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Brennan v. State Respondent's Brief Dckt. 39391

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PETER BRENNAN,)	
)	
Petitioner-Appellant,)	NO. 39391
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

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

Statement of Facts and Course of Proceedings

Brennan pled guilty to one count of lewd conduct with a minor. (R., pp.3-4, 32.) The district court sentenced Brennan to a 25-year unified sentence with the first 10 years fixed. (R., pp.3, 32.) The district court denied Brennan's subsequent Rule 35 request for reduction of sentence. (R., pp.32-33.) Brennan did not appeal his underlying sentence or the denial of his Rule 35 motion. (R., pp.4, 33.)

Statement of the Facts and Course of Post-Conviction Proceedings

Brennan filed a *pro se* "Successive Petition and Affidavit for Post Conviction Relief"¹ "within one year of the Court's order denying his Rule 35 motion, but more than two years following the entry of the Amended Judgment of Conviction and Commitment." (R., pp.3-15, 33.) He claimed his counsel had

¹ Although Brennan calls his petition for post-conviction relief "successive," it is the only petition for post-conviction relief filed in this case according to the record before this Court. This appears to be Brennan's attempt to circumvent statutorily mandated filing limitations: "Mr. Brennan brings the following claims under the successive petition as there is no time limitation imposed on it[.]" (Appellant's brief, unnumbered p.2.)

been ineffective for failing to file a suppression motion and at his sentencing. (R., pp.4-5.)

The district court filed an order denying Brennan's request for appointment of counsel in the post-conviction action and notice of intent to dismiss the petition. (R., pp.31-35.) The court found Brennan's application for post-conviction relief was untimely as it related to his underlying sentence and Brennan's Rule 35 motion did not extend the time for filing his petition under the facts presented. (R., pp.33-34.) It further found Brennan had failed to "assert facts sufficient to raise the possibility of a valid claim for equitable tolling that could be developed with the assistance of counsel." (R., p.34.)

Brennan filed a response to the court's notice of intent to dismiss, asserting there was no time limit on a successive petition for post-conviction relief. (R., p.36.) Brennan then conceded the district court "may be correct in denying appointment of counsel," but contended "the real issue here is a violation of the Petitioners [sic] Fourteenth Amendments [sic] guaranteeing the Petitioner his right to due Process [sic]." (Id.)

The district court filed an order dismissing Brennan's *pro se* successive petition for post-conviction relief as untimely, finding Brennan had "presented nothing in either his petition or response tending to show that his circumstances fall within those situations where the equitable tolling doctrine would apply." (R., p.42.)

Brennan timely appeals from the order dismissing his petition. (R., pp.44-48.)

ISSUE

Brennan states the issues on appeal as:

1. Did the District Court issue an order to waive attorney client privilege to allow Mr[.] Brennan to present his factual support to his allegation/claims in the open court?
2. Did the District Court error [sic] in not issue [sic] an order to waive attorney clien [sic] privilege?
3. Did the District Court error [sic] in dismissing Mr[.] Brennan's successive petition for post conviction relief?
4. Did the District Court error [sic] in not granting the state's motion for scheduling order waiver of attorney client privilege and response to motion for appointed counsel?

(Appellant's brief, unnumbered p.1 (original capitalization modified).)

The state rephrases the issue on appeal as:

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

ARGUMENT

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

A. Introduction

The district court summarily dismissed Brennan's petition for post-conviction relief after concluding Brennan failed to make any showing why his claims were timely. (R., pp.41-42.) On appeal, Brennan asserts the real issue on his appeal is "a violation of [his] Fourteenth [sic] Amendment guaranteeing [his] right to due Process [sic]." (Appellant's brief, unnumbered p.2.) Brennan has failed to show error in the district court's dismissal of the petition because it is untimely.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). 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. Dismissal Of Brennan's Petition For Post-Conviction Relief Was Appropriate Because It Was Untimely Filed And Brennan Failed To Allege Facts That, If True, Would Toll Application Of The Statute Of Limitations

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 Brennan'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 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, 30 P.3d 967 (2001); Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). The only three circumstances in which Idaho recognizes equitable tolling are: (1) "where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials," Sayas, 139 Idaho at 960, 88 P.3d at 779; (2) "where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction," Id.; and (3) where there are "claims which simply [were] 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)). Brennan's petition did not allege any of the foregoing bases (or any basis at all) as a reason to toll the limitation period for filing his petition. (See generally R., pp.3-15.)

Brennan did not file a direct appeal following the entry of judgment of conviction or the denial of his Rule 35 motion. His petition for post-conviction relief was filed September 15, 2011, more than two years after the filing of the judgment of conviction and commitment on June 30, 2009. (R., pp.3, 32.) The filing and subsequent denial of Brennan's Rule 35 motion did not extend the time within which Brennan was required to file a petition for post-conviction relief. See Gonzalez v. State, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct. App. 2003) (“[W]here there has been a post-judgment motion or proceeding in a criminal action, the order entered on the post-judgment matter ordinarily does not extend the statute of limitation for a post-conviction action pertaining to the judgment of conviction or the original sentence.”) Fox v. State, 129 Idaho 881, 884, 934 P.2d 947, 950 (Ct. App. 1997) (post-conviction petition, which was timely only from the denial of his Rule 35 motion, was properly dismissed as time-barred under I.C. § 19-4902, at least as to those claims in which Fox challenged only his conviction and sentence). Therefore, to be timely, any post-conviction claims in which Brennan challenged his judgment of conviction must have been filed within one year and 42 days of the entry of the June 30, 2009 judgment.

Brennan 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

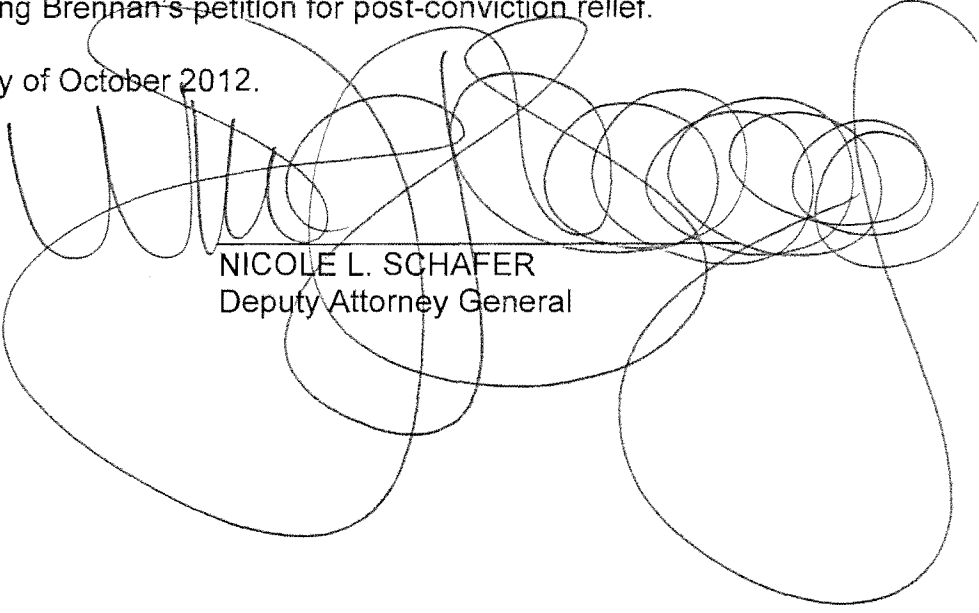
initial post-conviction petition. Instead, Brennan makes only blanket, unsupported claims that his attorney's actions in his representation constituted "mis-representation [sic] and eneffectiveness [sic]." (R., p.5.) Because Brennan failed to justify the untimely filing of his petition, he has failed to show that the district court erred in dismissing his self-termed successive petition for post-conviction relief.

The district court correctly concluded Brennan failed to present anything in his petition or response "tending to show that his circumstances fall within those situations where the equitable tolling doctrine would apply." (R., p.42.) As such the court's decision that Brennan's petition was untimely should be affirmed.

CONCLUSION

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

DATED this 9th day of October 2012.

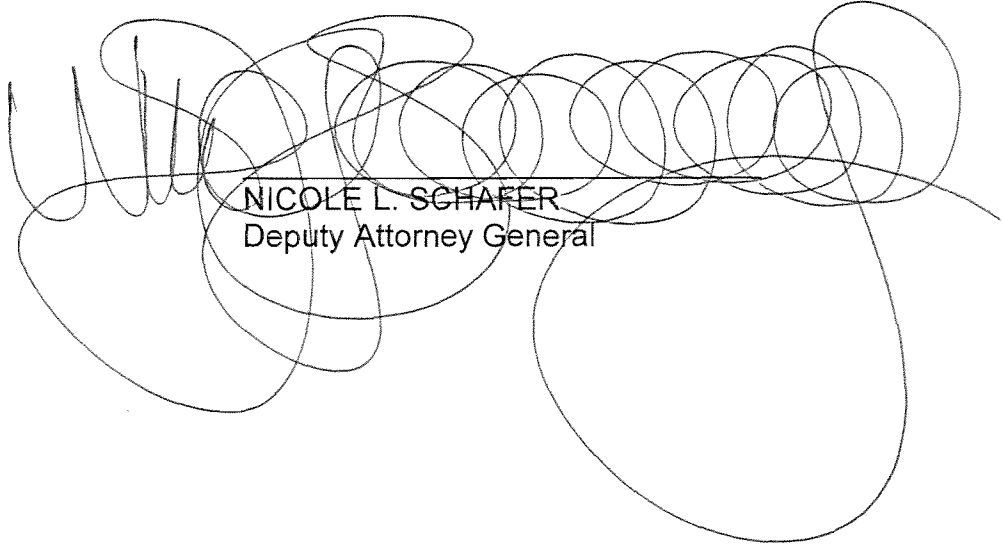


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of October 2012, I caused two true and correct copies of the foregoing REPLY BRIEF to be placed in the United States mail, postage prepaid, addressed to:

PETER BRENNAN
Inmate # 93142
Idaho Correctional Center
P.O. Box 70010
Boise, ID 83707



NICOLE L. SCHAFFER
Deputy Attorney General

NLS/pm