

12-8-2011

Banks v. State Appellant's Brief Dckt. 38409

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I. STATEMENT OF THE CASE

A. Nature of the Case

Dewayne Banks appeals from the district court's order granting summary dismissal dated January 26, 2010 (R., pp. 98-103), and the district court's order, filed December 16, 2010; in which the district court dismissed his petition for post-conviction relief (R., p. 325). Mr. Banks asserts that the district court erred by summarily dismissing his petition for post-conviction relief and by failing to alter or amend its dismissal.

B. Statement of the Facts & Course of Proceedings

On June 18, 2009, Mr. Banks filed a petition for post-conviction relief along with a supporting Memorandum, alleging ineffective assistance of counsel regarding the performance of both his trial level attorney (R., pp.3 and 4-22). due to ineffective assistance of counsel.

The State filed a motion for summary dismissal on December 4, 2009, alleging that the application for post-conviction relief was not verified as required by rule, and that it was untimely, pursuant to I.C. § 19-4902(1), and finally that the application was an improper successive application pursuant to I.C. § 19-4908. (R., pp. 96-97).

Mr. Banks, after not hearing from his appointed counsel on post-conviction, filed a motion and affidavit for extension of time to amend his petition. (R., pp. 78-80). The State objected. (R., pp. 84-85). The District Court issued an Order ruling the motion to extend time and other procedural motions moot, and dismissing the application for post-conviction relief as untimely under I.C. § 19-4902, and as an improper successive petition under I.C. § 19-4908. (R., pp. 98-103).

Mr. Banks filed a motion and an affidavit and memorandum in support thereof to alter or amend judgment on post-conviction relief on the basis that disputes of material fact prevented summary disposition and that it was not a successive petition due to his efforts on a federal writ of certiorari. (R., pp. 104-165).

Ultimately, the District Court denied the motion to alter or amend in its memorandum decision. (R., pp. 304-324), and entered an order dismissing the petition for post-conviction relief. (R., p. 325).

Mr. Banks timely filed his appeal. (R., pp. 327-330).

II. ISSUES PRESENTED ON APPEAL

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

III. ARGUMENT

A.

The District Court Erred When It Summarily Dismissed Mr. Bank's Petition For Post-Conviction Relief As Untimely And As A Successive Petition And/Or Failed to Grant Mr. Bank's Motion to Alter or Amend.

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144

Idaho at 522, 164 P.3d at 802.

A claim for post-conviction relief must be raised in an original application. I.C. § 19-4908. That application must 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 a proceeding following an appeal, whichever proceeding is later. I.C. § 19-4902. Successive petitions are impermissible "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. Section 19-4908 sets forth no fixed time within which successive petitions may be filed, however, the "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is considered by the courts on a case-by-case basis. *Id.*

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in

the first petition. *See id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. *See Workman*, 144 Idaho at 522, 164 P.3d at 802.

Summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

1. Mr. Bank's June 18, 2009 application for post-conviction relief was timely filed.

It is Mr. Bank's position that his June 18, 2000 application for post-conviction relief was timely filed in light of his federal habeus corpus case which he contends is a proceeding following an appeal as contemplated by I.C. § 19-4902(1), and that therefore, the district court erred by summarily dismissing his petition as untimely.

As the district court noted (R., p. 307), on August 22, 2002, Mr. Banks filed his

federal Petition for Writ of Habeus Corpus, which was then stayed so Mr. Banks could pursue his state remedies on direct appeal. Following dismissal of his appeal from his earlier post-conviction action, Mr. Banks was permitted to re-open the federal case and file an amended petition. (R., p. 307). Mr. Banks's claims were dismissed, and he appealed. Ultimately, on April 20, 2009, The United States Supreme Court sent a letter denying his final writ of certiorari. (R., p. 307).

Therefore, it is Mr. Banks's position that 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.

The district court in its memorandum opinion denying Mr. Banks's motion to alter or amend reasoned that the line of cases beginning with *Freeman v. State*, 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992), determining what event marks the beginning of the period of limitation for filing an application for post-conviction relief, barred Mr. Banks's argument that his federal habeas corpus proceedings constituted a "proceeding following an appeal". The district court distinguished the case of *Atkinson v. State*, 131 Idaho 222, 953 P.2d 662 (Ct. App. 1998), which held that a petition to the United States Supreme Court for a writ of certiorari was filed after the denial of an appeal in the state courts, and where that petition for writ was denied, the limitation period begins to run on the date of that denial. *Id.* at 223. The district court reasoned that Mr. Banks's petition was not filed after direct appeal. (R., pp. 321-322).

It is Mr. Banks's contention that the district court erred in its ruling and by holding

that the *Atkinson* case did not apply. Mr. Banks argues that in fact, the denial of his petition for writ of certiorari (habeas corpus) was in fact a “proceeding following an appeal” in that it was filed on August 22, 2002, and was then stayed so Mr. Banks could pursue his state remedies on appeal from the dismissal of his first post-conviction. Following dismissal of his appeal from his earlier post-conviction action, Mr. Banks was permitted to re-open the federal case and file an amended petition. (R., p. 307). Mr. Banks’s claims were dismissed, and he appealed. Ultimately, on April 20, 2009, the United States Supreme Court sent a letter denying his final writ of certiorari. (R., p. 307). Therefore, Mr. Banks argues that his federal habeas corpus proceeding did constitute a proceeding following appeal as it was part of a continuous stream of events leading to the finality of his judgment of conviction, and pursued continuously regarding error he felt occurred at all levels of his proceedings.

The *Atkinson* court reasoned that a petition for certiorari to the United States Supreme Court qualifies as a proceeding following an appeal, due to the power of the United States Supreme Court to review state court decisions. *Id.* at 224. Mr. Banks argues that he was pursuing diligently his claims of fundamental errors including prosecutorial misconduct and a failure to instruct. It is Mr. Banks’s position that until his petition for writ was finally denied on April 30, 2009, the continuous stream of events leading to the finality of his conviction had not run. In other words, he argues that his habeas corpus proceeding constitutes a proceeding following appeal under *Atkinson*, and I.C. § 19-4902.

2. Mr. Banks's Petition should have been allowed under I.C. 19-4901.

The district court stated that it was "unnecessary to engage in an analysis of why this petition represents an improper successive petition." (R., 323). The district court apparently concluded, though it did not specifically analyse that the petition was an improper successive petition. Mr. Banks's contends that the district court erred by failing to allow his petition under I.C. § 14-4901. Mr. Banks argues that 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, allowing a successive petition under I.C. § 19-4901. He contends that the ineffectiveness of his attorney at his first post-conviction prevented him from properly presenting his arguments.

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. *See id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. *See Workman*, 144 Idaho at 522, 164 P.3d at 802.

As stated above, summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

It bears repeating that on review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Mr. Banks contends that he raised substantial facts in his pleadings (See R., pp. 3-22, 104-223) concerning the performance of his attorneys, that his underlying claims were not adequately presented, and that the inadequate presentation of his claims was due to the inadequate performance on his attorneys. Mr. Banks contends that he raised numerous facts presenting issues regarding ineffective performance by his attorney that caused his underlying claim to be inadequately presented.

It is further Mr. Banks's contention that because he raised such claims, and supported them with the facts in his pleadings which the district court specifically considered (R., p. 313), that summary dismissal, and the failure to amend or alter said dismissal upon his motion, was error. The district court, on the other hand, determined

that it was "unnecessary to engage in an analysis of why this petition represents an improper successive petition." (R., 323). As a result, the district court failed to properly determine whether or not a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file as required by law. Consequently, as the district court failed to properly analyse the factual questions raised by Mr. Banks's pleadings and by the record, the court erred by summarily dismissing his petition.

IV. CONCLUSION

Based on the above, Mr. Banks respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.

DATED this 7 day of December, 2011.


STEPHEN D. THOMPSON
Conflict Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7 day of December, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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