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Atwell v. State Appellant's Brief Dckt. 39996

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN LEE ATWELL,)
)
 Plaintiff-Appellant,) NO. 39996
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

APPELLANT'S BRIEF

**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

GREG S. SILVEY
Attorney at Law
P.O. Box 565
Star, Idaho 83669

(208) 286-7400

**ATTORNEY FOR
APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

**ATTORNEY FOR
RESPONDENT**

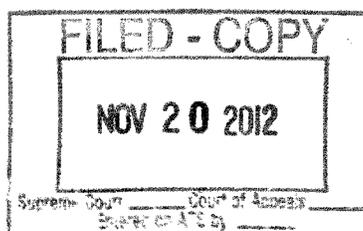


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STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the summary dismissal of his petition for post conviction relief asserting that the court erred when it applied the revised version of I.A.R. 14, rather than the version in effect at the time of his criminal case, in determining when the statute of limitations ran on his post conviction claims.

Briefly, in the criminal case, the defendant pled guilty, was sentenced to a rider, went on his rider, was flopped, then filed and prosecuted a direct appeal (including a petition for review which was denied), all prior to July 1, 2011.

Petitioner filed a timely petition for post conviction relief. However, the district court, apparently failing to realize that I.A.R. 14 (time for filing appeals) had been amended effective July 1, 2011, summarily dismissed all his claims relating to his conviction (as opposed to his sentence) as being time barred because he failed to appeal them within 42 days of the judgment. The court also made alternative rulings dismissing these claims.

Since the court applied the wrong law, it clearly erred. But to make matters worse, his appointed post conviction counsel also failed to argue that the current version of I.A.R. 14 could not have required an appeal of the conviction to be taken some two years prior to the amendment which would allow such an appeal. Instead, appointed counsel conceded that the majority of the claims were time barred and because of this did not argue their merits, but instead simply made an absurd equitable tolling argument.

Thus, Appellant asserts that the summary dismissal must be reversed because the district court was clearly wrong about the timeliness issue. Further, since Appellant received ineffective assistance of post conviction counsel who failed to correct the court and then failed to address the merits of the claims, this matter should be reversed and remanded so that competent counsel can address the claims and prosecute the post conviction petition.

Statement of the Facts and Course of Proceedings

The background of this matter is explained by the district court in its notice of intent to dismiss petition for post conviction relief.

The Judgment of Conviction establishes that Atwell was sentenced to the Idaho State Penitentiary for the crime of Conspiracy to commit Injury to Children for a unified sentence of 10 years, 10 determinate, 0 years indeterminate, on July 20, 2009 with the Court retaining jurisdiction for a period of one hundred eighty days. Atwell did not appeal from that judgment. A review hearing was held on January 4, 2010. The Court relinquished jurisdiction on January 12, 2010 and reduced Atwell's sentence to a unified sentence of 10 years, 7 determinate, 3 years indeterminate. Atwell filed an appeal of the Order Relinquishing Jurisdiction on January 15, 2010. The Court of Appeals affirmed the decision on November 16, 2010. Atwell filed a Petition for Review that was denied on December 9, 2010. Atwell then filed this Petition for Post-Conviction Relief on December 1, 2011.

In his petition, Atwell asserts that his "conviction should be overturned" or that his "sentence and plea agreement should be exchanged for a plea of misdemeanor battery" or that his sentence be amended to a sentence of 6 years with probation.

Id., p. 2. (R. p. 49.)

To further explain, Petitioner filed a verified pro se petition for post conviction raising some seven claims related to his conviction and four claims

related to his sentence or other post sentencing matters. (R. p. 4-25.) Petitioner also requested that counsel be appointed (and counsel was). (R. p. 26-29, 36.)

The state moved for summary dismissal and filed a memorandum in support, arguing that the majority of the claims are barred by the statute of limitations. (R. p. 45.) According to the state, this was because no appeal was filed at the time of the conviction, but only after jurisdiction was relinquished. Thus, since more than a year and 42 days had passed since the conviction, the claims related to the conviction are time barred. (R. p. 45-46.)

The court then issued a notice of intent to dismiss which followed the state's theory of untimeliness, but also made alternative rulings regarding the claims. (R. p. 51-61.)

Appointed counsel filed a memorandum in opposition to motion for summary disposition which conceded that the majority of the claims are time barred and so did not discuss the actual factual allegations, but instead requested that the state of limitations be equitably tolled. (R. p. 121-122.)

The court rejected all of appointed counsel's arguments and requests and entered its judgment dismissing the petition. (R. p. 128-130.)

Appointed counsel then filed a motion to reconsider, which was denied. (R. p. 135-136, 137.)

Petitioner timely appeals from both the judgment dismissing the petition and from the motion to reconsider. (R. p. 139-140.)

ISSUE

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.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST-CONVICTION RELIEF PETITION AS UNTIMELY AND A REMAND IS NECESSARY BECAUSE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF POST CONVICTION COUNSEL

A. Standard of Review

“Our review of the district court’s construction and application of the time limitations aspects of the Uniform Post-Conviction Procedure Act is a matter of free review.” *Kriebel v. State*, 148 Idaho 188 (Ct.App. 2009).

Also, the standard of review for a motion for reconsideration is as explained in *Straub v. Smith*, 145 Idaho 65 (2007):

A decision to grant or deny a motion for reconsideration generally rests in the sound discretion of the trial court. Abuse of discretion is determined by a three part test which asks whether the district court “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason.”

Id. p. 71 (internal citations omitted).

B. The Arguments and the Court’s Rulings

As mentioned above, Petitioner filed a verified pro se petition for post conviction relief raising some seven claims related to his conviction and four claims related to his sentence or other post conviction matters. (R. p. 4-25.) The state moved for summary dismissal and filed a memorandum in support, arguing that the majority of his claims are barred by the statute of limitations. (R. p. 45.)

The state argued that a petition for post conviction relief must be filed within 1 year from the expiration of the time for appeal or from the determination of the appeal and that an appeal of a conviction must be filed within 42 days of the judgment according to I.A.R. 14(a). (R. p. 45-46.) The state explained that in this case the judgment of conviction was entered on July 21, 2009, and so defendant had 42 days to appeal it but he did not. Thus, he was required to file his petition for post conviction relief on issues regarding his conviction by September 1, 2010. Since his petition was filed on December 1, 2011, it is untimely as to challenges to his conviction and must be dismissed as to those issues. (R. p. 46.)

The state then explained that only claims related to the denial of probation following his retained jurisdiction are timely, but those are barred by res judicata. (R. p. 46.)

The court issue a notice of intent to dismiss which followed the state's theory of timeliness:

Additionally, the statute of limitation for post-conviction actions provides that a petition for post-conviction relief "may be filed at 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." I.C. § 19-4902.

Atwell utilized several appeal options available to him. The latest decision on a proceeding following the appeal was a dismissal of a petition for review by the Court of Appeals on December 9, 2010. Since this petition was filed on December 1, 2011, within the one year deadline, the petition is timely. However, as will be discussed, portions of his claim that predate his conviction are clearly barred by the statute of limitations.

ANALYSIS AND DECISION

Atwell raises the following issues in his petition for post-conviction relief:

1. Undisclosed charges;
2. Illegal search and seizure;
3. Vindictive prosecution;
4. Duress;
5. Judicial bias;
6. Ineffective assistance of counsel: Failure to investigate, Guilty Plea, and Sentencing;
7. Ineffective appellate counsel;
8. Disproportionate sentence;
9. Illegal sentencing enhancement based upon prior convictions;
10. Illegally imposed sentence; and
11. Arbitrary denial of probation.

Portions of Atwell's claims are barred by the statute of limitations. Atwell did not appeal from the original judgment of conviction. Therefore, the time for filing a petition for post-conviction relief relating to any issues arising from the conviction itself expired as of August 2010 (one year and 42 days from the judgment in July 2009). Those aspects of his claims which fall into this category will be discussed below.

Id., p. 4-5. (R. p. 51-52.)

The court's rulings were somewhat unclear, but basically it went on to find that claims 1, 2, 3, 5 and 7 were untimely. But the court's same reasoning, to wit, if the claims concerned the conviction and not the sentence they are time barred, would logically apply to claims 4 and 6 as well (as appointed counsel

assumed, more on this below). Also, the court did make alternative rulings and dismissed every claim on grounds other than timeliness.

Appointed counsel filed a memorandum in opposition to motion for summary disposition (rather than a response to the court's notice of intent to dismiss). The memorandum states since the court's finding that the petition was untimely as to any issues arising from the conviction itself would effectively prevent Petitioner from arguing the majority of his factual allegations, to wit, issues 1-6, the statute of limitations will be the primary focus of the brief. (R. p. 121-122.) Appointed counsel did not argue the merits of claim 6 (and presumably 4) because he thought that the court had found it to be time barred. (R. p. 124.)

Regarding the timeliness issue, appointed counsel requested only that the court invoke the doctrine of equitable tolling to the extent that said relief is available to him. (R. p. 122.) Appointed counsel also (correctly) argued that the claim of ineffective assistance of appellate counsel was a timely claim (even under the court's theory of timeliness) since it concerned counsel's performance after the judgment of conviction was issued. (R. p. 123.) Appointed counsel also believed the court found that issue 8 was time barred even though it had not. (R. p. 123.)

As to the claims that even the court found timely, appointed counsel made some nonsensical arguments which will not even be attempted to be explained here. (R. p. 123-125.)

The memorandum concluded by reiterating that the primary subject of the memorandum is the statute of limitations and requested 7 days in which to supplement the record with an affidavit. "It is Atwell's position that he did not know/was not informed of the deadlines in which to file an appeal concerning his Judgment of Conviction and was also not made aware of the deadlines relating to the filing of a Petition for Post-Conviction Relief." (R. p. 125.)

The court then filed a judgment dismissing post conviction relief, which explained:

Atwell concedes that his petition relating to any claims arising from the conviction are time barred. Nevertheless he asks the court to consider the doctrine of equitable tolling. He presents absolutely no pleading, argument or evidence to support this position. The Court did advise Atwell that his petition would be dismissed as to any claims barred by the statute of limitations. The Court did not advise him that his petition would be dismissed for failure to support his untimely filing based upon an equitable tolling argument. The Court was not required to do so since Atwell has failed to amend his pleading or to offer any evidence in support of this argument. His "equitable tolling" assertion is without merit.

Judgment p. 1-2. (R. p. 128-129.)

Significantly, the judgment also explained:

His second argument is that the State seeks summary disposition on res judicata grounds. The Court has addressed these issues in its notice of intent to dismiss which is specific and broader than the State's motion. . . .

Judgment, p. 2. (R. p. 129.)

As to the request to supplement the petition, the court stated:

Next he asks for 7 days to file an affidavit to supplement the record. The Court has given Atwell more than adequate time to do this and declines to grant this request. If it is Atwell's position that he was not informed of the deadlines in which to file an appeal concerning his judgment of conviction, an affidavit in support thereof is of no

avail. That is an issue that should have been raised in a petition that was required to be filed within one year and 42 days from the conviction. This claim would be time barred even if he made such affirmation.

Judgment, p. 2-3. (R. p. 129-130.)

The court went on to reject all of appointed counsel's arguments and requests. (R. p. 130.) The court then dismissed the petition. (R. p. 130.)

The next day, an affidavit of Petitioner was filed which inter alia, swore that he was never advised of any deadlines. (R. p. 132-133.) More importantly, attached to it was the version of I.A.R. 14 in effect in 2009. (R. p. 134.)

Appointed counsel then filed a bare motion for reconsideration which was based on an affidavit of facts of Petitioner. (R. p. 135-1636.) However, appointed counsel never pointed out in its motion that the relevant part of the rule at the time of the criminal case provided that:

. . . 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. . . .

I.A.R. 14. (R. p. 134.)

The court denied the motion for reconsideration without explanation. (R. p. 137.)

C. The Court Erred in Summarily Denying the Petition as Untimely

The district court was unquestionably wrong in its timeliness analysis since it used the wrong version of I.A.R. 14. The version in effect at the time of

the entire criminal case and direct appeal is as recited above. However, that rule was amended, effective July 1, 2011, to provide as follows:

. . . If, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code § 19-2601(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.

I.A.R. 14.

In other words, the court in this case utilized the current version of the rule which requires the actual conviction to be appealed within 42 days of its entry but allows the sentence to be appealed within 42 days from the time the court relinquishes jurisdiction. But of course, that was not the rule during the criminal case, which instead provided that the time to appeal from the conviction and sentence did not commence until 42 days after the court relinquished jurisdiction.

It appears that no one below, be it the prosecutor, appointed counsel, or the court, was aware of this amendment and just assumed that the current version was the version in effect at the time of the conviction. There was certainly no suggestion by anyone, nor could there be, that a rule that would not be promulgated for another two years could require Mr. Atwell to file a notice of appeal prior to the time that the time for appeal commenced to run. Nor can there be a suggestion that his failure to follow the then non-existent rule would

prevent his ability to challenge anything related to his conviction in his post conviction.¹

In short, the court was wrong about what version of the rule applied and so erroneously dismissed the claims in the petition for the reason that they were untimely. Further, the court erred when it denied the motion for reconsideration, because even if it was previously unaware of the amendment to I.A.R. 14, by that time the correct version of the rule was before the court.

D. A remand is necessary because Petitioner received ineffective assistance of counsel in an initial review proceeding

The real question here is not whether the district court erred in its timeliness analysis, that is undisputable. Rather, the real question is what to do about it. As explained above, the court made alternative rulings as to the claims it was dismissing which were never challenged by post conviction counsel because he wrongly conceded they were time barred. Thus, Appellant asserts that simply affirming the summary dismissal based on the unchallenged alternative grounds is not the proper or equitable result here, but rather, this matter should simply be remanded back to the district court to start again with

¹ Since it is not at issue here, Appellant takes no position as to whether the court was correct regarding the operation of the current version of the rule which under the court's theory, would require not only two appeals, but two post convictions as well.

competent counsel.²

While admittedly not directly applicable here, Appellant urges this result based in part on the sea change in law regarding the competence of post conviction counsel arising from the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), which concerned the federal habeas petition of a state prisoner. A bit of background is in order.

According to the federal statutes and pursuant to various cases of the United States Supreme Court, before a claim may be brought in federal court, it must be exhausted in state court, to wit, the highest court of a state must have had an opportunity to rule on it. In the event a claim is unexhausted, there is a procedural default that bars federal review unless the petitioner can show 'cause' for the default and 'prejudice' therefrom. While attorney inadvertence rising to the level of an independent constitutional violation does constitute cause, the ineffective assistance of post conviction counsel did not since there is no constitutional right to counsel in state PCR proceedings.

Then last term, the United States Supreme Court decided *Martinez*. Since this is not meant to be a comprehensive primer on federal habeas law, the following is a succinct explanation of *Martinez* as it appears in the Ninth Circuit case of *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012):

However, in *Martinez v. Ryan*, the Supreme Court found "it . . . necessary to modify the unqualified statement in *Coleman* [*Coleman v. Thompson*, 501 U.S. 722, 731, 111 S. Ct. 2546, 115 L.

² Appellant asserts the same is true as to the non-time barred claims since appointed counsel made only half hearted nonsensical arguments because as was stated in his memorandum, his focus was on the statute of limitations issue which he thought was controlling.

Ed. 2d 640 (1991)] that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." *Martinez* creates a narrow exception to *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." "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." The Supreme Court expressly held this to be a narrow equitable ruling and not a constitutional ruling. For a prisoner to meet this equitable rule establishing cause for a procedural default in a scenario applicable to this case, the prisoner must demonstrate that "counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland*" In addition, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Id. p. 1071-1072 (internal citations and footnotes omitted).

In other words, *Martinez* held that where a petition for post conviction relief is the first time in which a defendant may raise a claim of ineffective assistance of trial counsel, the ineffective assistance of his post conviction counsel may constitute cause to excuse his procedural default in not raising a claim and thus allow the federal court to consider it.

So again, while Appellant is not claiming that *Martinez* directly applies here, it does highlight the importance of competent post conviction counsel where certain claims concerning matters outside the record may only be raised for the first time in a post conviction. In our case, post conviction counsel clearly did not know the applicable law. Because he did not know the applicable law, he was unable to correct the court as to the applicable law.

But more to the point here, since post conviction counsel believed that the statute of limitations issue was controlling, he 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. Further, as post conviction counsel stated, the focus of his memorandum was the statute of limitations issue, and accordingly, his attempts to address the non-time barred claims were brief and nonsensical.

Given all this, Appellant asserts that the proper equitable remedy is to reverse and remand to the district court. At that time, newly appointed counsel can actually address the court's notice of intent to dismiss without being distracted by the timeliness red herring thrown up by the state and unfortunately, accepted by the court.³

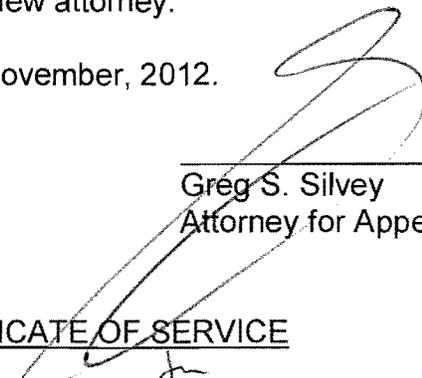
CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's summary denial of the post conviction petition be reversed and that this matter be remanded back to the

³ Appellant recognizes that a successive petition for post conviction relief may possibly be appropriate as well. There, petitioner would assert as sufficient cause for a successive petition, that post conviction counsel's ineffective assistance of counsel caused the claims to be wrongfully dismissed on timeliness grounds and also prevented counsel from arguing or providing support for any other grounds and so counsel essentially abandoned the claims. However, this would end up requiring yet another proceeding and so judicial economy suggests that a remand is the more efficient method of proceeding.

district court for appointment of a new attorney.

DATED this 20th day of November, 2012.



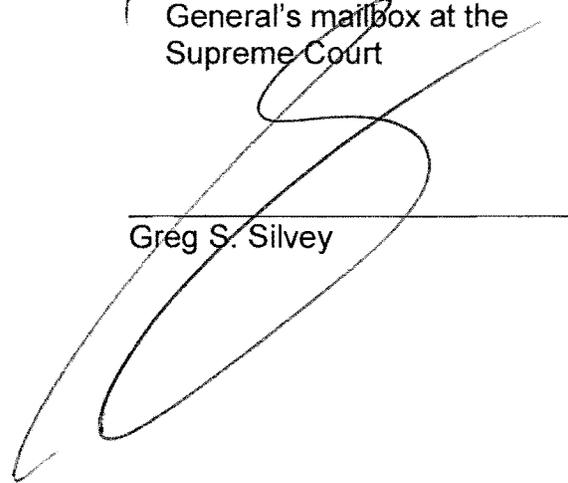
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
STATEHOUSE, ROOM 210
P.O. BOX 83720
BOISE, ID 83720-0010

- U.S. Mail, postage prepaid
- Hand Delivered to the Attorney General's mailbox at the Supreme Court



Greg S. Silvey