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Amboh v. State Appellant's Brief Dckt. 36779

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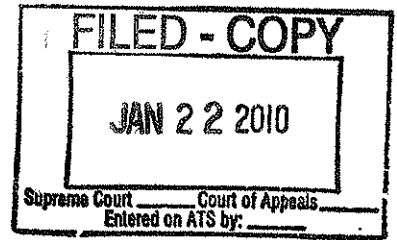
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JASON CHARLES AMBOH,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

S. Ct. No. 36779-2009



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Sixth
Judicial District of the State of Idaho
In and For the County of Power

HONORABLE PETER D. McDERMOTT
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the summary dismissal of Jason Amboh's petition for post-conviction relief. Clerk's Record (R) 76-79.

B. Procedural History and Statement of Facts

On March 11, 2009, Mr. Amboh filed a *pro se* petition for post-conviction relief. In the petition, Mr. Amboh stated that he pled guilty to DUI and was sentenced on June 21, 2007. R 1.

Mr. Amboh alleged three grounds for relief in his petition: 1) that trial counsel did not file a timely appeal; 2) that trial counsel and the state appellate defender did not inform him when his appeal was "denied"; and 3) that he received ineffective assistance of counsel during the criminal case and/or on appeal. R 2.

Mr. Amboh appended a letter to his petition from his public defender, Robert Eldredge. The letter, dated August 14, 2007, states that Mr. Eldredge had received Mr. Amboh's letter dated August 12, 2007, which requested that a notice of appeal be filed. However, Mr. Eldredge stated that the letter had arrived too late for a timely notice of appeal. Nonetheless, Mr. Eldredge stated, "I have filed the Appeal anyway." (Emphasis original.) Mr. Eldredge's letter further stated that he did not believe that an appeal would be helpful and that Mr. Amboh could pursue post-conviction relief citing Criminal Rule 57. R 8.

Mr. Amboh's petition also included an affidavit from Molly Huskey of the State Appellate Defender. Ms. Huskey stated that her office was appointed to represent Mr. Amboh on direct appeal on August 15, 2007. R 9. However, he was not assigned an individual attorney at that time, because the transcripts and record were not yet available. R 10. And, before Mr.

Amboh could be assigned an individual attorney, his appeal was dismissed as untimely. R. 11-12. Because Mr. Amboh did not have an individual attorney assigned, no letter was sent to him notifying him of the dismissal of his appeal. R 12. Further, he did not contact SAPD until February 2, 2009, and at that time, a review of the status of the case was made. R 12.

Counsel was appointed to represent Mr. Amboh on his petition. R 44.

The state moved for summary dismissal. R 50. Following oral argument, the District Court summarily dismissed the petition on two grounds: 1) it was untimely; and 2) there was no genuine issue of fact in dispute. Tr. p. 10, ln. 5 - p. 11, ln. 17. In dismissing the petition, the Court stated:

It's a jurisdictional issue. If we had the standard that defendant didn't know, they would all claim they didn't know and there wouldn't be any time limit at all to file post conviction because they would all claim they didn't know the proverbial 'disposition' of the case.

Tr. p. 10, ln. 18-24.

This appeal timely followed. R 67.

III. ISSUES PRESENTED FOR REVIEW

1. Should the statute of limitation be tolled given that Mr. Amboh's petition raises important due process claims and he did not discover the facts underlying his claims until after the time period had run?

2. Did Mr. Amboh's petition alleging trial counsel's ineffectiveness in failing to file a timely notice of appeal raise a genuine issue of material fact?

IV. ARGUMENT

A. The Statute of Limitation Should Have Been Tolloed Until Mr. Amboh Discovered the Facts Underlying his Claim.

The District Court erred in not finding that the statute of limitation was tolled due to the admitted failure of defense counsel, both trial counsel and appellate counsel, to notify Mr. Amboh of the dismissal of his appeal.

Idaho Code § 19-4902(a) requires that petitions for post-conviction relief be filed “within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later.” And, the failure to file a timely petition is a basis for dismissal, unless the petitioner has shown a reason why the statute of limitation should be tolled. *Person v. State*, 147 Idaho 453, 454, 210 P.3d 561, 562 (Ct. App. 2009), citing *Evensioky v. State*, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001) and *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). The question of whether the District Court erred in not tolling the post-conviction statute of limitation is subject to free review. *Person, supra*.

The time limitation for filing a post-conviction petition should be enlarged when the petitioner has been effectively denied access to the courts. *Sayas v. State, supra*, citing *Anderson v. State*, 133 Idaho 788, 792, 992 P.2d 783, 787 (Ct. App. 1999). While the bar for equitable tolling is high, tolling is appropriate in at least three situations: 1) where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials; 2) where mental disease and/or psychotropic medication rendered a petitioner incompetent and prevented the petitioner from earlier pursuing a challenge to his

conviction; and 3) where the post-conviction claim raises important due process issues, the limitation period may be postponed until the petitioner has discovered the factual basis for the claim. *Judd v. State*, 148 Idaho 22, 25, 218 P.3d 1, 4 (Ct. App. 2009), *rev. denied*, citing *Martinez v. State*, 130 Idaho 530, 536, 944 P.2d 127, 133 (Ct. App. 1994); *Sayas v. State*, *supra*; *Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Charboneau v. State*, 144 Idaho 900, 904-05, 174 P.3d 870, 874-75 (2008).

Mr. Amboh's case involves this third ground for tolling. Mr. Amboh's petition raises an important due process claim; specifically, the claim that counsel did not file a timely appeal. *See, Judd v. State*, *supra*, citing *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000); *Goodwin v. State*, 138 Idaho 269, 272-73, 61 P.3d 626, 629-30 (Ct. App. 2002); *LaBelle v. State*, 130 Idaho 115, 119, 937 P.2d 427, 431 (Ct.App. 1997); *Hassett v. State*, 127 Idaho 313, 900 P.2d 221 (Ct. App. 313, 900 P.2d 221 (Ct. App. 1995); *Mata v. State*, 124 Idaho 588, 591-93, 861 P.2d 1253, 1256-58 (Ct. App. 1993). Likewise, Mr. Amboh's claims that trial counsel was ineffective raise a significant due process claim as the state and federal constitutions require effective assistance of counsel in criminal trials. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho at 316, 900 P.2d at 224. As set out in *Rhoades v. State*, ___ Idaho ___, ___ P.3d ___ 2009 WL 3415732 * 5 "... the serious due process concerns enunciated in *Charboneau* encompass cases involving access to the courts claims. It would similarly cover claims of incompetency." (Citations omitted.)

Further, Mr. Amboh did not discover the facts underlying his claim of failure to file a timely appeal until after the limitation period had run. Mr. Amboh was specifically told by trial counsel that a direct appeal had been filed. And, neither trial counsel nor appellate counsel told

him when his direct appeal was dismissed. Rather, he did not find out that his appeal had been dismissed until February 2, 2009. And, he filed his petition for post-conviction relief less than six weeks later, on March 11, 2009.

Under these circumstances, the District Court erred in summarily dismissing Mr. Amboh's petition on the grounds that it was untimely. Mr. Amboh's petition raised an important due process claim and he did not discover the facts underlying his claim, that counsel's late filing of a notice of appeal was not effective and that his appeal was dismissed, until after the statute of limitation had run. Under these circumstances, the statute of limitation should have been tolled. *Judd, supra.*

B. The Question of Whether Counsel Rendered Ineffective Assistance by Failing to File a Timely Notice of Appeal is a Genuine Issue of Material Fact.

The District Court dismissed Mr. Amboh's petition not only because it believed it was untimely, but also because it believed that the petition did not raise a genuine issue of material fact. However, it is clear that the issue Mr. Amboh pled, whether counsel was ineffective when he failed to file a timely notice of appeal, raises a genuine issue of material fact and the District Court's decision to the contrary should be reversed.

Post-conviction proceedings are civil proceedings governed by the Idaho Rules of Civil Procedure. *Rhoades v. State, supra* at 3.

. . . On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party. However, 'while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted.'

Id., at 3-4 (citations omitted). *See also, Hauschulz v. State*, 144 Idaho 834, 838-9, 172 P.3d

1109, 1113-4 (2007) (standard of liberal construction is applied in order to avoid dismissal of an inartfully drawn complaint that gives adequate notice of the claims sought to be asserted).

In this case, Mr. Amboh raised a claim that trial counsel had been ineffective in failing to file a timely notice of appeal. And, indeed, the record bears this out. Mr. Amboh's direct appeal was dismissed because the notice of appeal was untimely. This claim does raise a genuine issue of material fact.

Per *Roe v. Flores-Ortega*, 528 U.S. at 477, 120 S.Ct. at 1035, an attorney who disregards specific instructions from a client to file a notice of appeal has rendered constitutionally unreasonable assistance. Likewise, an attorney who follows the explicit instructions of a client not to file a notice of appeal has not rendered unreasonable assistance. *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2052. See also, *Goodwin v. State*, 138 Idaho at 272, 61 P.3d at 629.

In cases in the middle, where the client has neither instructed counsel to file or not to file a notice of appeal, a separate, but antecedent, question must be addressed: whether counsel in fact consulted with the client about an appeal. If counsel did consult with the client, counsel's performance is deficient only if he/she failed to follow the client's express instructions. And, if counsel has not consulted with the client, then a second subsidiary question must be addressed: whether counsel's failure to consult amounts to deficient performance. Counsel has a constitutionally imposed duty to consult with the client about an appeal when there is reason to think either (1) that a rational client would want to appeal (for example, when there are non-frivolous grounds for appeal), or (2) that this particular client has reasonably demonstrated to counsel that he/she was interested in appealing. In making this determination, the court must take into account all the information counsel knew or should have known. *Flores-Ortega*, 528

U.S. at 479, 120 S.Ct. at 1036. *Goodwin*, 138 Idaho at 273, 61 P.3d at 630, “If counsel has not consulted with the defendant, then counsel’s performance in failing to consult with the defendant is itself deficient if a rational defendant would want to appeal or the particular defendant reasonably demonstrated to counsel that he or she was interested in appealing.”

To show prejudice if counsel has rendered deficient performance in not consulting with the client, it must be shown that if not for the failure to consult, the client would have timely appealed. *Flores-Ortega*, 528 U.S. at 484, 120 S.Ct. at 1038. *Goodwin*, *supra*.

In this case, Mr. Amboh alleged that trial counsel was ineffective in not filing a timely notice of appeal. And, the state admitted that a timely notice was not filed. This raised a genuine issue of material fact. If the failure to file the notice of appeal occurred despite Mr. Amboh’s request to file an appeal, then the failure was deficient performance and there is a presumption of prejudice requiring post-conviction relief. *Flores-Ortega*, 120 S.Ct. at 483, 120 S.Ct. at 1038. And, if the failure occurred in the absence of either direction from Mr. Amboh or consultation regarding appellate rights from counsel, then the secondary question must be addressed: whether counsel had a constitutional duty to consult with Mr. Amboh. The answer to that question depends upon whether (1) a rational client would have wanted to appeal or (2) Mr. Amboh demonstrated to counsel that he was interested in appealing. And, if it is determined that counsel had a duty to consult with Mr. Amboh and failed in that duty, the question of prejudice must be addressed: whether there is a reasonable probability that but for counsel’s failure, Mr. Amboh would have timely appealed. *Flores-Ortega*, 528 U.S. at 469-84, 120 S. Ct. at 1035-38.

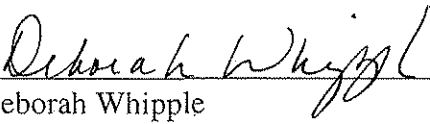
While Mr. Amboh’s petition might have been better drafted by an attorney, it clearly raised the question of whether counsel rendered ineffective assistance in failing to file a timely

notice of appeal. This was a genuine issue of material fact and consequently, summary dismissal was inappropriate. *Hauschultz v. State, supra.*

V. CONCLUSION

Because the District Court erred in both its conclusions – that the statute of limitation should not be tolled and that the petition did not raise a genuine issue of material fact regarding the claim of ineffective assistance of counsel – the order summarily dismissing Mr. Amboh’s petition should now be reversed and the matter remanded for an evidentiary hearing.

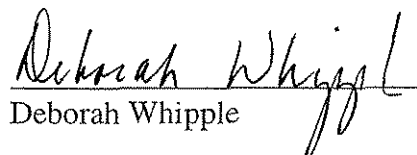
Respectfully submitted this 22nd day of January, 2010.



Deborah Whipple
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CERTIFICATE OF SERVICE

I, Deborah Whipple, do hereby certify that on this 27th day of January, 2010, I deposited two true copies of the foregoing brief in the United States mail, postage prepaid, addressed to: Office of the Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.


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