5-5-2010

Amboh v. State Appellant's Reply Brief Dckt. 36779

IN THE SUPREME COURT OF THE STATE OF IDAHO

JASON CHARLES AMBOH,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

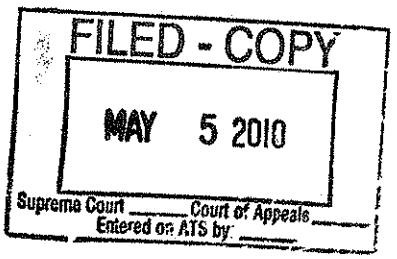
Respondent.

S. Ct. No. 36779-2009

REPLY 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



Deborah Whipple
ISBA #4355
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000
deborahannwhipple@msn.com

Attorneys for Appellant

Lawrence Wasden
IDAHO ATTORNEY GENERAL
Jennifer Birken
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. Table of Authorities ii

II. Argument in Reply 1

A. The Statute of Limitation Should Have Been Tolled Until Mr. Amboh Discovered the Facts Underlying his Claim 1

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 3

III. Conclusion 4

I. TABLE OF AUTHORITIES

FEDERAL CASES

Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1028 (2000) 3, 4

STATE CASES

Goodwin v. State, 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002) 3, 4

Rhoades v. State, 148 Idaho 247, 220 P.3d 1066 (2009) 1

II. ARGUMENT IN REPLY

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

Mr. Amboh and the state are in agreement as to the law applicable to the question of whether the statute of limitation should have been tolled. Both parties agree that the time for raising claims involving important due process issues may be tolled until discovery of the violation. *Rhoades v. State,* 148 Idaho 247, 220 P.3d 1066 (2009). Appellant's Opening Brief at page 4, Respondent's Brief at page 5. Where the parties disagree is on the question of whether Mr. Amboh knew or should have known that his appeal had been dismissed giving rise to the ineffective assistance of counsel claim even though neither his attorney nor the Court so informed him.

The state argues that even if Mr. Amboh was not told by anyone that his appeal had been dismissed, he "was on notice" from August 14, 2007, that his appeal likely would be dismissed and therefore the statute of limitation should not be tolled. Mr. Amboh believes that the statute should be tolled because he had no notice that his appeal had been dismissed.

The state's argument hinges on two assumptions: first, that the letter from counsel to Mr. Amboh when his notice of appeal was filed put him "on notice" that his appeal would be dismissed; and second that being "on notice" Mr. Amboh should have somehow expected that his appeal would be immediately dismissed. The state's argument that the statute of limitation should not be tolled can prevail only if both these assumptions are valid.

With regard to the first assumption, the letter Mr. Amboh received from counsel does not state that his appeal would be dismissed. The letter states that his request for a notice of appeal

had arrived too late to be timely, but, "I have filed the Appeal anyway." (Emphasis original.) Nowhere does the letter state that the appeal will be dismissed. While an attorney experienced in appellate practice might infer from counsel's letter that the appeal was soon to be dismissed, such an inference would not be reasonably made by a non-lawyer. In fact, a non-lawyer would make a very logical assumption in the opposite direction – if the appeal was going to be dismissed anyway, the attorney would not bother to file the notice of appeal. And, even an attorney might look to IAR 21 which states that failure to file a timely notice of appeal is "jurisdictional and shall cause automatic dismissal of such appeal or petition, *upon the motion of any party, or upon the initiative of the Supreme Court*" (emphasis added) and conclude that absent a motion by the state or an affirmative action of the Supreme Court, the appeal would remain pending and be decided.

With regard to the second assumption, there is no indication in any court rule or otherwise as to how quickly an untimely appeal might be dismissed. And, given that appeals generally take many months to even years to come to a resolution, it is not reasonable to conclude that Mr. Amboh should have expected a dismissal of his appeal within days or weeks of its filing.

Finally, Mr. Amboh had been assigned appellate counsel and reasonably would have expected that counsel to comply with IRPC 1.4(a)(3) and keep him informed of the status of his case. Even if Mr. Amboh should have somehow been "on notice" that his appeal would soon be dismissed, the failure of his counsel to alert him to the change in status of his case is cause for the tolling of the statute of limitation.

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.

In his Opening Brief, Mr. Amboh set out the law regarding ineffective assistance of counsel claims based upon a claim that counsel did not file a timely notice of appeal and its application to his case. Appellant's Opening Brief pages 5-8. There is no dispute that trial counsel did not file a timely notice of appeal. *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S. Ct. 1028 (2000) and *Goodwin v. State,* 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002), hold that an attorney who disregards specific instruction from a client to file a notice of appeal has rendered constitutionally unreasonable assistance. And, if the client has neither instructed counsel to file or not to file a notice of appeal, the question of whether ineffective assistance has occurred turns upon the inquiry of whether counsel consulted with the client. If counsel consulted with the client, then counsel's performance is deficient only if counsel fails to follow the client's express instructions. If counsel did not consult with the client, then it must be determined whether counsel's failure to consult was itself 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 an interest in appealing. To show prejudice, it is only necessary to show that but for the deficient performance of counsel, the client would have appealed. *Id.*

Mr. Amboh's claim that he received ineffective assistance of counsel because counsel failed to file a timely notice of appeal was, in accord with *Roe v. Flores-Ortega* and *Goodwin*, a genuine issue of material fact.

The state does not even mention *Roe v. Flores-Ortega* or *Goodwin*. Respondent's Brief at pages 6-10. Rather, the state asserts that Mr. Amboh failed to explain when he directed counsel to file his appeal. Respondent's Brief at page 7. However, in Mr. Amboh's affidavit in support of his petition, he does state "Attorney failed to contact and discuss any issues with my case." R 6. And, the absence of consultation may itself be ineffective assistance of counsel. *Id.* Thus, the question of whether ineffective assistance of counsel occurred when counsel failed to file a timely notice of appeal was a genuine issue of material fact and summary dismissal was not appropriate.

III. CONCLUSION

Because the District Court erred in both its conclusions – that the statute of limitation should not be tolled and that the petition failed to raise a genuine issue of material fact – the order summarily dismissing Mr. Amboh's petition should be reversed.

Respectfully submitted this 4th day of May, 2010.

Deborah Whipple
Attorney for Jason Amboh

CERTIFICATE OF SERVICE

I, Deborah Whipple, do hereby certify that on this 4th day of May, 2010, I deposited two true copies of the foregoing brief in the United States mail, postage prepaid, addressed to: Jennifer Birken, Deputy Attorney General, Office of the Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.

Deborah Whipple