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Banks v. State Respondent's Brief Dckt. 38409

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DEWAYNE NOBLE BANKS,)	
)	
Petitioner-Appellant,)	NO. 38409
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

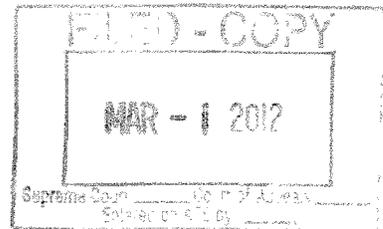
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STATEMENT OF THE CASE

Nature of the Case

Dewayne Banks appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

Statement of Facts and Course of Prior Post-Conviction Proceedings

The facts and course of proceedings relating to Banks' first post-conviction action are as set forth by the district court in its order granting the state's motion for summary dismissal:

On September 20, 2000, Petitioner was convicted following a trial by jury of the felony offense of Robbery as charged in Part I of the information and his guilty plea to a Persistent Violator sentence enhancement allegation. Petitioner filed a Motion for Judgment of Acquittal on October 4, 2000. The Court subsequently denied the Motion for Judgment of Acquittal on November 24, 2000 and on December 15, 2000 the Court sentenced Petitioner to a minimum period of confinement of ten (10) years, and a subsequent indeterminate period of confinement of not to exceed life, for a total unified term of life.

The Petitioner filed a *pro se* notice of Appeal on January 23, 2001. The State Appellate Public Defender (SAPD) was appointed to represent Petitioner in this appeal.

Thereafter, Petitioner filed a *pro se* Rule 35 motion seeking reduction of his sentence, which was subsequently denied by the Court on June 14, 2001. On June 26, 2001 the Petitioner filed a *pro se* Notice of Appeal on the denial of his Rule 35 Motion. The SAPD was appointed to represent Petitioner on his appeal from the Rule 35 Denial.

On June 4, 2002 the Court of Appeals issued its Unpublished Opinion Number 640 (Docket Nos. 27207 & 27629) affirming the sentence imposed and affirming this Court's Order denying Petitioners [sic] Rule 35 motion. A Petition for Review was subsequently denied and the decision of the Court of Appeals has now become final.

On September 4, 2002, Petitioner filed a *pro se* Petition for Post Conviction relief, Canyon County case number CV-2002-08175*C. The Court entered its final Order dismissing the Petition on October 1, 2003. Petitioner filed an appeal and the Idaho Supreme Court dismissed the appeal on July 23, 2004, Remittitur [sic] filed October 21, 2004 (No. 30070).

Thereafter, on October 26, 2005, Petitioner filed a *pro se* Notice of Appeal from the Order of Dismissal. This appeal was dismissed by the Idaho Supreme Court on November 7, 2005, Remittitur filed January 3, 2006 (No. 32436).

(R., pp.99-100.)

Statement of Facts and Course of Successive Post-Conviction Proceedings

The course of events of Banks' current petition for post-conviction relief were outlined by the district court in its order granting the state's motion for summary dismissal:

On June 18, 2009, the Petitioner, filed a *pro se* Petition and Memorandum in Support of Petition for Post Conviction Relief which was assigned Case No. CV 2009-0006327*C. On June 29, 2009, Petitioner filed a *pro se* Motion for Appointment of Counsel, Affidavit, and Memorandum of Law in Support of Appointment of Counsel.

On July 21, 2009, this Court ordered the appointment of the Canyon County Public Defender to represent Petitioner in this case. The Order appointing the Public Defender granted that office forty-five (45) days to investigate Petitioner's case and, if necessary, to file an amended petition.

On August 3, 2009, Petitioner filed a *pro se* Motion to Disqualify Weibe and Fouser, P.A., Canyon County Public Defender, Affidavit, and Memorandum in Support of Motion. On August 6, 2009, this Court appointed Mimura Law Offices to represent Petitioner. The Order appointing Mimura Law Offices gave that office forty-five (45) days to investigate Petitioner's case and, if necessary, file an amended petition. No amended petition has been filed.

On September 3, 2009, Petitioner filed a *pro se* Motion to Disqualify the Law Firm of Mimura Law Offices, Affidavit, and Memorandum in Support of Motion. On September 8, 2009, this Court entered its Order Denying Motion to Disqualify Law Firm.

On October 14, 2009, Petitioner filed a *pro se* Motion for Extension of Time to Amend Petition on Post-Conviction Relief requesting a thirty (30) day extension to file a *pro se* amended petition. Also, on October 14, 2009, Petitioner filed a *pro se* Motion for Correction of Clerical Errors on Request for Discovery on Post-Conviction Relief. Petitioner filed a Motion for Hearing on these motions on November 20, 2009.

On October 26, 2009 the State filed its Objection to Petitioner's motion for extension of time and motion for correction of clerical errors on the grounds that the motions were impermissibly made *pro se* after the Court's August 6, 2009, appointment of counsel.

On November 20, 2009, Petitioner filed a *pro se* Motion for Hearing on Petitioner's motion for extension of time and motion for correction of clerical errors.

The State filed an Answer on December 4, 2009 asserting the affirmative defenses of, *inter alia*, failure to state a claim, failure to raise claims on direct appeal, statute of limitations, failure to verify the petition, failure to support petition with admissible evidence, improper successive petition, and failure to allege sufficient facts to warrant a finding that counsel's performance was deficient. The State's Answer was filed together with a Motion for Summary Dismissal. The Motion for Summary Dismissal is brought on the grounds that the Petition is not verified, not timely, and improper successive application pursuant to I.C. § 19-4908.

(R., pp.98-99.)

The district court granted the state's motion for summary dismissal because it found Banks' petition for post-conviction relief was untimely and an improper successive petition. (R., pp.100-101.) The court denied Banks' request to alter or amend the judgment on post-conviction (R., pp.304-24) and entered an order dismissing his petition for post-conviction relief (R., p.325).

Banks timely appeals from the order dismissing his petition. (R., pp.325, 327-30).

ISSUE

Banks states the issue on appeal as:

Did the district court err when it summarily dismissed Mr. Bank's [sic] Petition for Post-Conviction Relief as untimely and as a successive petition, and/or failed to grant Mr. Bank's [sic] Motion to Alter or Amend?

(Appellant's brief, p.2.)

The state rephrases the issue on appeal as:

Has Banks failed to establish that the district court erred by summarily dismissing his successive post-conviction petition?

ARGUMENT

Banks Has Failed To Establish That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

The district court dismissed Banks' successive petition, finding the petition was not timely filed because the statutory time to file had expired on August 8, 2003 and Banks filed his *pro se* petition for post-conviction relief almost six years later on June 18, 2009. (R., p.101.) The district court further found in dismissing Banks' petition that it was an improper successive petition for post-conviction relief as Banks' claims had previously been raised in his direct appeals and prior petition for post-conviction relief and Banks had failed to assert "a sufficient reason for why grounds for relief were not adequately raised in the original petition." (R., p.101.) On appeal, Banks claims his petition was in fact timely "in light of his federal habeas [sic] corpus case which he contends is a proceeding following an appeal as contemplated by I.C. § 19-4902(1)" and, as such, the court "erred by summarily dismissing his petition as untimely." (Appellant's brief, p.4.) Banks also contends that he "made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability of the finding of guilt and could not have, in the exercise of due diligence, been raised earlier," thus entitling him to file a successive petition under I.C. § 19-4901. (Appellant's brief, p.7.)

Banks' arguments are without merit.

B. Standard Of Review

On review of a dismissal of a post-conviction application, the appellate court will review the entire record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require that relief be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id.

C. Dismissal Of Banks' Successive Petition For Post-Conviction Relief Was Appropriate Because It Was Untimely Filed And Banks Failed To Allege Facts That, If True, Would Overcome The Successive Petition Bar And Entitle Him To Post-Conviction Relief

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (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 v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it appears that the applicant is not entitled to relief. Specifically, I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Applying these principles in this case, the district court summarily dismissed Banks' petition as being untimely and improperly successive. Contrary to Banks' assertions on appeal, a review of the record and the applicable law supports the district court's order of summary dismissal.

1. Banks' Successive Petition Was Untimely

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) 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." In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. § 19-4902 would preclude courts from considering 'claims

which simply are not known to the defendant within the time limit, yet raise important due process issues.” Rhoades v. State, 148 Idaho 247, 250 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). In those circumstances, the court will apply a “reasonable time” standard. Rhoades, 148 Idaho at 251, 220 P.3d at 1070. “In determining what a reasonable time is for filing a successive petition, [the court] will simply consider it on a case-by-case basis, as has been done in capital cases.” Charboneau, 144 Idaho at 905, 174 P.3d at 875. However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho at 247, 220 P.3d at 1066.

All the claims in Banks’ successive petition, filed June 18, 2009, were filed beyond one year after the issuance of the Remittitur in Banks’ direct appeal filed in August of 2002. Banks does not argue that his claims were not known to him or could not reasonably have been known to him in the requisite time-frame for filing his initial post-conviction petition. Instead, Banks asserts “the habeas corpus proceedings that ended on April 20, 2009 with the final denial of his writ for certiorari constituted a proceeding following an appeal under I.C. § 19-4902, which would then make his June 18, 2009 application for post-conviction relief timely filed” under I.C. § 19-4902. (Appellant’s brief, p.5.) Although Banks’ direct appeals were exhausted upon the Court of Appeals’ affirming of the sentence imposed and decision denying his Rule 35 motion and the subsequent denial of a petition for review (R., p.100), Banks contends the filing of his

successive *pro se* petition for post-conviction relief some six years later was timely because of the previous stay of his habeas proceedings. (Appellant's brief, pp.4-6.)

Banks' argument is unsupported by cited precedent and is contrary to law. The statute of limitations for filing a post-conviction petition begins to run "from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal." I.C. § 19-4902. "[A] proceeding following an appeal . . . does not encompass a separately filed proceeding under the UPCPA or one for relief such as by way of a writ of habeas corpus, subsequent to the judgment of conviction." Freeman v. State, 122 Idaho 627, 629, 836 P.2d 1088, 1090 (Ct. App. 1992). Because Banks failed to file his successive petition within one year of the final determination of his direct appeal, he has failed to show that the district court erred in dismissing his successive petition as untimely.

2. Banks' Petition For Post-Conviction Relief Was An Improper Successive Petition

Banks' petition was also correctly dismissed on the basis that it failed to satisfy the criteria for a permissible successive petition under the UPCPA. Idaho Code § 19-4908 governs the filing of successive petitions and provides:

Waiver of or failure to assert claims. – All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for

sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

I.C. § 19-4908. In interpreting this statute, Idaho's appellate courts have held that "[i]neffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application." Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (footnote omitted) (citing Palmer v. Dermitt, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999)). To establish ineffective assistance of counsel, however, a post-conviction petitioner must demonstrate both that (a) his counsel's performance fell below an objective standard of reasonableness and (b) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Although Banks argues otherwise, a review of the record shows that Banks did not make even a prima facie showing of ineffective assistance of post-conviction counsel to establish a "sufficient reason" to justify the filing of his successive petition in this case.

Banks' *pro se* successive petition for post-conviction relief alleged numerous claims of the ineffectiveness of trial counsel, but Banks did not assert he was inadequately represented by post-conviction counsel in his first post-conviction action. Subsequent to the district court's order granting the state's motion for summary dismissal based on timeliness and the failure of Banks to assert sufficient reason why grounds for relief were not adequately raised in his

original post-conviction petition to allow a successive petition (R., pp.98-102), Banks filed a motion to alter or amend the judgment putting forth his general complaint that post-conviction counsel failed “to do anything whatsoever” on his behalf (R., pp.104-105).

Banks’ argument on appeal is that he was entitled to file a successive petition for post-conviction relief because “he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability of the finding of guilt and could not have, in the exercise of due diligence, been raised earlier.” (Appellant’s brief, p.7.) He asserts “the ineffectiveness of his attorney at his first post-conviction prevented him from properly presenting his arguments.” (Appellant’s brief, p.7.) The court, however, found in granting the state’s motion to summarily dismiss Banks’ petition for post-conviction as an improper successive petition that “the record before the Court shows that Petitioner’s claims have previously been raised in Petitioner’s appeals and prior petition for post conviction relief.” (R., p.101.) Further, the district court was unable to find that Banks had “asserted a sufficient reason for why grounds for relief were not adequately raised in the original petition.” (R, p.101.) In reiterating these findings when denying Banks’ motion to alter or amend the judgment on post-conviction relief, the court concluded as follows:

In addition, the Court further finds and concludes that Petitioner has failed to make a “substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier.” I.C. § 19-4901 (emphasis original). The petitioner relies on ineffective assistance of counsel at every stage in the proceedings during the last ten (10) years in which he has

fervently continued to pursue relief from the judgment as the basis for why the Court should grant him relief in the current petition. For the reasons herein, that argument is without merit.

The Court still further finds and concludes that the claims for relief asserted in his petition for post-conviction relief in this case are claims for relief he had previously raised in the several prior proceedings discussed in Section II above, and were fully known to him for many years prior to his filing of his post-conviction petition in the case on June 18, 2009.

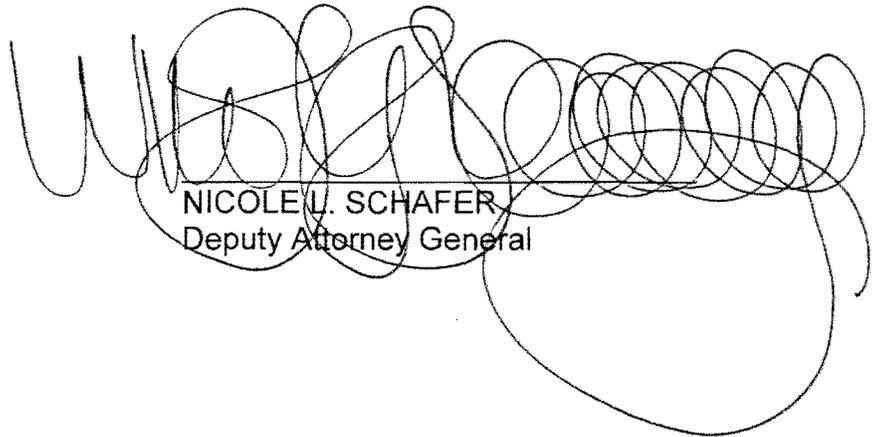
(R., pp.322-23.) Banks has failed to show otherwise.

The district court correctly dismissed Banks' petition on the ground that it did not meet the statutory requirements for a permissible successive petition under I.C. § 19-4908 as the record supports the district court's finding that Banks failed to make a substantial factual showing as to the ineffectiveness of his post-conviction counsel.

CONCLUSION

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

DATED this 1st day of March 2012.

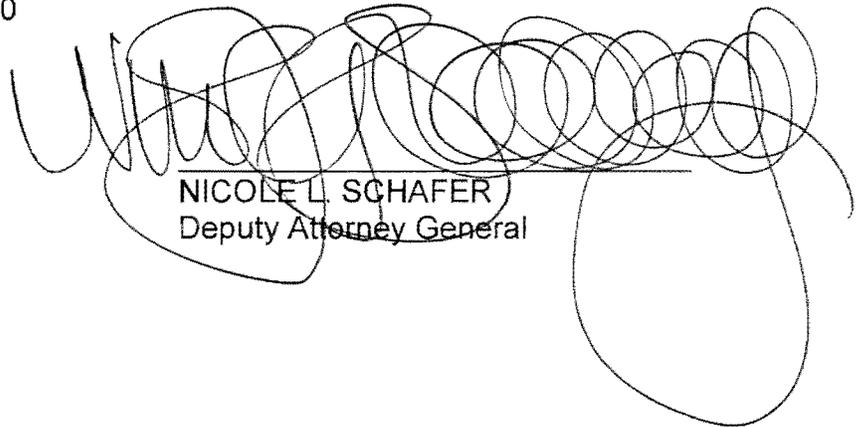


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of March 2012, 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:

STEPHEN D. THOMPSON
P.O. BOX 1707
KETCHUM, ID 83340



NICOLE L. SCHAFER
Deputy Attorney General