IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0764

BRIAN KELLY ALLISON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR KEOKUK COUNTY
THE HONORABLE MYRON GOOKIN, JUDGE

APPELLEE'S BRIEF

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PROOF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statute

State Rules

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The District Court Properly Granted the Motion to Dismiss Because Ineffective Assistance of Postconviction Counsel Is Not a Statute of Limitations Exception.

Dible v. State, 557 N.W.2d 881 (Iowa 1996)
Harrington v. State, 659 N.W.2d 509 (Iowa 2003)
In re F.W.S., 698 N.W.2d 134 (Iowa 2005)
Kelly v. State, No. 12-0838, 2014 WL 4224731 (Iowa Ct. App. 2014)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Perez v. State, 816 N.W.2d 354 (Iowa 2012)
Nguyen v. State, 829 N.W.2d 183 (Iowa 2013)
State v. McFarland, 287 N.W.2d 162 (Iowa 1980)
Iowa Code § 822.3
Iowa R. App. P. 6.806
Iowa R. Civ. P. 1.1001
Iowa R. Civ. P. 1.904(2)

ROUTING STATEMENT

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The applicant Brian Kelly Allison filed his second postconviction relief application two months after the statute of

limitations ran. He appeals the district court's dismissal of his application.

Course of Proceedings

This is the applicant's second attempt at obtaining postconviction relief. One of his claims relates back to his first application, therefore the State provides some explanation of the original application.

First PCR Application

In his first application, the applicant argued that his defense counsel was ineffective because he did not investigate a possibly biased juror. *Allison v. State*, No. 14-0925, 2015 WL 5278968, at *1 (Iowa Ct. App. 2015). At the postconviction hearing, the applicant, the applicant's son, and defense counsel testified. *Id.* The applicant argued that a female juror waved at the victim's mother during a recess at the criminal trial. *Id.* Although he alleged he told defense counsel about it, defense counsel had no record of the incident and did not recall it occurring. *Id.*

The district court denied the postconviction relief application, and the Court of Appeals affirmed. *Id.* The Court of Appeals determined that the applicant failed to show prejudice because the

only evidence that the juror was biased against him was the testimony of himself and his son and neither of them could identify the juror in question, it was unclear that the juror waved at the victim's mother, and even if there was a relationship between them, the gesture did not show the juror was biased. *Id*. at *2.

Second PCR Application

On November 5, 2015, the applicant raised essentially this same claim—though one further step removed from his criminal trial—in his second postconviction relief application. Petition; App. 1-5. The applicant argued solely that his postconviction trial counsel was ineffective during his first postconviction trial for failing to locate the juror from the above incident and for failing to call the victim's mother to testify. Petition; App. 1-5. The applicant asserted that "[a] brief investigation could have revealed the name of the juror and her familiarity with Tina Allison," though the applicant did not indicate he now knew the name of the juror, or now had any information about potential bias of the juror. *See* Petition; App. 4.

The State moved to dismiss the applicant's second application for exceeding the statute of limitations. The State argued that procedendo issued September 6, 2012, and the applicant did not file

his second application until November 5, 2015. Motion to Dismiss; App. 13-16. It also argued that the applicant failed to show a new ground of fact to justify excusing the statute of limitations. Motion to Dismiss; App. 14.

To attempt to avoid the statute of limitations, the applicant amended his application through counsel. Amended Petition; App. 20-22. He argued the ineffective assistance of counsel claim previously asserted, but also argued two new claims. Amended Petition; App. 20-22. The record does not show that the district court granted the amendment.

The applicant then resisted the motion to dismiss. Resistance; App. 19. He argued that the amended petition raised issues that fell under the exception to the statute of limitations. Resistance; App. 19.

The district court set a hearing, and counsel waived record of the hearing. Ruling; App. 24. After argument, the district court granted the motion to dismiss. Ruling; App. 24. It concluded that the alleged ineffective assistance of postconviction appellate counsel was not a new ground of fact under the statute. Ruling; App. 24. The applicant appeals.

Facts

The applicant sexually abused his wife's daughter, C.N., when C.N. was a minor. *Allison v. State*, at *1. C.N. recalled four specific instances of abuse: (1) C.N. was in seventh grade and while she was sleeping in her purple nightgown, the applicant "touched [her] in every spot but one, and then he touched [her] vagina"; (2) C.N. was a freshman in high school and the applicant had sex with her on the floor of the bathroom in their home; (3) C.N. was in the applicant's bed with her pants off and the applicant had sex with her; and (4) C.N. and the applicant were driving to get ice cream in a nearby town when the applicant pulled over at an old barn off the highway and had sex with C.N. *State v. Allison*, No. 11-0774, 2012 WL 2819324, at *1 (Iowa Ct. App. 2012). The fourth instance was used for the limited purpose of showing the applicant's "passion or propensity for illicit sexual relations" with his victim. *Id.* The applicant was convicted of three counts of third-degree sexual abuse. *Id.*

ARGUMENT

I. The District Court Properly Granted the Motion to Dismiss Because Ineffective Assistance of Postconviction Counsel Is Not a Statute of Limitations Exception.

Preservation of Error

Error is only preserved on the applicant's ineffective-assistance-of-counsel claim raised in his November 5 application. Generally, a party must both raise and have an issue decided in the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The State filed a Motion to Dismiss. Motion to Dismiss; App. 13. The applicant resisted the State's motion. Resistance; App. 19. The district court ruled on the applicant's ineffective-assistance-of-counsel claim. Ruling; App. 24. Error is preserved on this issue.

Error is not preserved on the applicant's claims raised for the first time in his amended petition. The district court did not file an order allowing the applicant to amend his petition. The district court only ruled on the applicant's ineffective assistance of counsel claim raised in the initial application. It referred to the amended petition only to refute the applicant's argument that the applicant had cured the statute of limitations bar. *See* Ruling ("The court acknowledges Petitioner claims his amended petition cures the statute of limitations

bar that is raised in Respondent's Motion to Dismiss. The court concludes that the amended petition does not change the core basis for Petitioner's claim for postconviction relief. . . ."); App. 24. The applicant acknowledges that the district court did not address the amended claims, yet chose not to ask the district court to reconsider the motion and specifically address those two remaining claims. *See* Allison Br. 8. He could have filed a motion to request the district court to enlarge or amend its findings. *See* Iowa R. Civ. P. 1.904(2). But the applicant did not. The applicant did not receive a ruling on his two additional issues. Therefore, he has not preserved error for this Court.

Standard of Review

The appellate court reviews a district court's ruling on the statute of limitations in a postconviction action for correction of errors at law. *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996) abrogated on other grounds by *Harrington v. State*, 659 N.W.2d 509, 521 (Iowa 2003); *see also Kelly v. State*, No. 12-0838, 2014 WL 4224731, at *1 (Iowa Ct. App. 2014).

Merits

In his initial application, the applicant argues that his post-conviction counsel was ineffective on an issue raised in the applicant's first postconviction application. He requests an evidentiary hearing. The applicant fails to show he is entitled to relief.

A. The applicant filed his second application outside the three-year statute of limitations.

The applicant failed to meet the three-year statute of limitations with his application. Generally all postconviction relief applications "must be filed 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." Iowa Code § 822.3.

The applicant filed this petition on November 5, 2015. Procedendo issued in his direct appeal September 10, 2012. Online Docket FECR011576. His statute of limitations deadline ran on September 10, 2015, thus the applicant missed his deadline by several months.

B. The applicant's ineffective-assistance-of-counsel claim is barred by *Dible v. State*.

The district court correctly granted the motion to dismiss because *Dible v. State*, 557 N.W.2d 881 (Iowa 1996) does not permit the applicant to avoid the statute of limitations by arguing that his

post-conviction counsel was ineffective. The *Dible* case holds that the ineffective assistance of post-conviction counsel is not a "ground of fact" to provide an exception to the three-year statute of limitations. *See Dible*, 557 N.W.2d at 884 (recognizing that ineffective assistance of post-conviction counsel does not directly impact the validity of the criminal conviction; the court's focus remains on whether a defendant knew within the three-year period of the errors made during his criminal trial).

The rationale of *Dible* is still strong. Postconviction relief is a creature of statute, and the legislature could have included ineffective assistance of post-conviction counsel as an exception to the statute of limitations. *Dible*, 557 N.W.2d at 885. Instead, the exceptions are limited because the purpose of this statute of limitations is to reduce stale claims and create a sense of repose in the criminal justice system. *See id.* at 885-86. The applicant had three years to raise his claims, and he did raise this claim in his prior action. The *Dible* case bars him from continuing to challenge this issue.

The applicant repackages an ineffectiveness claim that he already made in his first postconviction action. Ultimately, the applicant knew at the time of trial that he wanted to raise a potential

juror bias issue. He fully litigated this claim in his first postconviction action, and both the district court and the court of appeals found he failed to prove prejudice. He cannot continue to attack this issue by asserting his past postconviction counsel could have more effectively brought his claim. The statute of limitations does not waver here. This Court should affirm the district court's conclusion that *Dible v. State* bars the applicant's claim.

C. Even if the applicant's other claims were preserved, he fails to show he is entitled to an evidentiary hearing based on vague allegations.

The applicant must provide enough information in his application and supporting documents to show he meets an exception to the statute of limitations. Here, the applicant's amended petition is too vague to indicate an exception applies.

There are two statutory exceptions to the statute of limitations for a postconviction relief action. The three-year statute of limitations does not apply to (1) a ground of fact or (2) a ground of law if the fact or law "could not have been raised within the applicable time period." Iowa Code § 822.3.

First, the applicant has not shown there is a ground of fact he could not have raised within the three-year time period. He argued in

his amended petition that there was evidence of material facts, specifically that "[t]he Applicant has reason to believe that the victim and other witnesses have recanted their testimony thus taking away the factual basis for his conviction." Amended Petition; App. 22. The applicant did not identify which other witnesses had recanted, did not identify when he learned that witnesses may have recanted, and did not provide any attachments to give more specificity to his claim. *See* Amended Petition; App. 22. He has not provided enough information to this Court to show that he could not have argued this issue within the three-year statute of limitations.

Second, the applicant has not shown there was a change in the law within the last three years that applies to his case. To benefit under the new law exception, the applicant must show the change in the law occurred within the past three years. Although section 822.3 does not specify a deadline for claims raising new grounds of fact or law, the Court has applied the same three-year limitations period. In *Nguyen*, the Court noted the applicant sought postconviction relief "more than three years after procedendo had issued on his original direct appeal, but less than three years after *Heemstra*." *Nguyen*, 629 N.W.2d at 186. Similarly, in *Perez* the Court remarked the applicant

filed for postconviction relief within two weeks of the *Padilla* decision. *Perez*, 816 N.W.2d at 356. Thus, *Nguyen* and *Perez* both acknowledge implicitly that a reasonable application of section 822.3 requires applicants to raise their claims within three years of the time when the new ground of fact or law arises.

The applicant's amended petition is unclear on what law he thinks applies. He argues "[t]hat changes in the law and particularly the admissibility of expert testimony that tends to invade the providence of the jury and attempting to bolster the credibility of child victims, would result in a change of verdict." Amended Petition; App. 22. The applicant does not identify either a statute or case law for the district court to have determined whether the law was new within the last three years. Nor does the applicant identify a particular witness or testimony from his criminal trial that would be affected by the allegedly new law.

If the applicant attempts to rely on the unreported hearing to argue he presented additional information to the district court, the applicant has failed to provide this Court with a record. Initially, the district court apparently did not find any specific facts from the unreported hearing to support the applicant's claim because it did not

mention these facts in its ruling. *See* Ruling; App. 24. But further, it is the applicant's burden to provide this Court with a record. *See, e.g.*, *In re F.W.S.*, 698 N.W.2d 134, 135 (Iowa 2005) ("It is the appellant's duty to provide a record on appeal affirmatively disclosing the alleged error relied upon."). After the hearing the applicant could have filed a bill of exceptions setting out what occurred. *See* Iowa R. Civ. P. 1.1001 (permitting a bill of exceptions). Or after taking his appeal he could have filed a statement of evidence specifying any facts that he asserted at the hearing. *See* Iowa R. App. P. 6.806 (permitting the appellant to file a statement of evidence when a transcript is unavailable). Because the applicant did not take advantage of these methods to present a record, this Court is left to speculate about what happened at the unreported hearing. Absent any evidence to the contrary, this Court should presume regularity in the district court's handling of the PCR application, and that the applicant provided no additional evidence to the district court. *Cf. State v. McFarland*, 287 N.W.2d 162, 164 (Iowa 1980) ("To adopt appellant's argument would have the effect of a presumption that error occurred at trial and would place the burden upon the State to

disprove it. However, there is a presumption of regularity in trial proceedings.").

Even if the applicant had preserved these claims, he has failed to show his claims are an exception to the statute of limitations. This Court should affirm.

CONCLUSION

The applicant filed his second postconviction relief application outside the three-year statute of limitations, and has not met any exception to the statute. The State asks this Court to affirm.

REQUEST FOR NONORAL SUBMISSION

The State believes oral argument is unnecessary to decide this case and will not "be of assistance to the Court." *See* Iowa R. App. P. 6.908.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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