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State v. Ochieng Respondent's Brief Dckt. 34755

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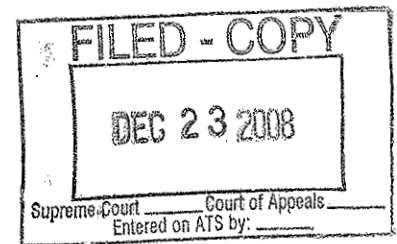
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LAW CLERK

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 34755
)
 vs.)
)
 COLLINS OCHIENG,)
)
 Defendant-Appellant.)

COPY



BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK**

HONORABLE DAVID C. NYE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Collins Ochieng appeals from the district court's order denying his "Motion for Obtaining an Order Modifying the Original Conviction and Sentence."

Statement of Facts and Course of Proceedings

Ochieng, 32 years of age, raped K.K., a fifteen year old girl. (PSI, pp.1-2.) K.K. reported the rape to the Bannock County Sheriff's Department. (PSI, p.1.) The state charged Ochieng with rape, Ochieng waived his right to a preliminary hearing and the case was bound over to district court. (R., pp.26-33.) Ochieng pled guilty to an amended charge of injury to a child, in violation of Idaho Code § 18-1501(1). (R., pp.36-46.) The district court imposed a unified sentence of ten years with three years fixed, suspended sentence, and placed Ochieng on probation for ten years. (R., pp.51-57.) As a condition of probation, the district court also ordered Ochieng to serve 365 days in the Bannock County Jail, and noted that Ochieng could be deported while serving the jail time. (R., p.55.)

Ochieng did not appeal his sentence. (R., p.80.) Over one year and eight months after sentencing, Ochieng filed a "Motion for Obtaining an Order Modifying the Original Conviction and Sentence" and a motion for appointment of counsel.¹ (R., pp.58-71.) On September 4, 2007, Ochieng requested a hearing on those motions. (R., pp.77-78.) The district court denied the motions. (R., pp.79-81.) Ochieng filed a motion to reconsider a few days later. (R., pp.82-87.)

¹ Although Ochieng filed his motion for counsel on May 29, 2007, his attorney of record did not file a notice of intent to withdraw from Ochieng's case until July 3, 2007. (R., pp.70-77.)

The district court denied Ochieng's motion to reconsider. (R., pp.88-90.)

Ochieng timely appealed. (R., pp.91-92; 108-111.)

ISSUES

Ochieng states the issues on appeal as:

1. Did the district court err when it *sua sponte* summarily dismissed, prior to any response by the State, Mr. Ochieng's petition for post-conviction relief because he failed to allege facts in his Petition that would defend against an affirmative defense that the State was required to raise, or would waive?
2. Did the district court err when it *sua sponte* summarily dismissed Mr. Ochieng's petition for post-conviction relief without providing a notice of its intent to dismiss?
3. Did the district court err when is [sic] *sua sponte* summarily dismissed Mr. Ochieng's petition for post-Conviction [sic] relief without ruling on Mr. Ochieng's motion for appointment of counsel?

(Appellant's brief, p.9.)

The state rephrases the issues on appeal as:

1. Has Ochieng failed to establish the district court erred when it dismissed Ochieng's "petition" as time barred?
2. Has Ochieng failed to establish the district court erred when it denied his request for counsel?

ARGUMENT

I.

Ochieng Has Failed To Establish The District Court Erred When It Dismissed Ochieng's "Petition" As Time Barred

A. Introduction

Ochieng claims the district court erred when it *sua sponte* dismissed his petition for post-conviction relief as untimely. (Appellant's brief, p.10.) Specifically, Ochieng asserts "[f]ailure to comply with the Statute of Limitations is an affirmative defense that the State would have had to have raised in its response to [Ochieng's] petition, or else it would have been considered waived." (Id., at p.17.) Because, Ochieng argues, the state did not file an answer to Ochieng's petition raising timeliness as an affirmative defense, the district court erred with its *sua sponte* dismissal on the same grounds. (Id., at pp.10, 16-18.) Ochieng further argues that this dismissal was reversible error because the district court failed to give Ochieng notice of the dismissal. (Id. at pp.10, 18-20.)

Assuming for purposes of argument that Ochieng's motion was a petition for post-conviction relief, Ochieng's claims fail for two reasons. First, the state was not required to raise the timeliness issue as an affirmative defense. Under the UPCPA, the district court may dismiss, *sua sponte*, an untimely petition for post-conviction relief. Second, because the district court explained its reasons for denying the petition, and Ochieng responded to those reasons accordingly with his Motion for Reconsideration, Ochieng effectively received notice such that the district court did not err by dismissing the petition as untimely.

B. Standard of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001).

C. Ochieng Has Failed To Establish The District Court Erred When It Dismissed Ochieng's "Petition"² As Time Barred

Ochieng asserts that the district court erred in dismissing his petition for two reasons. First, Ochieng argues the district court could not *sua sponte* dismiss the petition based on the statute of limitations because, he claims, the statute of limitations can only be raised as an affirmative defense. Second, Ochieng argues, dismissal was improper because he was not given the opportunity to respond to the reasons for dismissal as required by I.C. § 19-4906(b). Both of Ochieng's claims fail. Although the district court made no definitive finding in this regard, because it analyzed the motion as a post-conviction petition, the state will assume for purposes of appeal that Ochieng's motion constituted a petition for post-conviction relief and will refer to the motion as a petition.

² As noted by the district court, "It is not clear to the Court whether [Ochieng's motion] is meant to be a Rule 35 Motion or a Petition for Post Conviction Relief." (R., p.80.)

1. Contrary To Ochieng's Assertion, The Failure To Comply With The Statute Of Limitations Is Not An Affirmative Defense The State Must Raise Or Waive, And The District Court Properly Dismissed The Petition On This Basis

Ochieng contends the district court erred in applying the statute of limitations to his petition, because, he asserts, the "[f]ailure to comply with the Statute of Limitations is an affirmative defense that the State would have had to have raised in its response to [Ochieng's] petition, or else it would have been considered waived." (Appellant's brief, p.17.) Ochieng relies on Cole v. State, 135 Idaho 107, 15 P.3d 820 (2000), in support of his argument. Cole, however, does not stand for this proposition. Rather, the court in Cole merely held that a failure to comply with time limitations does not create a jurisdictional defect in an application for post-conviction relief that would allow the state to raise the issue for the first time on appeal. 135 Idaho at 110, 15 P.2d at 823.

Contrary to Ochieng's assertion, I.C. § 19-4906(b) "authorizes the trial court to raise issues *sua sponte* Under the terms of this statute, a trial court, in determining whether the applicant 'is not entitled to post-conviction relief,' is not limited to defenses pleaded by the State." Martinez v. State, 130 Idaho 530, 533, 944 P.2d 127 (Ct. App.1997). Because the UPCPA specifically provides a time limit on filing a post-conviction petition, "it [is] proper for the district court to consider the statute of limitation though this defense [is] not raised by the State." Martinez, supra.

In this case, the district court correctly concluded Ochieng's petition was untimely. The district court entered judgment upon Ochieng's guilty plea to injury to a child on September 2, 2005. (R., pp.51-59.) Ochieng did not appeal from

the judgment. (R., p.80.) Therefore, to be timely, Ochieng's post-conviction petition must have been filed within one year and 42 days after the entry of judgment. I.C. § 19-4902(a); I.A.R. 14. Ochieng did not file his petition until May 29, 2007 (R., pp.79-81), nearly two years after his judgment became final. Ochieng's petition was untimely and the district court properly dismissed it on this basis.

2. Because Ochieng Had The Opportunity Respond To The Court's Grounds For Dismissal, He Effectively Received The Notice Required By I.C. § 19-4906(b)

If a district court decides *sua sponte* to dismiss a post-conviction petition, I.C. § 19-4906(b) requires the court to give the petitioner notice of the reasons for its contemplated dismissal and an opportunity, within 20 days, to respond. I.C. § 19-4906(b); Saykahamchone v. State, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). The purpose of the 20-day notice requirement of I.C. § 19-4906(b) is to ensure that the applicant will have an opportunity to challenge an adverse decision before it becomes final. Baruth v. Gardner, 110 Idaho 156, 158, 715 P.2d 369, 371 (Ct. App. 1986); Gibbs v. State, 103 Idaho 758, 759, 653 P.2d 813, 814 (Ct. App. 1982).

Ochieng argues that the district court did not give him proper notice of its intent to dismiss his petition and that "[i]n doing so the district court denied [Ochieng] of the substantial right of receiving notice of and the opportunity to be heard regarding the viability of his petition." (Appellant's brief, p.18.) Although the district court did not issue a formal notice of its intent to dismiss, it did clearly

state the reasons for dismissal in its September 7, 2007 "Order Re: Motion." (R., pp.79-81.) In that order, the district court put Ochieng on notice that his petition was time barred and dismissed the petition on that basis. (Id.) In response, Ochieng filed a motion for reconsideration in which he directly addressed the timeliness issue by claiming the statute of limitations should be tolled due to ineffective assistance of counsel. (R., pp.82-83.) Ineffective assistance of counsel is not, however, a basis for tolling the post-conviction statute of limitation in Idaho except where counsel failed to include a claim previously raised by the petitioner. Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999). Rather, the Idaho appellate courts have recognized tolling only where an applicant is prevented, either by mental disease or by being denied access to courts, from earlier pursuing challenges to his or her conviction. Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003); Anderson v. State, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct. App. 1999); Abbott v. State, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996).

The district court's dismissal set forth the reasons for the denial of Ochieng's "petition" — that it was not timely under I.C. § 19-4902(a). Because Ochieng took the opportunity to respond to the timeliness issue with a motion for reconsideration asserting equitable tolling, and the district court in turn considered that motion, Ochieng has failed to establish reversible error based on a lack of notice.

II.

Ochieng Has Failed To Establish The District Court Erred When It Denied
Ochieng's Request For Counsel

A. Introduction

Ochieng argues that because his "petition set forth facts sufficient to establish a possible viable claim for post-conviction relief," the district court "committed reversible error in failing to appoint [him] counsel prior to summarily dismissing his petition." (Appellant's brief, p.25.) Ochieng's claim fails because his petition was time-barred under the UPCPA, thus he was not entitled to post-conviction counsel and the district court did not err in denying his request to appoint counsel. In addition, any error that the district court may have made by denying the motion for counsel within the same order as the petition was harmless.

B. Standard of Review

The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to I.C. § 19-4904 is discretionary. Plant v. State, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2007). "In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, '[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.'" Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. Ochieng Has Failed To Establish The District Court Erred When It Denied Ochieng's Request For Counsel

Under the UPCPA, a court-appointed attorney may be made available to an applicant who is unable to afford counsel. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel in post-conviction proceedings is within the discretion of the district court. Charboneau, 140 Idaho at 792, 102 P.3d at 1111. If the district court fails to rule on a motion for appointment of counsel prior to dismissal of a petition on the merits, an appellate court should determine whether the error was harmless because the petition did not allege facts prerequisite to appointment of counsel. Fox v. State, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997) (failure to rule on motion for appointment of counsel not harmless); Swisher v. State, 129 Idaho 467, 469-71, 926 P.2d 1314, 1316-18 (Ct. App. 1996) (failure to rule on motion for counsel harmless); see also I.R.C.P. 61 (no error is grounds for vacating an order or judgment unless it is "inconsistent with substantial justice" and court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"). A district court may deny a motion for appointment of counsel if the court determines that the petitioner's claims are frivolous. I.C. § 19-852.

Applying these standards to this case shows that the district court did not err when it denied Ochieng's request for counsel. Ochieng's alleged claims for post-conviction relief were time-barred. His petition was, therefore, frivolous and Ochieng was not denied a substantial right when the district court denied his

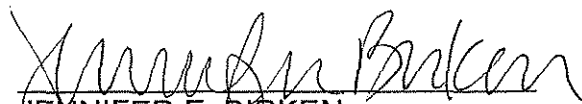
request for appointed counsel without addressing the substantive claims in his petition. Swisher, 129 Idaho at 470-71, 926 P.2d at 1317-18.

To the extent Ochieng claims error based on his assertion that the court failed to rule on his request for counsel before dismissing his petition, the record does not support his assertion. Although the district court denied appointment of counsel within the same order that it dismissed Ochieng's petition (R., pp.79-81), the record does not provide any evidence that the district court failed to consider Ochieng's motion for counsel before it dismissed his petition. To the extent the district court failed to consider Ochieng's request for counsel before dismissing his petition's merits, the error was harmless since the petition was time-barred and therefore frivolous.

CONCLUSION

The State respectfully requests that this Court affirm the district court's order denying Ochieng's "Motion for Obtaining an Order Modifying the Original Conviction and Sentence," and its order denying his request for counsel.

DATED this 23rd day of December 2008.

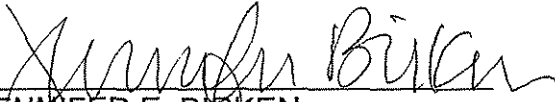

JENNIFER E. BIRKEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of December 2008, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SARA B. THOMAS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



JENNIFER E. BIRKEN
Deputy Attorney General

