred claims relating to those documents, and the district court did not err in summarily dismissing them.

Turning to the 141 pages of police records, Allen attached a letter from a police records clerk dated November 1, 2001, stating that some, but not all the requested records would be provided. Allen included certain produced records with his filing. The records he included pertained to this murder investigation and, to that extent, were relevant. *Harrington*, 659 N.W.2d at 521 (stating nexus test for ground-of-fact-exception was established by showing relevance of documents). The material witness complaint and arrest warrant referred to above were included in this 2001 production. We have determined these documents could have been obtained within the applicable time period, with the exercise of due diligence. With respect to the remaining documents, we conclude Allen generated an issue of material fact as to whether they could have been discovered within the applicable period, in the exercise of due diligence. *Harrington*, 659 N.W.2d at 521. As Allen has generated an issue of material fact on this question, we conclude he is entitled to an evidentiary hearing on whether the "ground of fact" exception to the statute of limitations applies to claims based on the 141 pages of police records other than the material witness complaint and the arrest warrant. If the district court determines that these documents could not have been discovered within the applicable time period in the exercise of due diligence, Allen would also be entitled to an evidentiary hearing on the merits of this newly discovered evidence claim.

Count III. Allen alleged he "was denied his right to be free from unreasonable search and seizure in contravention of the Fourth, Fifth, and 14th Amendments to the United States Constitution, the Iowa Constitution, and the laws of the state." The grounds of fact and law listed within this count were

raised within the applicable time period. Specifically, in his direct appeal, Allen urged that his trial attorney was ineffective in failing to file a motion to suppress statements made to the police. With respect to this ground, the Iowa Supreme Court concluded Allen failed to show either a breach of essential duty or prejudice. *See State v. Allen*, 348 N.W.2d 243, 248 (Iowa 1984).

Allen also raised the search and seizure issue in his first postconviction relief action. Allen conceded this fact, stating he "raised issues of whether the material witness complaint lacked probable cause within the four corners of the document itself and whether such a charge was authorized by statute in his final brief in an attempt to comply with the requirement that issues be raised when they first become known." Moreover, Allen concedes that the district court "[accepted] the new issues and rendered a ruling thereon." In an appeal from the district court's denial of his first postconviction relief application, Allen asserted that "he was originally arrested as a material witness without probable cause, consent, or exigent circumstances" and "the evidence derived from that incident should have been suppressed." *Allen v. State*, 90-711 (Iowa Ct. App. Jan. 29, 1992). Noting that this issue was resolved on its merits by the Iowa Supreme Court, our court declined to address it. *Id.* at 4.[3]

We discern no material distinction between Allen's present allegations in ground three and the allegations he raised and litigated in previous proceedings.

[3] Allen raised the search and seizure issue again in an appeal from the denial of an application for writ of habeas corpus, although this filing was not made "within the applicable time period." The federal Eighth Circuit Court of Appeals also rejected Allen's claim that "his arrest pursuant to a material witness warrant, and the subsequent search and seizure of items, violated his Fourth Amendment rights," and his claim that "his trial counsel was ineffective in failing to move to suppress evidence derived from his arrest and the subsequent search." *See Allen v. Nix*, 55 F.3d 414 (8th Cir. 1995).

This ground clearly "could have been raised within the applicable time period" and, indeed, it was. For that reason, we conclude the district court did not err in summarily dismissing it.

Count IV. Allen alleged he "was denied his untied states (sic) and Iowa Constitutional rights of due process when the State of Iowa suppressed and/or failed in its obligation to release favorable evidence to the defense at the time of the original murder trial and during P.C.R. proceedings." This allegation is reasserted in paragraph A of the sixth ground. It is related to the newly discovered evidence claim asserted in ground 2. As we determined that Allen generated an issue of material fact on that issue with respect to portions of the 141 pages of police records (documents other than the material witness complaint and arrest warrant), we also conclude this issue must be scheduled for an evidentiary hearing on the merits if the court concludes the "ground of fact" exception to the statute of limitations applies.

Count V. Allen alleges he "was denied his United States and Iowa Constitutional rights of a fair and impartial trial when the State of Iowa used illegally obtained or tainted evidence in support of its case in chief during the original murder trial." The argument appears to be related to foundational evidence offered by the State for the introduction of crime scene photographs. The Iowa Supreme Court noted that these photos were "admitted into evidence without objection." *Allen*, 348 N.W.2d at 247. Allen suggests that he could have impeached the foundational witness, had he known about Shaklee's testimony in his brother's trial. As we have rejected Allen's argument that Shaklee's testimony could not have been discovered with due diligence within the

applicable limitations period, we also conclude this claim is subject to the statute of limitations bar of section 822.3. The district court did not err in summarily dismissing it.

Count VI. Allen alleges he "was denied his United States and Iowa Constitutional rights of the assistance of counsel" in several respects. We have addressed paragraph A of this ground and determined that it is related to the second ground for relief. Allen is entitled to an evidentiary hearing as specified under Count II. Paragraph B is related to the third ground for relief that we concluded was correctly dismissed. Paragraphs C, D, and E raise ineffective-assistance-of-counsel claims. We believe Allen has created a fact issue entitling him to an evidentiary hearing on these paragraphs, but only as they relate to portions of the 141 pages of police reports discussed in Count II. *See Manning*, 654 N.W.2d at 562 ("we have recognized that when claims of ineffective assistance of counsel are properly raised in a postconviction relief application, "an evidentiary hearing on the merits is ordinarily required.").

Count VII. Allen alleges he should benefit from the holding of *State v. Heemstra*, 721 N.W.2d 549, 559 (Iowa 2006) ("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."). Recognizing the bar set forth in section 822.3, he argues, "the *Heemstra* ruling created a change in the law by overturning 24 years of legal practice."

Allen had all the necessary information to raise a *Heemstra*-style challenge within the applicable time period. *Smith v. State*, 542 N.W.2d 853, 854 (Iowa Ct. App. 1995). ("The legal and factual underpinnings of each of Smith's

claims were in existence during the three-year period and were available to be addressed in Smith's appellate and postconviction proceedings."); *cf. State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989) ("In the case of a ground of law, it would be necessary to allow for a review of a conviction if there has been a change in the law that would affect the validity of the conviction."). He did not do so. Accordingly, the district court did not err in summarily dismissing this count, filed in an amendment to Allen's second application for postconviction relief.

III. Disposition

We affirm the district court's summary disposition of all the counts in Allen's second amended petition except Count II as it relates to the 141 pages of police records other than the material witness complaint and arrest warrant, Count IV as it relates to the same records, and Count VI as it relates to the same records. With respect to these counts, we reverse and remand for an evidentiary hearing on (1) the applicability of the ground of fact exception and, specifically, whether those records could have been discovered within the applicable time period in the exercise of due diligence and (2) the merits of the specified counts, if necessary. We deny as untimely Allen's April 11, 2008 request for a stay to allow him to file a pro se supplemental brief.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.