IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–2016

JOHN LEWIS ARTHUR ANDERSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE JOSEPH W. SEIDLIN, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

JOHN P. SARCONE
Polk County Attorney

JAMES HATHAWAY
Assistant Polk County Attorney

ATTORNEYS FOR RESPONDENT-APPELLEE

FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 5

ROUTING STATEMENT..... 7

STATEMENT OF THE CASE..... 7

ARGUMENT..... 17

I. This Court should not exercise appellate jurisdiction. 17

II. The PCR court did not err in granting the State's motion for summary disposition. Anderson's claim about Cassell is based on facts that he knew within the three-year limitations period. 23

CONCLUSION..... 27

REQUEST FOR NONORAL SUBMISSION..... 27

CERTIFICATE OF COMPLIANCE..... 28

TABLE OF AUTHORITIES

Federal Cases

Addington v. Texas, 441 U.S. 418 (1979).....19

Evitts v. Lucey, 469 U.S. 387 (1985) 20

Pennsylvania v. Finley, 481 U.S. 551 (1987) 20

Ross v. Moffitt, 417 U.S. 600 (1974).....20

State Cases

Brock v. Dickinson Cnty Bd. of Adjustment, 287 N.W.2d 566 (Iowa 1981).....17

Cleesen v. State, 258 N.W.2d 330 (Iowa 1977).....22

Cornell v. State, 529 N.W.2d 606 (Iowa Ct. App. 1994) 24

Davis v. State, 443 N.W.2d 707 (Iowa 1989) 21

Dewberry v. State, 941 N.W.2d 1 (Iowa 2019).....23

Grayson v. State, No. 17–0910, 2018 WL 347552 (Iowa Ct. App. Jan. 10, 2018).....25

Harrington v. State, 659 N.W.2d 509 (Iowa 2003).....23

In re A.B., No. 99–0227, 1999 WL 976097 (Iowa Ct. App. Oct. 27, 1999).....19

In re M.E., No. 16–1479, 2017 WL 1278321 (Iowa Ct. App. Apr. 5, 2017).....18

Jensen v. State, 312 N.W.2d 581 (Iowa 1981).....17

Jones v. Scurr, 316 N.W.2d 905 (Iowa 1982).....25

Lamasters v. State, 821 N.W.2d 856 (Iowa 2012) 23

Martin v. State, No. 15–1622, 2016 WL 4384755 (Iowa Ct. App. Aug. 17, 2016).....26

Perez v. State, 816 N.W.2d 354 (Iowa 2012) 21

Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978) 17

Schmidt v. State, 909 N.W.2d 778 (Iowa 2018) 20, 23

State v. Anderson, 308 N.W.2d 42 (Iowa 1981) 22

State v. Horsey, 180 N.W.2d 459 (Iowa 1970) 18

State v. Wetzel, 192 N.W.2d 762 (Iowa 1971) 22

Swanson v. State, 406 N.W.2d 792 (Iowa 1987) 17, 18

Wilkens v. State, 522 N.W.2d 822 (Iowa 1994) 24

State Statutes

Iowa Code § 822.6(3) 24

Iowa Code § 822.9 17

State Rules

Iowa R. App. P. 6.101(1)(b) 17

Iowa R. App. P. 6.101(5) 22

Iowa R. Civ. P. 1.981(3) 24

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does this Court have appellate jurisdiction over this delayed appeal?

Authorities

Addington v. Texas, 441 U.S. 418 (1979)
Evitts v. Lucey, 469 U.S. 387 (1985)
Pennsylvania v. Finley, 481 U.S. 551 (1987)
Ross v. Moffitt, 417 U.S. 600 (1974)
Brock v. Dickinson Cnty Bd. of Adjustment, 287 N.W.2d 566 (Iowa 1981)
Cleesen v. State, 258 N.W.2d 330 (Iowa 1977)
Davis v. State, 443 N.W.2d 707 (Iowa 1989)
In re A.B., No. 99–0227, 1999 WL 976097 (Iowa Ct. App. Oct. 27, 1999)
In re M.E., No. 16–1479, 2017 WL 1278321 (Iowa Ct. App. Apr. 5, 2017)
Jensen v. State, 312 N.W.2d 581 (Iowa 1981)
Perez v. State, 816 N.W.2d 354 (Iowa 2012)
Qualley v. Chrysler Credit Corp., 261 N.W.2d 466 (Iowa 1978)
Schmidt v. State, 909 N.W.2d 778 (Iowa 2018)
State v. Anderson, 308 N.W.2d 42 (Iowa 1981)
State v. Horsey, 180 N.W.2d 459 (Iowa 1970)
State v. Wetzel, 192 N.W.2d 762 (Iowa 1971)
Swanson v. State, 406 N.W.2d 792 (Iowa 1987)
Iowa Code § 822.9
Iowa R. App. P. 6.101(1)(b)
Iowa R. App. P. 6.101(5)

II. Did the PCR court err in dismissing this third PCR action as untimely, and in rejecting Anderson's claim about newly discovered evidence in this PCR action?

Authorities

Cornell v. State, 529 N.W.2d 606 (Iowa Ct. App. 1994)
Dewberry v. State, 941 N.W.2d 1 (Iowa 2019)
Grayson v. State, No. 17–0910, 2018 WL 347552 (Iowa Ct. App. Jan. 10, 2018)
Harrington v. State, 659 N.W.2d 509 (Iowa 2003)
Jones v. Scurr, 316 N.W.2d 905 (Iowa 1982)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
Martin v. State, No. 15–1622, 2016 WL 4384755 (Iowa Ct. App. Aug. 17, 2016)
Schmidt v. State, 909 N.W.2d 778 (Iowa 2018)
Wilkens v. State, 522 N.W.2d 822 (Iowa 1994)
Iowa Code § 822.6(3)
Iowa R. Civ. P. 1.981(3)

ROUTING STATEMENT

Anderson seeks retention. *See* App's Br. at 5. But while some of Anderson's claims raise constitutional issues, they can all be resolved by applying established legal principles and settled law. Transfer to the Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a ruling granting summary disposition and dismissing John Lewis Arthur Anderson's third PCR application. *See* Ruling (5/16/19); App. 88. Anderson's notice of appeal was filed about six months after that ruling, as a "motion for belated appeal." *See* Notice of Appeal (11/21/19); App. 98.

Anderson's substantive challenge is that the PCR court erred in granting summary disposition and ruling that his claim about letters from a recanting witness was time-barred, because it was based on newly discovered evidence that would qualify as a new ground of fact under section 822.3. But first, before reaching Anderson's challenge, this Court would need to conclude that it had jurisdiction over this delayed appeal. The narrow exception that allows an appellate court to assert jurisdiction over a delayed appeal is not applicable here.

Statement of Facts

Anderson was convicted of committing first-degree robbery and first-degree burglary. The Iowa Court of Appeals summarized the facts in its decision that affirmed his convictions on direct appeal:

> On April 25, 2009, a group of eight people left Waterloo in two cars, headed for Des Moines. Upon arrival, Katie Hahn and Natasha Elgers checked into a hotel room on the second floor of an Econo Lodge and let their six friends into the hotel through a side door. The group of eight spent time together in the room smoking marijuana and drinking a concoction containing codeine cough syrup and a liqueur.
>
> On a trip to the ice machine, Elgers met Rogerick Powel, who was staying in a room on the first floor with Wayne and Shane Bellanger. Over the course of the next several hours, Elgers went back and forth between the group's room on the second floor and the Bellangers' room on the first floor. At some point in the evening, Powel said something that offended Elgers. She returned to the group's room on the second floor and told its occupants that the men in the other room had disrespected her.
>
> The group then formulated a plan to fight the men who had disrespected Elgers and to take anything of value the men had, including a car in the parking lot. Several members of the group testified that John Anderson led the planning and assigned roles to those involved. Elgers was to return to the men's hotel room and tell the men goodbye with her cell phone on speakerphone so the group could hear when she was leaving. The group planned that as Elgers left the room, they would rush in. According to the testimony of Shane and Wayne Bellanger, this is how the plan was executed. The Bellangers testified that three to four men burst into the room as Elgers left and said, "Give us all your shit." One of the men was holding a sawed off shotgun.

The record reveals that Anderson, Cory Dreier, and DeJaaron Cassell had been assigned to fight. A man known only as Willie Mack was assigned to hold a gun that Dreier had retrieved from Hahn's car. Hahn and Angelene Garrett were told to start the group's two cars. Cassell also testified Garrett was to have a clean shirt for him in the car so that he could not later be identified based on his clothing.

Garrett and Hahn testified they had heard the group making plans, but neither believed anyone in the group was serious. They testified they believed they had been asked to start the cars because it was checkout time. Hahn checked out of the hotel and started her car. Garrett accompanied Hahn and started an Explorer belonging to Eric Bryant. Garrett and Hahn testified that at the time they went to start the cars, they did not believe they had been sent to drive getaway cars.

The role assigned to the final member of the group, Bryant, is unclear. Garrett and Elgers testified that Bryant was asleep during most of the conversation in which the group planned its attack. Dreier and Cassell testified that Bryant had no role in the incident. Hahn testified Anderson talked to Bryant during the planning stages, but she could not identify a role that was given to Bryant.

Bryant testified he heard the group planning to rob the men who had offended Elgers, but he fell asleep during the conversation. He testified that when he woke up, everyone was leaving, but he continued to lie in the bed. Garrett testified that when she and Hahn left to start the cars, Bryant was still sitting on the bed, but everyone else was gone. . . . Bryant testified that five to ten minutes after everyone left, he grabbed his bag and headed toward the car. He stated that in the hallway of the first floor, he ran into a girl he knew from the internet and stopped to talk to her. As he was talking to her, a door swung open, and he saw a man struggling with Anderson. The man, Shane Bellanger, escaped from Anderson's grasp and ran to the front desk to call police. Shane testified that a male and a female were in the doorway of his room and that he knocked them out of the way as he ran out of the room.

> Bryant testified that soon after Bellanger escaped, Anderson, Dreier, Willie Mack, and Cassell left the room and ran outside. Bryant testified he stood where he was for a moment because he was shocked and while he was there, another man came out of the room.
>
> Hahn and Garrett testified that after they started the cars, Elgers, Cassell, Willie Mack, Dreier, and Anderson ran out of the hotel. Anderson pushed Hahn into the passenger seat of her car and drove away. Cassell, Garrett, Elgers, Dreier, and Willie Mack got into Bryant's Explorer and left. Bryant walked outside, but both of the group's cars were gone. Soon after, the brown Explorer returned for Bryant.
>
> The Explorer then left again, heading east on Interstate 80. The group left Willie Mack in an unknown location after he demanded to be let out of the car. The Explorer exited Interstate 80 onto Second Avenue, where it was stopped by a state trooper. The Bellangers were driven to the scene of the stop and identified all the males in the car (Cassell, Dreier, and Bryant) as being involved in the attack at their hotel room. They also identified Elgers but were not able to identify Garrett as one who had taken part in the robbery.
>
> Hahn and Anderson returned to Waterloo, where, according to Hahn's testimony, Anderson and his girlfriend Rebecca Gladney made plans to establish an alibi for him. Besides Anderson, six members of the group from Waterloo testified at trial. All six testified that Anderson was involved in the robbery. Anderson and Gladney testified that at the time of the incident they were in Colorado visiting members of Gladney's family.

State v. Anderson, No. 10–0802, 2011 WL 2419797, at *1–2 (Iowa Ct. App. June 15, 2011). The Iowa Court of Appeals affirmed, and the Iowa Supreme Court denied further review. Procedendo issued on August 18, 2011.

Course of Proceedings

Anderson filed his first PCR application on February 20, 2012. *See* PCCE070789 PCR Application (2/20/12). He raised and litigated a variety of claims of ineffective assistance of counsel. The PCR court rejected his claims on their merits, and it denied his PCR application. The Iowa Court of Appeals affirmed that ruling. *See Anderson v. State*, No. 13–0057, 2013 WL 6662514, at *1 (Iowa Ct. App. Dec. 18, 2013). Procedendo issued on July 25, 2014.

Anderson filed his second PCR application on January 9, 2015. *See* PCCE077660 PCR Application (1/9/15); App. 108. The PCR court ruled that his PCR application was time-barred by section 822.3. The Iowa Court of Appeals affirmed, and it rejected Anderson's argument that he was asserting a new ground of fact because he "continue[d] to fail to identify or assert any specific ground of fact or law that might constitute such an exception." *See Anderson v. State*, No. 15–1809, 2016 WL 7403738, at *1 (Iowa Ct. App. Dec. 21, 2016). Procedendo issued on February 21, 2017.

This is Anderson's third PCR action, which he initiated by filing a PCR application on June 22, 2018. *See* PCR Application (6/22/18); App. 14. The State moved for summary disposition, arguing that "[a]ll

of Anderson's claims are time-barred and there is no applicable exception." *See* Motion for Summary Disposition (9/18/18) at 8; App. 34. Anderson filed a resistance, arguing that his claim that alleged "newly discovered evidence" was "not subject to summary judgment." *See* Resistance (11/13/18); App. 62. Subsequent filings elaborated that he was referring to a claim that was "based on the recantation of testimony of a co-defendant." *See* Resistance (3/21/19) at 2; App. 67. That "recantation" came in the form of two letters that were attached to that resistance, purporting to be from Dejaaron Cassell. One of those letters was addressed to Rebecca Gladney (who was Anderson's girlfriend, and testified in support of his alibi defense at trial). It was postmarked with a date of February 11, 2010, and it said this:

> Whats good? Man I got Johny Back. If he take it to trial I'll testify on his behalf that he wasn't there. What I said was all lies. I Just made it up because they wouldn't have gave me a Deal If I didn't. If he need me to testify Im ready. I am sorry for the trouble I have caused. It was just a story. I didn't mean for him to get involed. So I hope you accept my help and apoligee.

Attachment (3/21/19) at 1; App. 69. About two months later, Cassell testified that Anderson was involved with the robbery (as did five other members of their group). *See* FECR233112 Order for Transportation (3/16/10); *Anderson*, 2011 WL 2419797, at *2.

The other letter was dated "Tuseday 2-14-17." But it was not postmarked; it did not address a recipient or reader by name; it was not accompanied by an envelope; and there was no indication that it had ever been mailed. This note said:

> I'm writing you this letter to tell you how I was forced to lie at on Johnny. As you seen at his court I told them in front of the Jury that he had nothing to do with the case. They then took me off the stand and threaten me with more prison time. I was a child back then who didn't understand double Jepordy. Also I feel guilt about what happen to Johnny. I hope this letter can help him some how. Sorr for the wait.

Attachment (3/21/19) at 2; App. 70. At the hearing on the merits of Anderson's first PCR application, Anderson supported his allegation of prosecutorial misconduct by testifying about events surrounding a break in Cassell's testimony during trial:

> What I witnessed firsthand was first he — he said what he was going to say. And when they took — they dismissed the jury and they had the jury go out for a break, and when they may have took him off of the stand, he ended up cussing at them or something and telling them, you know, just — basically how he felt. And then they took him from one room — and his attorney and the prosecutor was in the room with him. The prosecutor stormed out of the room, went somewhere else.
>
> They — the attorney left the room. Then they came back, got him, took him into another room. And the way I see it, it sounded like they were talking loud— I don't know if you would call it yelling or not — talking loud to him, telling him what was what — why they didn't like what he was saying.

> And then after that they left him in that room, came back, took him into another room, and I wasn't around that area, so I couldn't hear anything at all. And then about — they let him sit where he was sitting for a little while, then brought in two more witnesses and brought him back.

See PCCE070789 PCR Transcript (11/14/12), *filed in* PCCE077660 (5/14/15), at 22:8–24:25. Later, in response to a question about whether he had "firsthand knowledge" of what happened in that conversation between Cassell and those two attorneys, Anderson said that "the person that was in the room told [him] what happened." *See* PCCE070789 PCR Transcript at 47:2–48:15.

After a hearing on the State's motion for summary disposition, the PCR court ruled that Anderson could not show that these claims were based on new facts and were not time-barred.

> For his claim regarding newly discovered evidence, Anderson submits two letters from DeJaaron Cassell. The first is post-marked Feb. 11, 2010. The second is dated February 14, 2017. Both letters claim that Cassell knew Anderson wasn't there or wasn't involved, and that he was lying when he said otherwise.
>
> [. . .]
>
> The information from Cassell was clearly available to Anderson prior to his trial which took place in April, 2010, and Anderson makes no claim that it was discovered after the verdict or could not have been discovered earlier in the exercise of due diligence. Further, this information would simply have been impeaching as to Cassell's trial testimony. Anderson's claim of newly discovered evidence is both time-barred, and not a substantive claim.

[. . .]

> Anderson makes a claim that he is actually innocent of the crimes for which he was convicted. . . . [T]he claim of actual innocence must still meet the statute of limitations requirements of Iowa Code section 822.3. Anderson bases his actual innocence claim on the same letters from Cassell noted above. As also noted above, the information in the letters was known and could have been raised within the applicable time period. The claim is time barred.

PCR Ruling (5/16/19) at 7–9; App. 94–96. Based on that, and on its rulings that all of Anderson's other claims were either time-barred, cumulative, or both, the PCR court granted the State's motion for summary disposition and dismissed this PCR action. It assessed the costs of the action to Anderson, and notations in the docket indicate that it was mailed to him (along with a statement of costs). *See id.* at 9; App. 96; Statement of Costs (5/16/19); App. 87; General Docket Report (11/26/19) at 6; App. 11.

On November 21, 2019, Anderson filed a handwritten "motion for belated appeal" that stated: "counsel was inefective for failing to file notice of appeal when State was granted summary judgement." *See* Notice of Appeal (11/21/19); App. 98. He also stated that he repeatedly told PCR counsel "to fix this error" and that PCR counsel "has failed to uphold the task." *See id.*; App. 98. Anderson did not specify *when* he learned that a notice of appeal had not been filed.

The Iowa Supreme Court directed PCR counsel to file a statement "addressing, at minimum, whether the appellant exhibited a good-faith effort or otherwise indicated an intent to appeal within the time period for perfecting a notice of appeal." *See* Order (12/10/19); App. 100. PCR counsel submitted a statement that said this:

> 1. An order of summary judgment was entered against the applicant on May 16, 2019 in PCCE083218.
>
> 2. Following the dismissal of the applicant's petition for postconviction relief, this attorney did communicate with the applicant.
>
> 3. This communication was on May 31, 2019, in which this attorney did inquire whether the applicant would wish to appeal the adverse ruling.
>
> 4. The applicant indicated that he did want to appeal the district court's ruling.
>
> 5. This attorney subsequently miscalculated the filing deadline, and did not realize the error until after that deadline had passed. There is no excuse for this error.

Statement (12/24/19); App. 103. The State filed a resistance, noting that the deadline for filing a notice of appeal is jurisdictional. *See* Resistance to Motion for Delayed Appeal (12/30/19); App. 105. The Iowa Supreme Court ruled that "the issue of whether the court has jurisdiction shall be submitted with the appeal," and it ordered that "[t]he parties shall brief the issue whether the court should grant appellant a delayed appeal." *See* Order (1/27/20); App. 112.

Additional facts will be discussed when relevant.

ARGUMENT

I. This Court should not exercise appellate jurisdiction.

Notice of appeal from a final judgment or final order must be filed within thirty days of its issuance. *See* Iowa R. App. P. 6.101(1)(b); *accord* Iowa Code § 822.9 ("An appeal from a final judgment entered under this chapter may be taken, perfected, and prosecuted either by the applicant or by the state in the manner and within the time after judgment as provided in the rules of appellate procedure for appeals from final judgments in criminal cases."). This timeliness requirement is "jurisdictional in both civil [and] criminal cases." *See Swanson v. State*, 406 N.W.2d 792, 792 (Iowa 1987).

> There is an appellate jurisdiction which is a class of its own, and which is limited, in the sense that it is contingent or conditional upon timely appeal by statutory method and within statutory time. Failure of such condition terminates its potential power to acquire thereafter any jurisdiction to review the judgment below. Consent will not confer it, nor waiver revive it.

Jensen v. State, 312 N.W.2d 581, 581 (Iowa 1981) (quoting *Brock v. Dickinson Cnty Bd. of Adjustment*, 287 N.W.2d 566, 568 (Iowa 1981)). Even if neither party has raised the issue, every Iowa appellate court "has a duty to determine its own jurisdiction and to refuse, on its own motion, to entertain an appeal not authorized by rule." *See id.* (citing *Qualley v. Chrysler Credit Corp.*, 261 N.W.2d 466, 468 (Iowa 1978)).

Anderson argues that this Court can exercise jurisdiction over this appeal under a very narrow exception: "in certain criminal cases," Iowa appellate courts have granted delayed appeals "where it appears that state action or other circumstances beyond appellant's control have frustrated an intention to appeal," because of case-specific and context-dependent concerns that "denial of a right of appeal would violate the due process or equal protection clause of the fourteenth amendment to the federal constitution." *See Swanson*, 406 N.W.2d at 792–93 (citing *State v. Horsey*, 180 N.W.2d 459, 460 (Iowa 1970)); *accord* App's Br. at 12–15. However, this is still a narrow exception. "[T]his approach has never been considered a discretionary action based on mere excusable neglect," because Iowa appellate courts do not have unlimited power to assert jurisdiction at their own discretion. *See Swanson*, 406 N.W.2d at 93. Rather, the exception that allows a delayed appeal in some circumstances "is limited to those instances where a valid due process argument might be advanced should the right of appeal be denied." *See id.* Consequently, it is generally limited to cases where the appellant is challenging an order or judgment that imposes "a significant deprivation of liberty that requires due process protection," like an involuntary civil commitment. *See, e.g.*, *In re M.E.*,

No. 16–1479, 2017 WL 1278321, at *3 (Iowa Ct. App. Apr. 5, 2017) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *In re A.B.*, No. 99–0227, 1999 WL 976097, at *3 (Iowa Ct. App. Oct. 27, 1999) (granting a delayed appeal from order terminating parental rights because denial of parent's right to appeal would violate due process when the delay was attributable to counsel, not the parent).

There is no constitutional right to a third PCR action, and there is no due process right to an appeal from a ruling that dismisses a third PCR action as time-barred. Anderson asserts this PCR ruling implicated "[t]he Iowa Constitution's guarantees of substantive and procedural due process and one's liberty interest in remaining free from undeserved punishment," and he argues those are "significant liberty interests justifying application of the delayed appeal provisions to this post-conviction relief action." *See* App's Br. at 15. But the order dismissing this third PCR action did not impose punishment at all. The final judgment that imposed the punishment that constituted a deprivation of liberty was the judgment of conviction and sentence. Any procedural due process right to review of his challenges to his convictions must have been vindicated at some point along the route from his direct appeal, through his first PCR and first PCR appeal.

Any constitutional dimension of any right to appellate counsel is "limited to the first appeal as of right." *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (reversing state court ruling that Fourteenth Amendment required extension of the rule from *Anders v. California* to state post-conviction proceedings, because "[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions"). Loss of a right of appeal through inaction cannot possibly give rise to a meritorious procedural due process claim, in this context.

As for substantive due process, Anderson's assertion is based on his claim that his imprisonment is a due process violation because he is actually innocent. *See* App's Br. at 14 (quoting *Schmidt v. State*, 909 N.W.2d 778, 793–94 (Iowa 2018)). But even *Schmidt* claims are subject to the timeliness requirement in section 822.3. *See Schmidt*, 909 N.W.2d at 798–99 (recognizing actual-innocence challenge to conviction imposed after guilty plea, but still requiring the applicant to show that he "could not have discovered the recantation earlier than he did in the exercise of due diligence"). If the claim may be forfeited entirely by failure to raise it within a certain time period,

then it cannot amount to a violation of due process to enforce rules requiring timely appeals from such rulings. *See Davis v. State*, 443 N.W.2d 707, 710–11 (Iowa 1989) ("We conclude that the legislature, in providing the time limit in section 663A.3, afforded defendant a reasonable opportunity to be heard, thus ensuring his federal and state due process rights."); *accord Perez v. State*, 816 N.W.2d 354, 360 (Iowa 2012) (noting that *Davis* "upheld the constitutionality" of predecessor statute that was transferred to section 822.3).

An appeal from summary disposition on a third PCR action is not a situation where there may be a valid due process challenge if the rules that confine appellate jurisdiction to timely appeals are enforced. As such, even if this delay were entirely attributable to PCR counsel, it would still be improper to grant a delayed appeal.

There is an additional reason for this Court to decline to apply its narrow exception to the rule that prohibits appellate jurisdiction over untimely appeals. This delayed appeal was not filed until about six months after the ruling that Anderson is appealing from. *See* PCR Ruling (5/16/19); App. 88; Notice of Appeal (11/21/19); App. 98. PCR counsel stated that, after communicating with Anderson and confirming that he "did want to appeal," PCR counsel "miscalculated

the filing deadline, and did not realize the error until after that deadline had passed." *See* Statement (12/24/19); App. 103. But that does not explain this six-month delay—there is no miscalculation that would account for that. Either some subsequent communication from PCR counsel or the absence of notifications relating to filing an appeal (which Anderson would have known to expect, based on his two prior PCR appeals) would have surely put Anderson on notice of the need to take action at some earlier point. Even in contexts where denial of a right of appeal would violate due process, Iowa appellate courts will only grant a delayed appeal to the party who "made a good faith effort to perfect his appeal." *See State v. Anderson*, 308 N.W.2d 42, 46 (Iowa 1981) (quoting *Cleesen v. State*, 258 N.W.2d 330, 332 (Iowa 1977)); *accord State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971) (granting delayed appeal when defendant "has at all times attempted to appeal his conviction to this court"); *cf.* Iowa R. App. P. 6.101(5) (noting that delayed appeal must be "no later than 60 days" after original deadline, even if clerk failed to send notice of ruling). Neither Anderson's filing nor PCR counsel's statement can establish that Anderson really made a "good faith effort" to appeal throughout that six-month period. Thus, this Court should not exercise jurisdiction over this untimely appeal.

II. The PCR court did not err in granting the State's motion for summary disposition. Anderson's claim about Cassell is based on facts that he knew within the three-year limitations period.

Preservation of Error

Error was preserved for Anderson's argument that this claim fell within the exception for claims based on new grounds of fact by the court's ruling that considered and rejected it. *See* PCR Ruling (5/16/19) at 7–9; App. 94–96; *accord Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Iowa appellate courts generally "review summary dismissals of postconviction-relief applications for errors at law." *See Dewberry v. State*, 941 N.W.2d 1, 4 (Iowa 2019) (quoting *Schmidt*, 909 N.W.2d at 784). Where this requires interpretation of the statutes that prescribe rules for post-conviction relief actions, review for errors at law is still the correct standard. *See, e.g.*, *Harrington v. State*, 659 N.W.2d 509, 519–20 (Iowa 2003).

Merits

Summary disposition is appropriate if the record shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Dewberry*, 941

N.W.2d at 4 (quoting Iowa R. Civ. P. 1.981(3)); *accord* Iowa Code § 822.6(3) (describing the same standard for summary disposition).

Anderson argues that there was a genuine dispute of fact regarding whether he could have discovered the facts that gave rise to this claim of actual innocence and newly discovered evidence within the applicable three-year limitations period, because "[t]he letters were addressed to a third party and nothing in the PCR record establishes that the letters were received by Mr. Anderson." *See* App's Br. at 17. Anderson is correct that nothing in the PCR record establishes when or how he received these letters—but that undermines his challenge.

"A party claiming an exception to a normal limitations period must plead and prove the exception." *See Cornell v. State*, 529 N.W.2d 606, 610 (Iowa Ct. App. 1994). Anderson has not created a record that could withstand a motion for summary disposition on the issue of whether he could have discovered the contents of a letter that was mailed to his girlfriend—a cooperative defense witness—before the underlying criminal trial. *See id.* at 610–11 (quoting *Wilkens v. State*, 522 N.W.2d 822, 823–24 (Iowa 1994)) (explaining that exception for claims based on new grounds of fact in section 822.3 will only apply "when an applicant had 'no opportunity' to assert the claim before the

limitation period expired" and "the focus of our inquiry has been whether the applicant was or should have been 'alerted' to the potential claim before the limitation period expired").

The only non-handwritten date on these exhibits established that Anderson's girlfriend (who cooperated with the defense) received one of these two letters, months in advance of trial. *See* Attachment (3/21/19) at 1; App. 69. It does not matter when the other letter was received, because it contained the same information that Anderson *already* could have discovered from Gladney. Anderson's challenge resembles the claim that was rejected in *Grayson v. State*:

> Even though Grayson did not learn the name of the gas station until January 2017, he is unable to show it could not have been discovered earlier in the exercise of due diligence. Grayson's presence at the gas station presupposes his knowledge of its existence, even if he was unable to recall its name. Exculpatory evidence that is known to the defendant at the time of trial—even if it is unavailable to the defendant at trial—is not newly discovered evidence. *See Jones v. Scurr*, 316 N.W.2d 905, 910 (Iowa 1982).

See Grayson v. State, No. 17–0910, 2018 WL 347552, at *1 (Iowa Ct. App. Jan. 10, 2018). Anderson would have known whether he was at the scene of the crime; he would have known whether Cassell was telling the truth in his testimony; and he would have been able to discover the existence and contents of Cassell's letter from Gladney.

All of that would foreclose this claim, even without the addition of Anderson's testimony from the first PCR proceeding about what he saw and heard during the underlying criminal trial—he testified that he *knew* about this alleged influence on Cassell's testimony at trial. *See* PCCE070789 PCR Transcript (11/14/12) at 22:8–24:25. And he also said that "the person that was in the room told [him] what happened." *See* PCCE070789 PCR Transcript (11/14/12) at 47:2–48:15. His own testimony forecloses any assertion that he could not have discovered the underlying facts that give rise to this claim before the three-year limitations period expired—he testified about it during his first PCR. *See Martin v. State*, No. 15–1622, 2016 WL 4384755, at *3 (Iowa Ct. App. Aug. 17, 2016) (affirming grant of summary disposition because "the record reflects that at least some of these documents were in Martin's possession at the time of his last PCR application").

Thus, even if this Court reaches the actual merits of this appeal, Anderson cannot establish that there was anything in the PCR record that could create a genuine dispute of material fact as to whether this claim was based on new facts that could not have been discovered during the initial three-year limitations period—indeed, this record forecloses such a finding. Therefore, this Court should affirm.

CONCLUSION

The State respectfully requests this Court dismiss this appeal for lack of jurisdiction. Alternatively, the State requests that it affirm the ruling that granted the State's motion for summary disposition.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **5,050** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 26, 2020

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov