

IN THE COURT OF APPEALS OF IOWA

No. 18-0121
Filed January 23, 2019

BOBBY RAY DEVERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Mark J.
Eveloff, Judge.

Applicant appeals the district court's summary dismissal of his fourth
postconviction-relief action. **AFFIRMED.**

Joel Baxter of Wild, Baxter & Sand, P.C., Guthrie Center, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney
General, for appellee State.

Considered by Vogel, C.J., and Vaitheswaran and McDonald, JJ.

Appendix A

We agree with the PCR court that neither claim Devers now makes would be newly-discovered evidence. Therefore, the PCR court's grant of summary dismissal is affirmed without further opinion. See Iowa Ct. R. 21.26(1)(b), (d), (e).

AFFIRMED.

IN THE DISTRICT COURT OF IOWA IN AND FOR POTTAWATTAMIE COUNTY

BOBBY RAY DEVERS,)	Case No. PCCV 115823
)	
Applicant,)	
)	
v.)	ORDER
)	
STATE OF IOWA,)	
)	
Respondent.)	

This matter came before the Court on December 11, 2017, on the Respondent's motion for summary dismissal. Applicant appeared by telephone and with counsel Christopher Roth. The Respondent, State of Iowa, appeared by Assistant Pottawattamie County Attorney Margaret Popp Reyes. The Applicant advised the Court that he had mailed two resistances to the clerk of court, and neither resistance had been filed yet. The Applicant agreed to go on with the hearing so long as the Court would leave the record open and review his two resistances before entering a ruling in this matter. The State then asked for a short time to respond to the resistances if it so chose. Now, having reviewed the State's motion, the Applicant's resistances, the state's response, argument of counsel and argument of Applicant, the Court finds as follows:

The Applicant was convicted of sexual abuse in the first degree following a jury trial on January 23, 2004, Pottawattamie County Case No. FECR030477. He was sentenced to life imprisonment on March 10, 2004, and remains incarcerated. The Applicant took a direct appeal, which affirmed the Applicant's conviction. *State v. Devers*, 697 N.W.2d 127 (Iowa App. 2005). The facts of the Applicant's underlying criminal case are set out in the direct appeal opinion. The Applicant has filed three previous postconviction matters, all of which have been dismissed, *Devers v. State*, Pottawattamie County Case Nos. PCCV090693, PCCV107024 and PCCV110644. The Court of Appeals affirmed the dismissal of the Applicant's original postconviction action. *Devers v. State*, 772 N.W.2d 15, 2009 WL 1676643 (Iowa App. 2009). The Applicant's second postconviction application was dismissed as untimely on August 14, 2012. The Iowa Supreme Court dismissed the appeal as frivolous, Appeal No. 13-1500, procedendo May 17, 2013. The Applicant also filed a federal habeas action raising the same or similar

issues raised in his direct appeal and original postconviction action. He was denied relief on his habeas request on December 16, 2011, *Devers v. Fayram*, 2011 WL 6328389 (N.D. Iowa) (cert. denied 133 S.Ct. 342(2012)).

The Applicant filed a third postconviction case on January 2, 2014, which was summarily dismissed on March 11, 2014. The Applicant did not appeal that decision. The present action is the Applicant's fourth postconviction case. He raises claims of newly discovered evidence. The State filed a motion for summary dismissal claiming the Applicant's claims are untimely under Iowa Code Section 822.3.

Summary disposition of an application for postconviction relief, provided for by Iowa Code Section 822.6, is analogous to the summary judgment procedure provided for in our rules of civil procedure. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002); *Schawitsch v. State*, 752 N.W.2d 34 (Iowa Ct. App. 2008). 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). *Johnson v. State*, 730 N.W.2d 209 (Iowa Ct. App. 2007).

The Applicant throughout his resistances as well as his petition talks about newly discovered evidence. At the hearing, the Applicant stated that his newly discovered evidence included a January 9, 2004, deposition, wherein Council Bluffs police officer Dudik did not know if the victim was wearing slacks or a skirt. All other witnesses said she had pants on. Appellant did state he was present at this deposition. In addition, he stated that he had just discovered within the last three months that the victim said that she was told to pick the Applicant from a lineup. His family was able to find this out on his behalf. He clarifies this in his resistance filed December 12, 2017 in that his mug shot in the photo lineup was marked with the letter "R" which is how Council Bluffs Police at the time marked Rape/Sexual Assault suspects photos. Lastly, the Applicant stated that he had just discovered discrepancies as to what the victim was wearing. He stated that a previous attorney, Justin High, found this out for him when he did a previous appeal in 2014.

Mr. Roth stated that there were two new issues regarding newly discovered evidence that he would set forth. The first involved inconsistent statements by the witnesses, and the second was pretrial identification from the victim in this matter. Neither one of these issues had been addressed prior to this time. The Applicant had

advised Mr. Roth that he had just learned of the pretrial identification, as he advised the Court also. It is set forth that these issues constitute newly discovered evidence and, presumably, provide an exception to the statute of limitations.

Iowa Code Section 822.2(1)(d) requires an applicant to establish four elements before a new trial will be granted based on newly discovered evidence. *See Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998). An applicant must show: (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted. *Mayberry v. State*, 834 N.W.2d 872 (Iowa App. 2013). Using this criteria, the Court finds the Applicant has failed to show that these requirements exist in this case. There is no showing as to why the issue of a pretrial identification could not have been discovered with the exercise of due diligence until more than 13 years after his trial. Also the State's Response shows this was not true. The state attached the photo lineup to their response showing the signatures of the witnesses who identified the Applicant, not the letter "R". There is no showing this is newly discovered evidence. In addition, the Applicant's argument regarding the discrepancies regarding what the victim was wearing, he did admit he was at the deposition in 2004 when this would have occurred. The state also points out in their response that Officer Dudik also testified at trial that he believed the victim was wearing blue jeans at the time. Both the victim and applicant testified at trial the victim was wearing a skirt at the time of the assault. The Applicant was present when Officer Dudik testified to this mistaken belief. Therefore, the Court cannot find that this is newly discovered evidence. The Applicant fails to allege how these issues would have likely changed the result if a new trial were to be granted, or why such evidence creates an exception to the statute of limitations under Iowa Code Section 822.3. The Applicant has previously challenged his trial attorney's effectiveness concerning his handling of the victim in his original postconviction case.

The State has filed a motion for summary disposition. The Applicant must come forward with specific facts demonstrating the existence of a genuine issue for trial. Iowa R. Civ. P. 1.981(5). The Applicant fails to do so. If the resisting party does not provide such facts, summary judgment shall be granted.

IT IS THEREFORE ORDERED that the Respondent is entitled to summary dismissal as a matter of law. The foregoing is based upon the Court's review of the pleadings, files, records and exhibits made in the above-captioned action, as well as the Applicant's underlying criminal action and previous postconviction actions, namely

Pottawattamie County Case Nos. FECRo30477, PCCV090693, PCCV107024 and PCCV110644.

IT IS FURTHER ORDERED that the above-captioned matter is dismissed with costs taxed to the Applicant.



State of Iowa Courts

Type: OTHER ORDER

Case Number	Case Title
PCCV115823	BOBBY RAY DEVERS VS STATE OF IOWA

So Ordered

A handwritten signature in black ink, reading "Mark J. Eveloff", is written over a horizontal line. Below the line, the text "Mark J. Eveloff, District Court Judge, Fourth Judicial District of Iowa" is printed.

Mark J. Eveloff, District Court Judge,
Fourth Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

No. 18-0121

Pottawattamie County No. PCCV115823

ORDER

BOBBY RAY DEVERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

After consideration by this court, McDonald, J., taking no part, further review of the above-captioned case is denied.

Copies to:

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Kevin Cmelik
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Des Moines, IA 50319-0106

APPENDIX C



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
18-0121

Case Title
Devers v. State

So Ordered

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Mark S. Cady, Chief Justice

Electronically signed on 2019-03-19 16:48:03

IN THE COURT OF APPEALS OF IOWA

No. 18-0121

Pottawattamie County No. PCCV115823

PROCEDENDO

BOBBY RAY DEVERS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

To the Iowa District Court for the County of Pottawattamie:

Whereas, there was an appeal from the district court in the above-captioned case to the supreme court, and the supreme court transferred the case to the court of appeals. The appeal is now concluded.

Therefore, you are hereby directed to proceed in the manner required by law and consistent with the opinion of the court.

In witness whereof, I have hereunto set my hand and affixed the seal of the court of appeals.

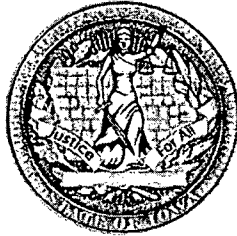
APPENDIX D

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Pottawattamie County Clerk of Court



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number
18-0121

Case Title
Devers v. State

So Ordered

A handwritten signature in cursive script, reading "Christine A. Mayberry", is written over a horizontal line.

Christine A. Mayberry, Deputy Clerk

Electronically signed on 2019-03-20 08:47:49

03/20/2019

**Additional material
from this filing is
available in the
Clerk's Office.**