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Gerdon v. State Appellant's Brief Dckt. 40420

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|------------------------------------|
| JAMES GERDON, |) | |
| Petitioner-Appellant, |) | No. 40420 |
| v. |) | Twin Falls Cty. Case No. 2012-3345 |
| STATE OF IDAHO, |) | APPELLANT'S BRIEF |
| Respondent. |) | |

BRIEF OF APPELLANT

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

HONORABLE G. RICHARD BEVAN
District Judge

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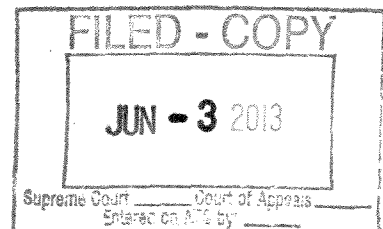


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I. STATEMENT OF THE CASE

A. Nature of the Case

James Gerdon appeals from the district court's Summary Dismissal dated September 5, 2012, of his successive petition for post conviction, and the Order Denying Motion to Reconsider dated September 19, 2012. (R., pp. 27-29, 38-40). Mr. Gerdon asserts that the district court erred by dismissing his petition for post-conviction relief and by failing to reconsider its dismissal.

B. Statement of the Facts & Course of Proceedings

On August 9, 2012, the petitioner, Mr. Gerdon, filed his successive Petition and Affidavit for Post-Conviction Relief claim due to failure of the court to rule on a motion he had filed, and for lack of access to the courts and effective assistance of counsel on his prior post-conviction. (R., pp. 9-12). On August 13, 2012, the district court issued a Notice of Intent to Dismiss Successive Petition for Post-Conviction Relief, giving Mr. Gerdon 20 days to respond. (R., pp. 16-26). The district court clerk failed to mail the 20 day notice, issued on August 13, 2012, until August 23, 2012. (R., p. 35). After receiving no response to the notice, the district court dismissed Gerdon's petition on September 5, 2012. (R., pp. 27-29).

On September 14, 2012, Mr. Gerdon filed a Motion to Reconsider along with an Affidavit in support and requested a hearing to submit evidence on the matter. (R. pp. 32-37). In that motion, Mr. Gerdon indicated that the Notice of Intent to Dismiss Successive Petition for Post- Conviction Relief was mailed to him on August 23, 2012 so that he was deprived of the opportunity to respond to the Notice of Intent to Dismiss. (R., pp. 35-36).

In its order denying Mr. Gerdon's motion to reconsider, the district court noted that it did appear that Gerdon was limited in the amount of time he had to file a response to the court's notice of intent to dismiss. (R., p. 38). Nonetheless, the district court denied the motion and therefore summarily dismissed Mr. Gerdon's petition. (R., p. 39).

Mr. Gerdon timely filed his appeal. (R., pp. 45-48).

II. ISSUES PRESENTED ON APPEAL

- A. **Did the district court err when it summarily dismissed Mr. Gerdon's Successive Petition for Post-Conviction Relief as untimely and as a successive petition, and denied Mr. Gerdon's Motion to Reconsider?**

III. ARGUMENT

A.

- A. The District Court Erred when it summarily dismissed Mr. Gerdon's Successive Petition for Post-Conviction Relief as untimely and as a successive petition, and denied Mr. Gerdon's Motion to Reconsider.

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

A claim for post-conviction relief must be raised in an original application. I.C. § 19-4908. That application must be filed within one 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 proceeding is later. I.C. § 19-4902.

Successive petitions are impermissible "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908.

Section 19-4908 sets forth no fixed time within which successive petitions may be filed, however, the "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is considered by the courts on a case-by-case basis. *Id.*

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. *See id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. *See Workman*, 144 Idaho at 522, 164 P.3d at 802.

Summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

1. Mr. Gerdon's Petition should have been allowed under I.C. 19-4901 and not been summarily dismissed due to the existence of a genuine issue of fact.

Mr. Gerdon's contends that the district court erred by failing to allow his petition under I.C. § 14-4901, and *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). Mr. Gerdon argues that he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability the court process concerning the motion he filed that the court did not process. Further Mr. Gerdon contends that because the court did not rule on the motion, he could not have, in the exercise of due diligence, been raised earlier, allowing a successive petition under I.C. § 19-4901.

An "allegation that a claim was not adequately presented in the first post-conviction action . . . provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

Mr. Gerdon contends that he raised substantial facts in his verified petition and affidavit concerning the fact that his underlying claim were not adequately presented, and that the inadequate presentation of his claims was due to the failure of the court to rule on a motion that Mr. Gerdon had filed.

As a result, he could not pursue his claim, and that therefore, his points were not adequately presented as discussed in *Charboneau* and *Baker*.

Further, Mr. Gerdon presented testimony that he did not have access to Idaho law books as he was held out of state, and that for that additional reason, his arguments were not presented adequately previously. (R., p. 10).

The district court noted that "equitable tolling" as discussed by *Charboneau*, has been applied only in cases of mental disease and/or psychotropic medication, or when a petitioner was incarcerated out of state on an in-state conviction without legal representation or access to Idaho legal materials. (R. 22). Mr. Gerdon contends that he has submitted evidence of both those very things. First, his motion that he duly filed was not ruled upon, providing him no access to the courts to pursue his claim. Second, due to being housed out of state, and/or due to the communication issues he documented, he did not have access to legal representation in any effective sense. Last, he did not have access to Idaho legal materials.

It is Mr. Gerdon's position that the failure to rule on his motion denied him access to the courts. Therefore, Mr. Gerdon's problems with his legal mail cost him the ability to file for any further relief concerning those issues. His subsequent post-conviction, therefore, attempts dealt with the lack of ability to receive a ruling from the courts, and therefore a lack of access to the courts.

As stated above, summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

It bears repeating that on review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Mr. Gerdon contends that he raised substantial facts in his pleadings (See R., pp. 9-12) concerning his motion which was held by the courts for seven and one half years, and that the inadequate presentation of his claims was due to the inadequate access to the courts and to his attorneys. Mr. Banks contends that he raised numerous facts presenting issues regarding ineffective performance by his attorney that caused

his underlying claim to be inadequately presented.


It is further Mr. Gerdon's contention that because he raised such claims, and supported them with the facts in his pleadings, that summary dismissal, and the failure to reconsider or alter said dismissal upon his motion, was error.

As a result, the district court failed to properly determine whether or not a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file as required by law. Consequently, as the district court failed to properly analyse the factual questions raised by Mr. Gerdon's pleadings and by the record, and failed to allow Mr. Gerdon, a pro se applicant for relief, an opportunity for a hearing to "flesh out" his claims, the court erred by summarily dismissing his petition. Therefore, it is Mr. Gerdon's contention that his post-conviction petition, and at least a hearing thereon, should have been allowed.

IV. CONCLUSION

Based on the above, Mr. Gerdon respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief, and denying his motion to reconsider, and remand the matter for further hearings.

DATED this 31 day of May, 2013.




STEPHEN D. THOMPSON
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31 day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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