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Schultz v. State Respondent's Brief Dckt. 40391

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

WALLY KAY SCHULTZ,)	
)	No. 40391
Petitioner-Appellant,)	
)	Minidoka Co. Case No.
vs.)	CV-2011-96
)	
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 MINIDOKA**

**HONORABLE MICHAEL R. CRABTREE
District Judge**

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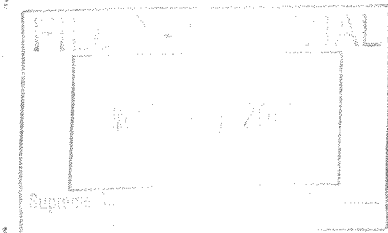


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STATEMENT OF THE CASE

Nature Of The Case

Wally Kay Schultz appeals from the summary dismissal of his successive petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In separate underlying criminal cases, a jury convicted Schultz of felony domestic battery and he pled guilty to possession of a controlled substance. (R., p. 135.) The matters proceeded to joint sentencing and the district court retained jurisdiction. (Id.) On May 22, 2006 the district court entered an order placing Schultz on probation. (Id.) Three days later it entered an order setting the terms and conditions of probation. (Id.)

Schultz's trial counsel filed a notice of appeal timely only from the second order. (R., p. 136.) The Idaho Court of Appeals ultimately dismissed this appeal as untimely. (Id.) The appellate court issued its remittitur on August 27, 2009. (Id.)

While the appeal of the underlying criminal cases was pending, Schultz filed petitions for post-conviction relief related to both cases on January 13, 2009, and March 24, 2009, respectively. (R., p. 136.) He did not allege claims of ineffective assistance of counsel for failing to file a timely appeal in either case, although he did unsuccessfully attempt to amend the petition to allege such a claim in one of them. (Id.) The district court appointed counsel to represent Schultz in both post-conviction cases. (Id.) The district court granted the state's motion to summarily dismiss the petitions on January 8, 2010. (R., p. 137.) The

Idaho Court of Appeals affirmed the dismissal on appeal on May 9, 2011, holding that the petitions were untimely because the untimely appeals in the criminal cases did not extend the time to file the post-conviction petitions. Schultz v. State, 151 Idaho 383, 256 P.3d 791 (Ct. App. 2011).

On January 21, 2011, Schultz initiated the current case by filing a successive petition for post-conviction relief. (R., p. 1.) In the petition Schultz asserted claims that his post-conviction counsel had been ineffective by failing to secure affidavits and make arguments that, he asserted, would have led to application of a “[d]iscovery exception” and prevented the dismissal of his initial petitions for post-conviction relief. (R., pp. 1-3.¹) The relief he ultimately requested was to be “allowed to re-file his original Post-conviction Cases and argue against the State’s Motion to Dismiss.” (R., p. 99.)

The state moved to dismiss the petition. (R., pp. 106-15.) In the motion the state argued that Schultz failed to show ineffective assistance of post-conviction counsel because Schultz failed to establish that post-conviction counsel could have prevented the dismissal of the petitions. (R., p. 113.) Schultz responded, contending that post conviction counsel failed to discover evidence that counsel in his criminal case and appeal advised Schultz that his time for filing the initial petitions was not running, which information would have led to his initial petitions not being dismissed as untimely. (R., pp. 119-28.)

¹ Schultz was later allowed to amend his petition to assert a claim of newly discovered evidence regarding the state crime lab. (R., pp. 58-60, 76, 91-92, 95-104.) Because Schultz does not challenge the dismissal of this claim on appeal (Appellant’s brief, p. 3), it is not further addressed in this brief.

The district court granted the state's motion for summary dismissal, but on a ground other than asserted by the state. (R., pp. 135-45.) Specifically the district court held that because Schultz asserted only a claim of ineffective assistance of post-conviction counsel, and no claim of ineffective assistance of trial counsel, Schultz failed to set forth a viable claim for post-conviction relief. (R., pp. 139-41.) Schultz filed a timely notice of appeal. (R., pp. 147, 149-50.)

ISSUE

Schultz states the issue on appeal as:

Should the order summarily dismissing the ineffective assistance of counsel claim be reversed because the district court dismissed on grounds not stated in the state's motion for summary dismissal without giving a 20-day notice and allowing Mr. Schultz to respond?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Schultz failed to show error in the summary dismissal of his successive petition for post-conviction relief?

ARGUMENT

Schultz Has Failed To Show That Dismissal Of His Successive Petition Was Improper

A. This Court Should Affirm On The Grounds Asserted In The State's Motion For Summary Dismissal

When the state files a motion for summary dismissal, setting forth adequate notice of the grounds for dismissal, and the court grants the state's motion for the reasons urged by the state, a post-conviction petitioner receives adequate notice of the grounds for dismissal. Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). The district court cannot, however, "dismiss a claim on a ground not asserted by the state in its motion unless the court gives the twenty-day notice required by Section 19-4906(b)." DeRushé v. State, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009) (citing Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995)). The purpose of the 20-day notice requirement of I.C. § 19-4906(b) is to give the petitioner the opportunity to provide further legal authority or evidence to establish a genuine issue of material fact. Fetterly v. State, 121 Idaho 417, 418, 825 P.2d 1073, 1074 (1991); State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Martinez v. State, 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).

Schultz correctly argues that the state moved to dismiss because Schultz failed to establish ineffective assistance of post-conviction counsel, but the district court dismissed for failure to state any claim of ineffective assistance of trial counsel. Schultz therefore lacked notice of the grounds ultimately applied by

the district court for dismissal. Where the grounds for dismissal articulated by the district court are erroneous, however, the appellate court “must consider ... any alternative ground” set forth in the summary judgment motion and “affirm the district court if ... summary judgment on this cause of action would have been proper on an alternative basis that was presented below.” Johnson v. McPhee, 147 Idaho 455, 466, 210 P.3d 563, 574 (Ct. App. 2009); see also Schultz v. State, 153 Idaho 791, ___, 291 P.3d 474, 480 (Ct. App. 2012) (affirming on ground different than trial court, but raised in state’s motion to dismiss). Because the state’s motion is meritorious, the district court’s dismissal should be affirmed on that basis.

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. Schultz Failed To Set Forth A Prima Facie Claim That His Initial Petitions Were Dismissed Because Of The Ineffective Assistance Of Post-Conviction Counsel

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.” In the case of successive petitions, the Idaho Supreme Court has “recognized that rigid application of I.C. § 19-4902 would preclude courts from considering ‘claims which simply are 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)). Because I.C. § 19-4908 contemplates successive petitions to assert a claim that “for sufficient reason was not asserted or was inadequately raised,” claims that “raise important due process issues” that were “not known to the defendant” within the one-year limitation period of I.C. § 19-4902(a) can be brought within a reasonable time of their discovery. Rhoades, 148 Idaho at 250-51, 220 P.3d at 1069-70. Absent a showing by the petitioner that the limitation period should be tolled, the failure to timely file a petition for post-conviction relief – either within the one-year limitation period of I.C. § 19-4902 or within a reasonable time of the discovery of new claims – is a basis for dismissal of the petition. Rhoades, 148 Idaho 247, 220 P.3d 1066; Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009).

In this case the statute of limitations for filing for post-conviction relief ran one year and 42 days from May 22, 2006. See Schultz v. State, 151 Idaho 383, 256 P.3d 791 (Ct. App. 2011) (untimely appeal did not extend time to file for post-conviction). Thus, Schultz should have filed his initial petition on or before July 3, 2007. Schultz filed his initial petitions on January 13, 2009 and March 24, 2009, respectively. (R., p. 136.) These petitions were dismissed as untimely brought. Schultz v. State, 151 Idaho 383, 256 P.3d 791 (Ct. App. 2011). Schultz, therefore, had the burden of establishing that ineffective assistance of his appellate counsel in defending against the statute of limitation defense was the reason his claims were dismissed as untimely. See I.C. § 19-4908; Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). He failed to carry that burden.

Initially, it is clear that post-conviction counsel appointed *after* the filing of the petitions was not responsible for the timing of the filing. Schultz's claim was that post-conviction counsel should have responded to the state's motion to dismiss the untimely petitions with affidavits or other evidence from the trial and appellate attorneys in the criminal case and by making certain legal arguments. (R., pp. 97-98.) The information Schultz believes his original post-conviction attorney should have presented included a letter from the bar association (R., p. 97; see also R., pp. 5-9) and an affidavit from the appellate lawyer in the criminal case (R., p. 97; see also R., pp. 10-23). The argument counsel should have made, according to Schultz, was that trial counsel had a duty to file a timely

appeal and that Schultz was misled by the belief that a timely appeal had been filed. (R., pp. 97-98; see also R., pp. 24-26.)

Schultz has failed to make a *prima facie* showing that his post-conviction counsel could have avoided the summary dismissal of his petitions. The Idaho Court of Appeals characterized Schultz's arguments against dismissal of the initial post-conviction petitions as follows:

Schultz argues that the district court erred in determining that his post-conviction petitions are barred by the statute of limitation because Schultz received ineffective assistance of counsel when his counsel failed to file timely direct appeals, and because Schultz did not discover this untimely filing until, at the earliest, the State's response on direct appeal. These circumstances, Schultz argues, tolled the statute of limitation in his cases. He asserts that when appeals were taken in his two criminal cases, he had no way of knowing that this Court would ultimately conclude that the notices of appeal were invalid because they were filed three days late. Schultz maintains that because he had a good faith belief that his appeals were timely, absent tolling of the statute of limitation he will be deprived of a reasonable opportunity to present his claims, and therefore will be deprived of due process.

Schultz, 151 Idaho at 386, 256 P.3d at 794. Applying existing Idaho authority, the Court of Appeals concluded "the statute of limitation on Schultz's properly pled post-conviction claims was not tolled," because the invalid appeal did not extend the time to file and Schultz "knew of the underlying facts giving rise to his claims." Id at 387, 256 P.3d at 795.²

² The Idaho Court of Appeals did not address whether tolling might have been applicable to a claim that trial counsel was ineffective for failing to timely file the notice of appeal, because such claim had not been pled. Schultz, 151 Idaho at 387, 256 P.3d at 795. Schultz did not assert a claim of ineffective assistance of trial counsel in his successive petition, and in fact requested as relief the reinstatement of the prior petitions that did not include any claim of ineffective assistance of counsel for failing to file a timely appeal. (R., p. 99 (requesting reinstatement of prior petitions in prayer for relief).)

Schultz failed to present a prima facie claim that post-conviction counsel could have prevented the dismissal of his untimely petitions. There was no tolling because the untimely notices of appeal did not toll the period to file and because Schultz was aware of the underlying facts supporting his claims. Schultz, 151 Idaho at 386-87, 256 P.3d at 794-95. Schultz presented no evidence that the notices of appeal were in fact timely filed, or that he was unaware of the underlying facts. His argument that he was “advised by counsel that his timeline for post-conviction was not running” (R., p. 122) fails because it was 2009 when he was first told he could file his post-conviction petition after his appeal (R., p. 13), well after the limitation period had run, and he in fact filed his petition (R., p. 136 (petition filed January 13, 2009)) before his appellate attorney advised him that his appeal might not be timely (R., pp. 18-19 (advising him of timeliness problem in February 11, 2009 letter)). The Court of Appeals already rejected his claim that his “mistaken belief that the law allowed him more time to file” tolled the limitation period. Schultz, 151 Idaho at 387, 256 P.3d at 795. Schultz did not present any claims or evidence that would call that holding into doubt.

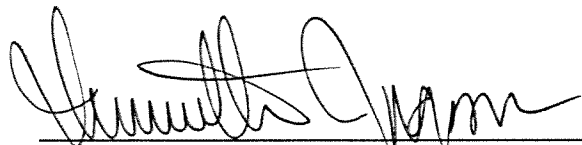
In this case the district court dismissed on a ground not asserted in the state’s motion. However, the court’s order may still be affirmed because the court could have granted the state’s motion on the ground asserted. Because Schultz failed to show that his post-conviction counsel’s handling of the statute of limitation issue had anything to do with the ultimate dismissal of the post-conviction petitions as untimely, he failed to establish any basis for reinstating

those petitions. He has therefore failed to show any error in the summary dismissal of his successive petition.

CONCLUSION

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

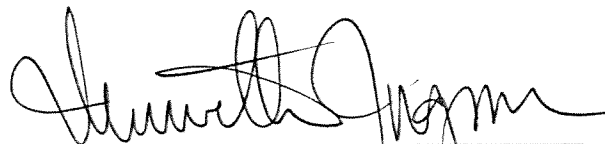
DATED this 11th day of March, 2013.


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2013, 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:

DEBORAH WHIPPLE
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