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Gerdon v. State Appellant's Brief Dckt. 40454

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES GERDON,)	
Petitioner-Appellant,)	Nos. 40454, 40455
v.)	Twin Falls Cty. Nos. CV-2008-3345,
STATE OF IDAHO,)	and CV-04-5173
Respondent.)	APPELLANT'S BRIEF

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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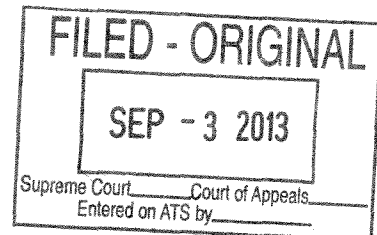


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I. STATEMENT OF THE CASE

A. Nature of the Case

James Gerdon appeals in Docket No. 40454, Twin Falls County No. CV-2008-1712, from the district court's Order dated October 16, 2012, Denying Petitioner's Motion for Relief (under IRCP 60(b) asking relief from an order summarily dismissing his successive petition for post conviction in Twin Falls County No. CV-2004-5173, which case is the subject of appeal in Docket No. 40455. In Docket No. 40455, Mr. Gerdon appeals the denial of his motion for relief under IRCP 60(a) and 60(b). Mr. Gerdon asserts that the district court erred by denying his motions in both cases.

B. Statement of the Facts & Course of Proceedings

On October 9, 2012, Mr. Gerdon filed his Motion for Relief in case 40454, CV-2008--1712 asking that the court grant relief from its summary dismissal of the argument of ineffective post-conviction counsel on the basis of IRCP 60(b) (R., 40454, pp. pg. 5-6). Also on October 9, 2012, Mr. Gerdon filed a motion in case 40455, CV-2004-5173, asking the court grant relief from summary disposition of his post-conviction petition under IRCP 60(a) and 60(b) on the basis of ineffective assistance of counsel, and because the district court failed to rule on a motion filed in CR-2003-6576.

In Docket No. 40454, the district court denied the Motion for Relief on October 16, 2012. (R., 40454, pp. 7-9). Also, in Docket No. 40455, the district court, also on October 16, 2012, denied Mr. Gerdon's motion for relief in that case. (R., 40455, pp. 35-37). After receiving no response to the notice, the district court dismissed Gerdon's petition on September 5, 2012. (R., pp. 27-29).

Mr. Gerdon timely filed his appeals. (R., 40454, p. 13; R., 40455, p. 41).

II. ISSUES PRESENTED ON APPEAL

- A. **Did The District Court Err When It Denied Mr. Gerdon's Motion For Relief Under IRCP 60(b) Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40454)?**
- B. **Did The District Court Err When It Denied Mr. Gerdon's Motion For Relief Under IRCP 60 (a) and 60(b) Also Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40455)?**

III. ARGUMENT

A.

- A. The District Court Erred when it Denied Mr. Gerdon's Motion For Relief Under IRCP 60(b) Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40454).

Mr. Gerdon argues that because he did not receive effective assistance of counsel due in part to the irregularities which resulted in him not receiving his legal mail. (R., 40454, p. 11), he should have received relief under IRCP 60(b) due to mistake, neglect, fraud, and/or because the judgment was void due to said irregularities which deprived him of effective assistance of counsel. He therefore argues that the summary disposition of his claim was in error and he should have been granted relief from that order.

- B. The District Court Erred when it Denied Mr. Gerdon's Motion For Relief Under IRCP 60 (a) and 60(b) Also Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40455).

Additionally, Mr. Gerdon argues in Docket No. 40455, that he should have received relief under IRCP 60(a) due to the irregularities in his mail which constitute clerical mistakes which deprived him of effective access to the courts. In addition, Mr. Gerdon argues that the court mistakenly failed to rule on his motion filed in CR-2003-6576, and that the sum of these errors and irregularities deprived Mr. Gerdon of effective assistance of counsel. (R., 40455 pp. 5, 29-30).

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). Mr. Gerdon argues that failure to provide him relief from such summary disposition under IRCP 60(a) or 60(b) constitutes error.

1. The District Court Erred when it Denied Mr. Gerdon's Motion For Relief Under IRCP 60(b) Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40454).

Mr. Gerdon argues that because he did not receive effective assistance of counsel due in part to the irregularities which resulted in him not receiving his legal mail. (R., 40454, p. 11), he should have received relief under IRCP 60(b) due to mistake, neglect, fraud, and/or because the judgment was void due to said irregularities with regard to his legal mail which deprived him of effective assistance of counsel and therefore the courts. He therefore argues that the summary disposition of his claim was in error and he should have been granted relief from that order.

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 because of the irregularities with regard to his mail and therefore access to the courts, that his underlying claims were not adequately

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

2. The District Court Erred when it Denied Mr. Gerdon's Motion For Relief Under IRCP 60 (a) and 60(b) Also Regarding The Petitioners Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40455).

Additionally, Mr. Gerdon argues in Docket No. 40455, that he should have received relief under IRCP 60(a) due to the irregularities in his mail which constitute clerical mistakes which deprived him of effective access to the courts. In addition, Mr. Gerdon argues that the court mistakenly failed to rule on his motion filed in CR-2003-6576, and that the sum of these errors and irregularities deprived Mr. Gerdon of effective assistance of counsel. (R., 40455 pp. 5, 29-30).

Mr. Gerdon argues that "equitable tolling" as discussed by *Charboneau*, applies in this case due to multiple failures at the district court level that deprived him of adequate access to the courts. First, Mr. Gerdon argues that due to clerical error, he did not receive his mail in a reliable fashion so as to know when to file responses and appeals. Second, the court did not rule on his motion filed in CR-2003-6576, so that he was effectively deprived access to the courts.

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-convictions, therefore, attempt 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).

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 concerning his motion which was held by the court 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. Gerdon therefore 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 original pleadings, that summary dismissal, and the failure to provide him relief under IRCP 60(a) or 60(b) from said dismissals upon his motions, was error.

As a result, the district court effectively 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 analyze the factual questions raised by Mr. Gerdon's pleadings and by the record. Therefore, it is Mr. Gerdon's contention that relief should have been provided by the court so that he could present his arguments at hearing rather than disposition in summary fashion.

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 29 day of August, 2013.



STEPHEN D. THOMPSON
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29 day of August, 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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