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Allsop v. State Respondent's Brief Dckt. 38812

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

WILLIAM ALLSOP

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38812

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

HONORABLE JOEL E. TINGEY
District Judge

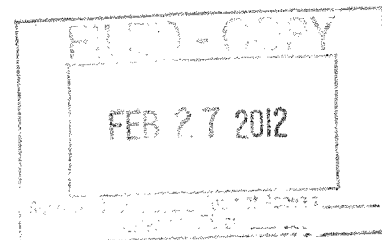
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STATEMENT OF THE CASE

Nature Of The Case

William Ronald Allsop appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

"In February 2007, Allsop pled guilty to lewd conduct with a minor under sixteen." State v. Allsop, 2009 Unpublished Opinion No. 352, Docket No. 34279, p.1 (Idaho App. Feb. 11, 2009). The court imposed a unified life sentence with fifteen years fixed. Id. Allsop appealed arguing his sentence is excessive. Id. The Idaho Court of Appeals affirmed, id., and issued its Remittitur on April 22, 2009 (Appendix A).

Allsop filed a *pro se* petition for post-conviction relief on August 31, 2010, claiming his attorney was ineffective for failing to advise him of his rights as set forth in Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006). (R., pp.3-9.) Allsop also filed a motion for the appointment of counsel, which the district court granted. (R., pp.10-14.)

The state filed an answer and motion for summary dismissal asserting, among other defenses, that Allsop's petition should be dismissed as untimely. (R., pp.15-20.) The district court conducted a hearing on the state's motion at which counsel for Allsop conceded the petition was untimely and stated he did not, at that time, have any evidence to support a claim that the statute of limitation should be tolled. (Tr., p.1, L.14 – p.2, L.15.) At the conclusion of the hearing, the court

granted the state's request to dismiss Allsop's petition as untimely. (R., pp.21-22.)

Allsop timely appealed. (R., pp.23-25.)

ISSUE

Allsop's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4). The state rephrases the issue as:

Has Allsop failed to establish that the district court erred in summarily dismissing his untimely petition for post-conviction relief?

ARGUMENT

Allsop Has Failed To Show Error In The Summary Dismissal Of His Untimely Petition For Post-Conviction Relief

A. Introduction

Allsop filed a petition for post-conviction more than one year after his conviction became final. (R., pp.3-7; Appendix A.) The district court concluded that the petition should be dismissed because it was barred by the applicable one-year statute of limitation. (R., p.22.) On appeal, Allsop does not challenge the district court's dismissal of his petition on the grounds that it is untimely. Indeed, Allsop's brief contains no argument whatsoever. (Appellant's Brief, p.6 (section entitled argument is blank).) Instead, Allsop asserts in the conclusion section of his brief that he would like the Court to reduce his sentence. (Appellant's Brief, p.7.) Because Allsop does not challenge the basis for dismissing his petition and because his request for a reduction of his sentence is not properly before this Court, Allsop has failed to establish he is entitled to any relief.

B. Standard Of Review

On appeal from 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. The District Court Correctly Dismissed Allsop's Petition As 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." 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 v. State, 148 Idaho 247, 220 P.3d 1066 (2009); Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Kriebel v. State, 148 Idaho 188, ___, 219 P.3d 1204, 1206 (Ct. App. 2009), *review denied* 11/20/09.

Allsop does not contest the district court's finding that his petition was filed beyond the one-year statute of limitation, nor could he in light of his concession below that the petition was not timely filed and he had no evidence to support a claim of tolling. The Court should, therefore, affirm the dismissal of Allsop's petition on this unchallenged basis. See, e.g., State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis).

Further, the only "claim" Allsop raises on appeal is not properly before this Court. Specifically, Allsop's only request on appeal is that the Court "consider a reduction of sentence." (Appellant's Brief, p.7.) This issue is not properly before this Court as it was not the basis for Allsop's post-conviction petition (see R., p.5) and

because this Court has already considered and rejected Allsop's request for sentencing relief. Allsop, supra.

Because Allsop has failed to establish any basis for reversing the district court's dismissal of his post-conviction petition or any other basis for relief, the district court's order should be affirmed.

CONCLUSION

The state respectfully requests this Court affirm the district court's summary dismissal of the petition for post-conviction relief.

DATED this 27th day of February, 2012.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of February 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:

WILLIAM RONALD ALLSOP
IDOC #85675
ICC
PO Box 70010
Boise, ID 83707



JESSICA M. LORELLO
Deputy Attorney General

JML/pm

APPENDIX A

In the Court of Appeals of the State of Idaho

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STATE OF IDAHO,

Plaintiff-Respondent,

v.

WILLIAM RONALD ALLSOP,

Defendant-Appellant.

OFFICE OF THE ATTORNEY GENERAL
CRIMINAL DIVISION

REMITTITUR

NO. 34279

TO: SEVENTH JUDICIAL DISTRICT, COUNTY OF BONNEVILLE.

The Court having announced its unpublished Opinion in this cause February 11, 2009, and having denied Appellant's Petition for Review on April 16, 2009; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the unpublished Opinion, if any action is required.

DATED this 22nd day of April, 2009.

Stephen Kenyon
Clerk of the Court of Appeals
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge

I, Stephen W. Kenyon, Clerk of the Court of Appeals of the State of Idaho, do hereby certify that the above is a true and correct copy of the Remittitur entered in the above entitled cause and now on record in my office.
WITNESS my hand and the Seal of this Court 4/22/09

STEPHEN W. KENYON

Clerk

By: Jan P. [Signature]

Deputy

SCANNED