

2-11-2013

Atwell v. State Respondent's Brief Dckt. 39996

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN LEE ATWELL,)
)
) No. 39996
)
) Petitioner-Appellant,)
)
) Twin Falls Co. Case No.
 vs.) CV-2011-5379
)
)
)
) STATE OF IDAHO,)
)
)
) Respondent.)
)
)
)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

**HONORABLE RANDY J. STOKER
District Judge**

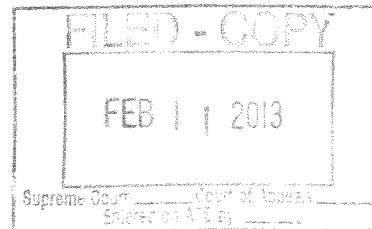
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STATEMENT OF THE CASE

Nature Of The Case

Bryan Lee Atwell appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

In his underlying criminal case, Atwell pled guilty to conspiracy to commit injury to a child in exchange for the state's agreement to dismiss a sexual battery charge and a sentencing enhancement. (R., pp.64, 77, 94.) On July 21, 2009, the district court entered judgment and imposed a fixed ten-year sentence but suspended the sentence and retained jurisdiction. (R., pp.76-81.) The court subsequently relinquished jurisdiction but *sua sponte* reduced Atwell's sentence to a unified ten-year term with seven years fixed. (R., pp.83-93.) The order relinquishing jurisdiction and granting sentencing relief was entered January 12, 2010. (R., p.83.) Atwell appealed, claiming the district court abused its discretion in relinquishing jurisdiction and not further reducing his sentence. (See R., p.95.) On November 18, 2010, the Idaho Court of Appeals affirmed both the relinquishment of jurisdiction and Atwell's sentence. (R., pp.94-95.) The Remittitur issued December 16, 2010.

On December 1, 2011, Atwell filed a *pro se* petition for post-conviction relief asserting the following claims: (1) "charges undisclosed"; (2) "illegal search and seizure"; (3) "vindictive prosecution"; (4) "duress"; (5) "judicial bias"; (6) ineffective assistance of counsel; (7) "disproportionate sentence"; (8) "priors unconstitutional"; and (9) complaints related to the denial of "parole-probation."

(R., pp.4-12 (capitalization altered).) Atwell also filed a motion for appointment of counsel, which the district court granted. (R., pp.26-29, 36, 103.)

The state filed a motion for summary dismissal, contending the “majority” of Atwell’s claims were untimely and that his claims regarding probation were *res judicata* because Atwell challenged the denial of probation on direct appeal. (R., pp.44-47.) The district court issued a Notice of Intent to Dismiss Petition for Post-Conviction Relief (“Notice”)¹ advising Atwell of its intent to dismiss his petition. Specifically, the court’s Notice stated “any issues arising from the conviction itself expired as of August 2010 (one year and 42 days from the judgment in July 2009).” (R., p.52.) The court also specifically addressed Atwell’s claims individually, setting forth the grounds for dismissing each, which included grounds unrelated to the timeliness of Atwell’s petition. (R., pp.52-61.)

Atwell, through counsel, filed a response to state’s motion, which response also referenced the court’s Notice, and was treated by the court as a response to its Notice. (R., pp.119-126, 128.) With respect to the statute of limitation, Atwell asked the court to “invoke the doctrine of ‘equitable tolling’ to the extent that said relief is available to him” and asserted that his petition was timely “at least in regard to the actions of counsel occurring after the Judgment of Conviction was entered,” which he identified as his ineffective assistance of appellate counsel and disproportionate sentence claims. (R., pp.122-23.)

The district court dismissed Atwell’s petition, rejecting Atwell’s request for equitable tolling and concluding Atwell failed to establish he was entitled to a

¹ As noted by the district court, its Notice was “specific and broader than the State’s motion.” (R., p.129.)

hearing on any of his claims. (R., pp.128-130.) Atwell filed a motion to reconsider and a supporting affidavit in which he averred he was never advised of his “right to, or deadlines for, filing of appeals, post convictions or Rule 35s.” (R., pp.132-136.) The court denied the motion (R., p.137), after which Atwell filed a timely notice of appeal (R., pp.139-41).

ISSUE

Atwell states the issue on appeal as:

Whether the district court erred when it summarily denied the post conviction relief petition as untimely and whether a remand is necessary because Petitioner received ineffective assistance of post conviction counsel.

(Appellant's Brief, p.4.)

The state rephrases the issue on appeal as:

Although the district court erred in concluding some of Atwell's claims were untimely, the court dismissed all of Atwell's claims on other grounds, which Atwell does not challenge. Has Atwell failed to show that rather than affirming on the unchallenged bases, he is entitled to remand based on his assertion, raised for the first time on appeal, that post-conviction counsel was ineffective?

ARGUMENT

Atwell Has Failed To Establish He Is Entitled To Remand Rather Than Having This Court Affirm The Dismissal Of His Petition On The Unchallenged Grounds Identified By The District Court

A. Introduction

Atwell contends the “district court was unquestionably wrong in its timeliness analysis since it used the wrong version of I.A.R. 14” in calculating the statute of limitation. (Appellant’s Brief, p.10.) The state agrees that the district court’s conclusion that some of Atwell’s claims were subject to dismissal based upon the one-year statute of limitation was erroneous. However, as Atwell acknowledges, the district court made “alternative rulings and dismissed every claim on grounds other than timeliness.” (Appellant’s Brief, p.8.) Atwell does not challenge the dismissal of his claims on the alternative grounds identified by the district court. Instead, Atwell argues this Court should remand this case for further proceedings based on his claim, raised for the first time on appeal, that post-conviction counsel was ineffective. (Appellant’s Brief, pp.12-15.) The Court should reject Atwell’s request and, consistent with Idaho law, affirm the dismissal of Atwell’s post-conviction dismissal on the unchallenged grounds upon which the district court dismissed Atwell’s claims.

B. Standard Of Review

“[R]eview of the district court's construction and application of the limitation statute is a matter of free review.” State v. Ochieng, 147 Idaho 621, 624, 213 P.3d 406, 409 (Ct. App. 2009) (citing Freeman v. State, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992)).

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. Atwell's Petition Was Timely Filed With Respect To All Claims Alleged Therein

A petition for post-conviction relief must be filed "within one (1) 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 is later." I.C. § 19-4902. The district court entered judgment in Atwell's case on July 21, 2009, at which time the court retained jurisdiction. (R., p.76.) At that time, I.A.R. 14(a) provided, in relevant part: "In a criminal case, the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction pursuant to Idaho Code. When the court releases its retained jurisdiction or places the defendant on probation, the time within which to appeal shall commence to run."² Thus, the time for filing an appeal in Atwell's case was tolled during the retained jurisdiction period.

² Rule 14(a), I.A.R., was amended, effective July 1, 2011. The amendment to I.A.R. 14(a) eliminated the quoted language and replaced it with: "If, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code § 19-

The district court relinquished jurisdiction in Atwell's case on January 12, 2010 (R., p.83), and Atwell filed a timely notice of appeal from that order (see R., pp.94-95). The Remittitur in Atwell's appeal issued December 16, 2010. Atwell had one year from that date in which to file his post-conviction petition. I.C. § 19-4902. Atwell filed his post-conviction petition on December 1, 2011, just inside the one-year deadline. Atwell's petition was, therefore, timely and the district court erred in concluding some of Atwell's claims were barred by the statute of limitation.³

D. This Court Should Affirm The Dismissal Of Atwell's Petition On The Alternative Grounds Not Challenged On Appeal

Where a basis for a ruling by a district court is unchallenged on appeal, the appellate court will affirm on the unchallenged basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998). As Atwell concedes, the district court dismissed all of his claims for reasons other than timeliness. (Appellant's Brief, pp.8, 12; see also R., pp.52-61 (court's Notice setting forth

2601(4), the length of time to file an appeal from the sentence contained in the criminal judgment shall be enlarged by the length of time between entry of the judgment of conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided, however, that all other appeals challenging the judgment must be brought within 42 days of that judgment."

³ Atwell contends the error in the calculation of the statute of limitation by both the state and the district was the result of an "assum[ption] that the current version was the version in effect at the time of the conviction." (Appellant's Brief, p.11.) This is not, however, entirely clear from the record as neither the state nor the district court referenced the language of I.A.R. 14(a). (See generally R., pp.45-46, 51-52, 128-130.) It is equally possible that the court and prosecutor simply did not account for the tolling provisions of I.A.R. 14(a) regardless of the version. In any event, the state concedes Atwell's petition was timely and his assertion that the version of I.A.R. 14(a) applicable to his case was the one in effect when judgment was entered.

grounds for dismissal in addition to statute of limitation).) Atwell also acknowledges the principle that this Court may affirm the dismissal of his petition on the grounds stated in the district court's notice that he does not challenge on appeal. (Appellant's Brief, p.12.) Atwell, however, invites this Court to disregard that principle, claiming it "is not the proper or equitable result here." (Appellant's Brief, p.12.) According to Atwell, the "proper" and "equitable" result is to "remand[] back to the district court to start again with competent counsel." (Appellant's Brief, pp.12-13.) In support of his request, Atwell relies on the United States Supreme Court's opinion in Martinez v. Ryan, 132 S.Ct. 1309 (2012). (Appellant's Brief, pp.13-15.) Atwell's reliance on Martinez is misplaced and his request for remand should be rejected.

At issue in Martinez was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance of counsel claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 132 S.Ct. at 1313. In resolving this issue, the Court held, "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez, 132 S.Ct. at 1320. Martinez clearly has no relevance here not only because this is not a federal habeas proceeding, but also because Martinez has no application in Idaho since, unlike the Arizona law at issue in Martinez, Idaho does not

categorically bar defendants from raising ineffective assistance of counsel claims on direct appeal, see Smith v. State, 146 Idaho 822, 834, 203 P.3d 1221, 1233 (2009), and because Idaho has a mechanism for raising ineffective assistance of post-conviction counsel, I.C. § 19-4908; Hernandez v. State, 992 P.2d 789, 792 (Ct. App. 1999).

That Atwell does not believe his post-conviction attorney “know[s] the applicable law” regarding the statute of limitation does not make it improper for this Court to affirm the dismissal of Atwell’s petition for the reasons cited by the district court that did not involve the statute of limitation. (Appellant’s Brief, p.14.) Atwell’s assertion that post-conviction counsel did not “address the merits of the claims or provide any additional support for them and so gave the court no reason not to summarily dismiss them for the alternative reasons” *because* he “believed that the statute of limitations issue was controlling” also does not compel the remedy he seeks. (Appellant’s Brief, p.15.) While post-conviction counsel undoubtedly stated in his response to the state’s motion and the court’s Notice that his “primary focus” would be on the statute of limitation (R., p.122), Atwell’s suggestion that post-conviction counsel would have “provide[d] . . . additional support” for the claims absent the statute of limitation issue is entirely speculative. Atwell is not entitled to an assumption that post-conviction counsel could have offered additional evidence in support of Atwell’s claims, much less a finding, made for the first time on appeal and without any evidentiary support, that post-conviction counsel was ineffective in his decision to focus on the statute of limitation, which would bar consideration of even a meritorious claim. See


State v. Parsons, 153 Idaho 666, ---, 289 P.3d 1059, 1061 (Ct. App. 2012) (“Idaho appellate courts generally will not consider an assertion of error on appeal unless the issue was preserved in the trial court proceedings.”) (citations omitted). This Court should reject Atwell’s request to adjudicate his post-conviction counsel ineffective and require Atwell to file a successive petition as authorized by I.C. § 19-4908 and prove his claim that post-conviction counsel was ineffective in the appropriate forum.

Because Atwell has failed to challenge the district court’s dismissal of his petition on all the grounds stated in the Notice, he is not entitled to relief and this Court should affirm the Judgment Dismissing Post Conviction Petition.

CONCLUSION

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

DATED this 11th day of February, 2013.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2013, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
Silvey Law Office, Ltd.
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Star, Idaho 83669



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