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Amboh v. State Respondent's Brief Dckt. 36779

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JASON CHARLES AMBOH,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 36779

BRIEF OF RESPONDENT

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

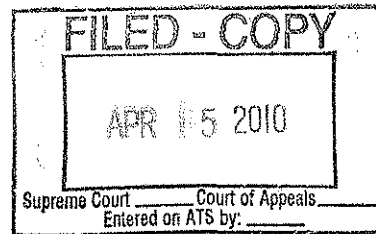
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STATEMENT OF THE CASE

Nature of the Case

Jason Charles Amboh appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

Amboh pled guilty to driving under the influence and received a sentence of six years with two years fixed on June 28, 2007. (R., pp.11-12, 24.) Amboh filed an appeal on August 24, 2007, six days past the deadline for doing so. (R., p.24.) *The Idaho Supreme Court dismissed Amboh's appeal as untimely and issued a remittitur on September 28, 2007.* (R., p.24, 26.)

Amboh filed a petition for post-conviction relief in March of 2009, one year and five months after the issuance of the remittitur in Amboh's underlying criminal appeal. (R., pp.1-4.) The state filed an answer, a motion for summary dismissal and brief in support of the motion. (R., pp.50-61.) The district court held a hearing on the motion for summary dismissal. (See generally, Tr.) The district court dismissed Amboh's petition for post-conviction relief. (R., pp. 65-66.) Amboh timely appealed. (R., pp.67-69.)

ISSUES

Amboh states the issues on appeal as:

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 that 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?

(Appellant's brief, p.2.)

The state rephrases the issue on appeal as:

Has Amboh failed to establish that the district court erred by summarily dismissing Amboh's untimely petition for post-conviction relief?

ARGUMENT

Amboh Has Failed To Establish The District Court Erred By Summarily Dismissing Amboh's Untimely Petition For Post-Conviction Relief

A. Introduction

The district court summarily dismissed Amboh's petition because it was untimely and because Amboh failed to establish a genuine issue of material fact. (R., p.66; Tr., p.10, L.25 – p.11, L.16.) Amboh challenges the dismissal of his petition and claims that he was entitled to equitable tolling of the statute of limitations for post-conviction petitions. (Appellant's brief, pp.4-5.) Amboh also asserts his petition presented a genuine issue of material fact based on ineffective assistance of counsel. Amboh's claims fail. He filed an untimely petition and did not demonstrate a valid claim for equitable tolling. In addition, Amboh's petition did not establish a prima facie claim of ineffective assistance of counsel.

B. Standard of Review

On appeal from the summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Amboh's Petition for Post-Conviction Relief Was Untimely

A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant's evidence has raised no genuine issue of material fact, which if resolved in the applicant's favor, would entitle the applicant to the requested relief. Downing, 132 Idaho at 863, 979 P.2d at 1221; Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995).

A proceeding under the UPCPA "may be filed at any time within one (1) year ... from the determination of an appeal" I.C. § 19-4902(a). Absent a showing by the petitioner that the one-year statute of limitation should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Evensiosky v. State, 136 Idaho 189, 190-91, 30 P.3d 967, 968-69 (2001); Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

Amboh filed an untimely appeal in his underlying criminal case. (R., p.24.) The Idaho Supreme Court dismissed his appeal (Id.) and issued a remittitur on September 28, 2007 (R., p.26). Amboh had one year from that date to file a petition for post-conviction relief. I.C. § 19-4902(a). Amboh filed his post conviction petition on March 11, 2009, more than five months late. Because Amboh's petition is untimely on its face, the only question is whether the untimely filing is excused.

Idaho courts have recognized that an untimely filing may be excused if the asserted claims "raise important due process issues." Rhoades v. State, 148 Idaho 247, ___, 220 P.3d 1066, 1069-70 (2009). The time for raising claims involving important due process issues may be tolled until the discovery of the violation. Id. at ___, 220 P.3d at 1070 (citing Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). Even claims raising important due process issues are deemed waived, however, if not brought within a reasonable time of when the claims were known or should have been known. Id. "We have repeatedly held that ineffective assistance of counsel claims can or should be known after trial." Id. at ___, 220 P.3d at 1072.

Amboh failed to show entitlement to tolling. His attorney informed him by letter on August 14, 2007 that although he filed an appeal for Amboh, it was late. (R., p.8.) In that same letter, Amboh's counsel informed him of his right to file a petition for post-conviction relief since his appeal time had expired and, as such, presumably Amboh would not prevail on the underlying appeal. (Id.) Even if Amboh, as he alleges (Appellant's brief, pp.4-5), never received notice of the dismissal of his underlying criminal appeal to begin the statute of limitation for filing a post-conviction petition, he was on notice from August 14, 2007 forward that the underlying appeal may likely be dismissed because it was filed late. Thus, Amboh knew or *should have known* whether his counsel rendered deficient performance in the timing of filing an appeal in Amboh's criminal case. Bringing claims of lack of notice due to ineffective assistance of counsel in March 2009,

when those claims were known and should have been know from August of 2007 forward, is simply not a reasonable under the applicable law.

As discussed above, and pursuant to Rhoades, because the applicable law requires a claim not brought within a year to have been brought within a reasonable time based on when the claim was known or should have been know, Amboh is not entitled to tolling and his petition was untimely as a matter of law.

D. Amboh's Petition For Post-Conviction Relief Failed To Establish A Prima Facie Case Of Ineffective Assistance Of Counsel

In order to establish a prima facie case of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out

a prima facie case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

In addition to dismissing Amboh's petition as untimely, the district court correctly found that Amboh failed to raise failed present a prima facie case ineffective assistance of counsel. (R., p.66; Tr., p.11, Ls.2-16.) In his petition, Amboh listed three arguments related to ineffective assistance of counsel: 1) that his trial counsel did not file a timely appeal in his underlying criminal case, 2) neither trial counsel nor appellate counsel informed him of the dismissal of his appeal in the underlying criminal case, and 3) "[i]neffective assistance of council [sic] during the criminal case and/or on appeal." (R., p.2.) He did not support these claims with evidence, however.

Amboh's own affidavit in support of his petition does nothing more than restate his claims. (R., p.6.) With relation to his trial counsel filing the appeal late, Amboh offers no explanation of when he directed trial counsel to file the appeal. (See generally, R., p.6.) The affidavit of Amboh's appellate counsel, however, notes that Amboh "had not notified his attorney that he wanted an appeal until . . . two days after the deadline had passed." (R., p.11.) Trial counsel's letter to Amboh does inform him that his attorney "d[id] not believe the appeal would be successful," and that although it was untimely (R., p.8), he "ha[d] filed the Appeal anyway." (R., p.8 (emphasis and capitalization in original).) Amboh's petition and supporting evidence fails to demonstrate how the late filing of the appeal was due to ineffective assistance of trial counsel.

Amboh also claims his trial and appellate attorneys provided ineffective assistance of counsel because they failed to notify him of the dismissal of his underlying criminal case. Trial counsel's letter to Amboh did inform Amboh that the appeal was untimely filed and informed Amboh of his post-conviction rights in the event the appeal was dismissed. (R., p.8.) Amboh did not contact the SAPD's office about the disposition of his underlying criminal appeal until February of 2009 (R., p.11)—despite, as already discussed in detail, Amboh's knowledge regarding the likely dismissal of his underlying appeal and knowing he still had post-conviction rights with regard to that appeal. Amboh has failed to establish that failure to notify him of the dismissal of his underlying criminal appeal constitutes ineffective assistance of counsel on the part of trial or appellate counsel. In addition, Amboh has failed to establish prejudice because he has failed to allege any meritorious post-conviction claims he could have timely presented but for the failure to inform him of the dismissal of the underlying criminal appeal.

Amboh's petition also contains a very general claim that trial and appellate counsel failed to provide adequate representation. (R., p.2.) Beyond this blanket statement in Amboh's affidavit in support of his petition, that his trial attorney "failed to contact and discuss any issues with my case," (R., p.6), Amboh provides no specific examples or evidence of the alleged ineffective assistance of counsel. Neither his trial attorney's letter or appellate counsel's affidavit addresses Amboh's bare claim of "ineffective assistance of council [sic] during the criminal case and/or on appeal." (R., p.2.) The only thing that can be

gleaned from those allegedly "supporting" documents is the fact that Amboh himself failed to contact both his trial and appellate counsel in a timely manner.

At the post-conviction hearing on the State's motion for summary dismissal, Amboh's attorney presented no additional evidence regarding ineffective assistance of trial counsel in the underlying criminal case. (See generally, Tr.) Instead Amboh's post-conviction counsel argued that because no one informed Amboh of the dismissal of his appeal and "that as he was incarcerated at the time, it was very difficult for him to become aware of the disposition on the appeal," that the district court should not grant the state's motion for summary dismissal. (Tr., p.8, L.12 – p.9, L.22.)

Whether in his petition, during the motion on summary dismissal or in this appeal, Amboh has never made any argument as to why anything trial or appellate counsel did—by failing to file a timely appeal or failing to notify Amboh of the date of the dismissal of his underlying criminal appeal—did in fact fall below an objective standard of reasonableness. Nor has Amboh ever argued that if either attorney did fall below that standard how Amboh was prejudiced or the outcome of the case would have otherwise been different. The district court did not have to accept Amboh's bare claims of ineffective assistance of counsel and properly dismissed his petition for failing to establish a prima facie case.


Amboh filed an untimely petition for post-conviction relief and has not demonstrated he was entitled to an equitable tolling of the statute of limitations. In addition, Amboh has failed to establish a prima facie case for ineffective

assistance of trial or appellate counsel. The district court properly granted the State's motion for summary dismissal.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Amboh's petition for post-conviction relief.

DATED this 15th day of April 2010.


JENNIFER E. BIRKEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of April 2010, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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