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Cadue v. State Respondent's Brief Dckt. 41001

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STATEMENT OF THE CASE

Nature Of The Case

Perry Wayne Cadue appeals from the summary dismissal of his successive petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In his underlying criminal case, Cadue was charged with, and a jury convicted him of, aggravated battery. Cadue v. State, Docket No. 40286, 2014 Unpublished Opinion No. 352, p.1 (Idaho App. Feb. 6, 2014). The court imposed a unified 15-year sentence with 10 years fixed and the Idaho Court of Appeals affirmed. Id.

Cadue filed a petition for post-conviction relief claiming his defense counsel provided ineffective assistance by failing to (1) “allow Cadue to testify at trial”; (2) “file a motion to compel the production of the victim’s knife;” and (3) “file a motion to compel the production of a police report.” Cadue at 4. The district court summarily dismissed Cadue’s original petition and the Idaho Court of Appeals affirmed. Cadue at 5.

While the appeal in his first post-conviction case was pending, Cadue filed a successive post-conviction petition. (R., pp.10-18.) In his successive petition, Cadue alleged the state “withheld favorable and conclusive evidence or information that would have aided [him] in this matter,” several claims of ineffective assistance of counsel, and a conflict of interest claim. (R., pp.12-17.) Cadue also filed a memorandum in support of his successive petition and a request for counsel. (R., pp.386-395.)

The district court denied Cadue's request for counsel and entered a notice of intent to dismiss Cadue's successive petition. (R., pp.396-403.) Cadue responded to the court's notice, arguing, in part, that "it would simply be unjust" to dismiss his petition and claiming counsel who represented him on his original petition was ineffective. (R., pp.404-405.) The court subsequently entered judgment dismissing Cadue's successive petition. (R., p.412.) Cadue filed a timely notice of appeal. (R., pp.426-429.)

ISSUES

Cadue states the issues on appeal as (verbatim):

- 1.) DID THE DISTRICT COURT IMPROPERLY DECIDE IN DENYING, CADUE APPOINTMENT OF COUNSEL.
- 2.) DID THE DISTRICT COURT IMPROPERLY DECIDE IN DISMISSING CADUE'S SECOND PETITION FOR POST CONVICTION RELIEF.

(Appellant's Brief, p.2 (capitalization original).)

The state rephrases the issue as:

1. Has Cadue failed to show error in the denial of his request for the appointment of counsel?
2. Has Cadue failed to establish the district court erred in dismissing his successive petition for post-conviction relief?

ARGUMENT

I.

Cadue Has Failed To Show Error In The Denial Of His Request For Counsel

A. Introduction

Cadue contends the district court erred in denying his request for counsel, asserting he believes he has shown his successive post-conviction claims “are not frivolous” and that his successive petition “alleges facts showing the possibility of a valid claim.” (Appellant’s Brief, p.3.) Review of the record and the applicable legal standards shows the district court correctly concluded Cadue was not entitled to the appointment of counsel to represent him on an improper successive petition.

B. Standard Of Review

A decision to grant or deny a request for counsel in post-conviction cases is reviewed for an abuse of discretion. Murphy v. State, 2014 WL 712695 *3 (Idaho 2014), *petition for rehearing pending*.

C. Cadue Was Not Entitled To Counsel To Represent Him On His Successive Petition

“A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904, which provides that in proceedings under the UPCPA, a court-appointed attorney ‘may be made available’ to an applicant who is unable to pay the costs of representation.” Murphy at *3 (quoting I.C. § 19-4904; citing Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004)). “The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the

possibility of a valid claim.” Murphy at *3 (citing Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007)). “In deciding whether the *pro se* petition raises the possibility of a valid claim, the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims.” Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007). The appointment of counsel is not appropriate for the purpose of searching the record for potentially nonfrivolous claims; rather, the petition itself must allege the facts that raise the possibility of a valid claim before the appointment of counsel is warranted. Murphy at *3 (citing Swader, 143 Idaho at 654, 152 P.3d at 15).

The district court cited the foregoing standards and denied Cadue’s request for counsel because Cadue failed to show a sufficient reason for pursuing a successive petition as required by I.C. § 19-4908 and, as such, there was no possibly valid claim entitling Cadue to counsel. (R., pp.397-398.) Although Cadue believes otherwise (Appellant’s Brief, p.3), the record supports the district court’s conclusion.¹ See Murphy at *6 (finding no error in failing to appoint counsel to represent petitioner on an improper successive petition).

¹ The reasons the district court was correct in finding Cadue could not overcome the successive petition bar are discussed in more detail in Section II, infra.

II.
Cadue Has Failed To Show Error In The Dismissal Of His Successive Post-Conviction Petition

A. Introduction

Cadue asserts the district court erred in dismissing his successive post-conviction petition because, he contends, “the burden is on the Court to determine whether the petitioner lacks sufficient reason for failing to raise the issues of the second petition in the previous petition” and, according to Cadue, he satisfied the standard for filing a successive petition because he thinks his previous post-conviction counsel was ineffective. (Appellant’s Brief, pp.3-7.) Cadue’s claim fails because his contention that his original post-conviction attorney was ineffective, which in itself lacks merit, does not constitute a sufficient reason for filing a successive petition.

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. The District Court Correctly Dismissed Cadue's Successive Petition

Idaho Code § 19-4908 states:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, 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.

Cadue contends dismissal of his successive petition was improper because, he argues, it was the district court's "burden" to determine whether there was a sufficient reason for filing the petition and, according to Cadue, the sufficient reason was the alleged ineffective assistance of post-conviction counsel in relation to his original petition. (Appellant's Brief, pp.3-9.) Cadue's arguments lack merit.

First, to the extent Cadue believes the district court had a *sua sponte* obligation to ascertain whether there was a sufficient reason for filing the petition, he is incorrect. It is not the district court's burden to scour the record to ascertain whether there is a sufficient reason; rather, the burden for alleging a sufficient reason to overcome the procedural bar to successive petitions is on the petitioner. Hooper v. State, 127 Idaho 945, 948, 908 P.2d 1252, 1255 (Ct. App. 1995). Moreover, the court in this case did make a determination that Cadue failed to demonstrate a sufficient reason to allow him to file a successive petition. (R., pp.399-402.)

Second, Cadue's contention that he provided a sufficient reason by alleging ineffective assistance of post-conviction counsel fails. In support of this claim,

Cadue relies on Palmer v. Dermitt, 102 Idaho 591, 6335 P.2d 955 (1981), in which the Court held “that an allegation of ineffective assistance of prior post-conviction counsel may provide sufficient reason under I.C. § 19-4908 to permit allegations of error at trial not previously raised or inadequately raised in the initial application to be raised in a subsequent post-conviction application.” Murphy at *5 (citing Palmer, 102 Idaho at 596, 635 P.2d at 960). The Court, however, recently overruled Palmer² and held that because there is “no statutory or constitutional right to effective assistance of post-conviction counsel,” an allegation of ineffective post-conviction counsel “cannot demonstrate ‘sufficient reason’ for filing a successive petition.” Murphy at *6. Cadue’s reliance on the United States Supreme Court’s opinions in Martinez v. Ryan, 566 U.S. 1 (2012), and Trevino v. Thaler, 133 S.Ct. 1911 (2013), is also misplaced because Martinez itself reiterates the principle stated in Murphy, that there is not constitutional right to post-conviction counsel, and in any event, Martinez and Trevino only involve an exception to the procedural default rule that allows federal courts to consider claims in habeas that were not exhausted in state court.

Even without the Court’s recent pronouncement in Murphy, Cadue could not meet his burden of showing a sufficient reason under Palmer because, as noted by the district court, Cadue’s assertion in this regard was conclusory. (R., p.401.) Further, contrary to Cadue’s argument, post-conviction counsel did not have the duty

² The state recognizes that Murphy was not issued when Cadue filed his successive petition and that when Cadue filed his successive petition, claiming ineffective assistance of post-conviction counsel was a viable “sufficient reason” for filing a successive petition.


to amend the original petition to add claims Cadue never raised or to engage in discovery that was not authorized by the court. (See R., p.401.) Even if the ineffective assistance of post-conviction counsel were still a sufficient reason for filing a successive petition, simply claiming post-conviction counsel was ineffective, without more, is not enough. In order to avoid summary dismissal, Cadue was still required to allege a genuine issue of material fact to support his claim that post-conviction counsel was ineffective, which in turn required alleging a genuine issue of material fact for each claim he believed post-conviction counsel should have raised. See Baldwin v. State, 145 Idaho 148, 153-154, 177 P.3d 362, 367-368 (2008). As noted by the district court, Cadue failed to do so in this case. (R., pp.401-402.) Cadue has failed to establish otherwise. Indeed, on appeal, Cadue fails to even address how he believes he met his burden of alleging a genuine issue of material fact in relation to any of the substantive claims he asserted in his successive petition. Having failed to present any argument on this point, Cadue has waived consideration of the merits of dismissal on this basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998).

Cadue has failed to show error in the dismissal of his successive post-conviction petition.

CONCLUSION

The state respectfully requests this Court affirm the district court's dismissal of Cadue's successive petition for post-conviction relief.

DATED this 27th day of March, 2014.

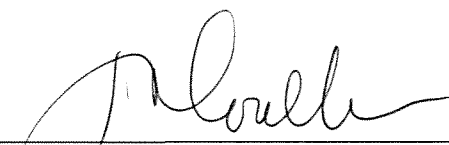


JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 2014, 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:

PERRY W. CADUE
IDOC # 94676
ICC
PO Box 70010
Boise, ID 83707



JESSICA M. LORELLO
Deputy Attorney General

JML/pm