

11-18-2014

Dalrymple v. State Respondent's Brief Dckt. 41620

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Dalrymple v. State Respondent's Brief Dckt. 41620" (2014). *Not Reported*. 1732.
https://digitalcommons.law.uidaho.edu/not_reported/1732

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DAVID DALRYMPLE,)	
)	No. 41620
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2013-14732
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

BRIEF OF RESPONDENT

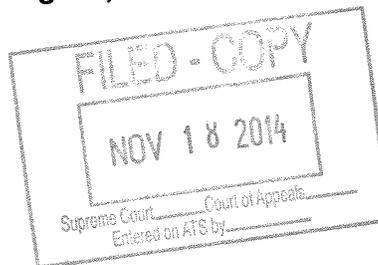
APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MELISSA MOODY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DAVID ALLEN DALRYMPLE
Inmate # 74807
Kit Carson Correction Center
49777 County Road V
Burlington, CO 80807

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division



JESSICA M. LORELLO
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
RESPONDENT

PRO SE
PETITIONER-APPELLANT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	4
ARGUMENT	5
Dalrymple Has Failed To Show Error In The Dismissal Of His Successive Post-Conviction Petition	5
A. Introduction.....	5
B. Standard Of Review	5
C. The District Court Correctly Dismissed Dalrymple’s Successive Petition	6
CONCLUSION	9
CERTIFICATE OF MAILING	10
APPENDICES	

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aeschliman v. State</u> , 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999)	5
<u>Akers v. D.L. White Const., Inc.</u> , 156 Idaho 37, 320 P.3d 428 (2014)	6
<u>Charboneau v. State</u> , 144 Idaho 900, 174 P.3d 870 (2007)	8
<u>Edwards v. Conchemco, Inc.</u> , 111 Idaho 851, 727 P.2d 1279 (Ct. App. 1986)	6
<u>Evensiosky v. State</u> , 136 Idaho 189, 30 P.3d 967 (2001).....	8
<u>Freeman v. State</u> , 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992)	9
<u>Hernandez v. State</u> , 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999)	9
<u>Kriebel v. State</u> , 148 Idaho 188, 219 P.3d 1204 (Ct. App. 2009).....	8
<u>Martinez v. Ryan</u> , 566 U.S. 1 (2012)	7
<u>Martinez v. State</u> , 130 Idaho 530, 944 P.2d 127 (Ct. App. 1997).....	8, 9
<u>Matthews v. State</u> , 122 Idaho 801, 839 P.2d 1215 (1992)	5
<u>Murphy v. State</u> , 156 Idaho 389, 327 P.3d 365 (2014).....	7
<u>Palmer v. Dermitt</u> , 102 Idaho 591, 635 P.2d 995 (1981)	9
<u>Rhoades v. State</u> , 148 Idaho 247, 220 P.3d 1066 (2009)	8
<u>State v. Dalrymple</u> , 144 Idaho 628, 167 P.3d 765 (2007).....	1
<u>State v. Freitas</u> , 157 Idaho 257, 335 P.3d 597 (Ct. App. 2014).....	6
<u>State v. Zichko</u> , 129 Idaho 257, 923 P.2d 966 (1996)	6
 <u>STATUTES</u>	
I.C. § 19-4902	7, 8, 9
I.C. § 19-4908	7

STATEMENT OF THE CASE

Nature Of The Case

David Dalrymple appeals from the summary dismissal of his successive petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Dalrymple was convicted of two counts of lewd conduct, one count of sexual abuse, two counts of second-degree kidnapping, and “several misdemeanors.” State v. Dalrymple, 144 Idaho 628, 632, 167 P.3d 765, 769 (2007). Although the Idaho Court of Appeals vacated Dalrymple’s convictions after “holding that the district court erred in failing to provide *Faretta* warnings contemporaneously to [Dalrymple’s] waiver of the right to counsel,” the Idaho Supreme Court granted the state’s petition for review and affirmed Dalrymple’s convictions. Id.

On review, the Idaho Supreme Court addressed four issues: “1) whether Dalrymple knowingly, intelligently, and voluntarily waived his Sixth Amendment right to counsel; 2) whether the district court abridged Dalrymple’s Sixth Amendment right to compulsory process; 3) whether the district court made prejudicial comments; and 4) whether the district court imposed excessive sentences.” Dalrymple, 144 Idaho at 633, 167 P.3d at 770. The Court denied relief on all four claims. Id. at 633-637, 167 P.3d at 770-773.

Following his direct appeal, Dalrymple filed a post-conviction petition, which was dismissed after an evidentiary hearing. (See R., pp.164-223 (transcript of initial post-conviction evidentiary hearing; 260 (court’s order noting dismissal of initial petition).) Although Dalrymple appealed from the denial of relief in his original post-

conviction case, the Idaho Supreme Court granted his motion to dismiss that appeal on September 23, 2010. (See Appendices A, B.)¹

Almost three years later, on August 19, 2013, Dalrymple filed a successive petition for post-conviction relief. (R., pp.3-44.) In his successive petition, Dalrymple raised numerous claims, including: (1) ineffective assistance of counsel for failing to “request a pre-trial proceeding to determine both the existence, and the potential prejudicial effect of, confabulated witness testimony arising from hypnotic suggestion”; (2) deprivation of the “right to confront and cross examine his accusers”; (3) an involuntary and untimely waiver of his right to proceed *pro se*; (4) ineffective assistance of counsel “due to a conflict of interest”; (5) “constructive denial of counsel”; (6) “incompetent to stand trial”; (7) cumulative error; (8) “abuse of discretion”; (9) ineffective assistance of counsel in post-conviction; and (10) deprivation of his rights under the 5th, 6th, 8th, and 14th amendments. (R., p.6 (capitalization altered).) Dalrymple filed a motion for counsel, which the district court denied. (R., pp.246-248, 250-252.)

Although the state filed a motion for summary dismissal (R., pp.254-257), the court also issued a notice of intent to dismiss setting forth the grounds on which it intended to dismiss Dalrymple’s successive petition and giving Dalrymple 20 days to file a response (R., pp.259-265). Dalrymple filed a response (R., pp.268-276), after which the court entered an order of dismissal and a judgment (R., pp.479, 481).

¹ Contemporaneous with this brief, the state filed a motion asking the Court to take judicial notice of the register of actions from Dalrymple’s initial post-conviction action (attached hereto as Appendix A) along with the Order Granting Motion to Dismiss the appeal therefrom (attached hereto as Appendix B).

Dalrymple filed a timely notice of appeal. (R., pp.483-486.)

Dalrymple filed a motion for counsel on appeal, which the district court granted by appointing the State Appellate Public Defender (“SAPD”); however, the SAPD withdrew after being “unable to identify an issue for appeal.” (R., pp.488-492; Affidavit in Support of Motion for Leave to Withdraw and Suspending Briefing Schedule, p.2 ¶5; Order Granting Motion to Withdraw as Counsel, filed May 20, 2014.) After the Court permitted the SAPD to withdraw, Dalrymple filed a motion for the appointment of conflict counsel, which the Idaho Supreme Court denied. (Order Denying Motion for Appointment of Conflict Counsel, dated August 7, 2014.)

ISSUE

Contrary to I.A.R. 35(4), Dalrymple's appellate brief does not include a statement of the issues on appeal. Instead, he indicates the Court can "find statements of fact regarding each issue" he presented in post-conviction in his filings. (Appellant's brief, p.5.)

The state phrases the issue as:

Has Dalrymple failed to establish the district court erred in dismissing his successive petition for post-conviction relief?

ARGUMENT

Dalrymple Has Failed To Show Error In The Dismissal Of His Successive Post-Conviction Petition

A. Introduction

The district court dismissed Dalrymple's successive petition on four separate grounds: (1) many of the claims in Dalrymple's successive petition were raised "in some form in [Dalrymple's] initial post-conviction petition and Dalrymple has not alleged or demonstrated a sufficient reason why the claims were inadequately raised or presented in that post-conviction action" (R., pp.261-262); (2) Dalrymple's remaining claims in his successive petition could have been raised in his initial petition but were not and Dalrymple failed to offer any reason for his failure to do so (R., p.262); (3) Dalrymple's ineffective assistance of post-conviction counsel claim does not establish that post-conviction counsel performed deficiently in Dalrymple's initial post-conviction action (R., pp.262-263); and (4) the petition is untimely (R., p.264). On appeal, Dalrymple fails to articulate any argument demonstrating error by the district court in summarily dismissing his 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 Dalrymple's Successive Petition

Dalrymple's arguments on appeal are unclear. In his brief, he complains that he was denied various rights, that all of his attorneys have performed ineffectively, and contends that his petition was "filed within the time constraints mandated by the State of Idaho." (Appellant's brief, pp.1-5.) Dalrymple then lists a variety of claims he believes are cognizable in post-conviction and appears to invite the Court to review the contents of his successive petition and his reply to the district court's notice of intent to dismiss, which he has attached to his brief, and "make a decision on any issue [this Court] feel[s] has merit." (Appellant's brief, p.5.) This Court should decline to do so. It is not this Court's obligation to scour the record in search of potentially meritorious claims; rather, it is Dalrymple's obligation to demonstrate error in the record. Akers v. D.L. White Const., Inc., 156 Idaho 37, 320 P.3d 428 (2014) (citations and quotations omitted) ("Because this Court does not search the record for error, and the party alleging error has the burden of showing it in the record."); see also State v. Freitas, 157 Idaho 257, ____, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 257, 263, 923 P.2d 966, 970 (1996)) (declining to address argument as a result based on established principle that "[a] party waives an issue on appeal if either authority or argument is lacking"). Having failed to properly present any claim to this Court for consideration, this Court should affirm the district court's order.

Even if this Court is willing to accept Dalrymple's invitation to review the district court's decision in this case, it will find no error. 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.

The district court properly dismissed Dalrymple's successive petition based on the procedural bar set forth in I.C. § 19-4908. To the extent Dalrymple believes that Martinez v. Ryan, 566 U.S. 1 (2012), supports the proposition that ineffective assistance of post-conviction counsel is a sufficient reason for filing a successive petition as a means to relitigate claims he believes were not adequately litigated in his initial petition or to present new claims, he is incorrect. (Appellant's Brief, p.4.) Martinez merely provides for an exception to the procedural default rule in federal habeas that allows federal courts to consider claims in habeas that were not exhausted in state court. Moreover, the Idaho Supreme Court's recent opinion in Murphy v. State, 156 Idaho 389, ___, 327 P.3d 365, 367 (2014), foreclosed the possibility that ineffective assistance of post-conviction counsel can qualify as a sufficient reason "under I.C. § 19-4908 for allowing a successive petition."

The district court's dismissal of Dalrymple's successive petition on the grounds that it was untimely is also correct. 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)). However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief 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).

With respect to timeliness, Dalrymple recites the language from I.C. § 19-4902 and then argues the statute “does not specify which court the case needs to have a determination from, only that the determination apply to the same case.” (Appellant’s brief, p.3.) The state is not entirely clear on what this argument means, but, given that Dalrymple has attached a federal court order to his brief, it appears he may think his successive petition is timely because it was filed within one year of the order dismissing his federal habeas case. If that is Dalrymple’s argument, it is without merit as it is unsupported by any legal authority. It is also unsupported by the plain reading of the statute or logic as nothing about either reveals that the Idaho Legislature implemented a statute of limitation that was predicated on federal habeas proceedings. In fact, as noted by the Idaho Court of Appeals in Martinez v.

State, 130 Idaho 530, 533, 944 P.2d 127, 130 (Ct. App. 1997), the language “proceeding following an appeal” from I.C. § 19-4902 “means a proceeding conducted in the criminal action, not in collateral judicial proceedings.”

To the extent Dalrymple believes his successive petition was timely based on the relation back theory, this is also incorrect. (See R., p.268 (response to notice of intent to dismiss referring to relation back theory, a copy of which is attached to appellate brief).) In Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999), the court applied the relation back theory to allow the petitioner to timely file a successive petition to litigate claims that were inadequately raised in the initial petition because post-conviction counsel was ineffective. Application of the relation back theory in Hernandez was predicated on ineffective assistance of post-conviction counsel qualifying as a sufficient reason under I.C. § 19-4908. As noted, however, that is no longer the law after Murphy, supra. As such, the relation back theory does not render Dalrymple’s successive petition timely.

Dalrymple 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 Dalrymple’s successive petition for post-conviction relief.

DATED this 18th day of November, 2014.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 18th day of November, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

DAVID ALLEN DALRYMPLE
Inmate # 74807
Kit Carson Correction Center
49777 County Road V
Burlington, CO 80807



JESSICA M. LORELLO
Deputy Attorney General

JML/pm

APPENDIX A

Case Number Result Page

Ada

1 Cases Found.

David Allen Dalrymple, Plaintiff vs State Of Idaho, Defendant					
CV-PC- Case: 2008- 11750	District	Filed: 06/23/2008	Subtype: Post Conviction Relief	Judge: Michael McLaughlin	Status: Closed 08/17/2009
Subjects: Dalrymple, David Allen					
Other Parties: State Of Idaho					
Disposition: Date	Judgment Type	Disposition Date	Disposition Type	Parties	In Favor Of
08/17/2009	Dismissal of Case			Dalrymple, David Allen (Subject), State Of Idaho (Other Party)	Dismissed
Register Date of actions:					
06/23/2008	New Case Filed - Post Conviction Relief				
06/23/2008	Petition for Post Conviction Relief (No SMFI)				
06/24/2008	Email Sent Date: 06/24/2008 11:54 am To: Kristin Brown No Files Attached.				
07/02/2008	Motion for Preparation of Transcripts				
07/09/2008	Order for Preparation of Transcripts				
08/06/2008	Prosecutor assigned Jean Fisher				
08/13/2008	Motion for Default Summary Judgment				
08/19/2008	States Answer to Petition for Post Conviction Relief J Fisher				
08/19/2008	Motion for Order Waiving Attorney Client Privilege				
08/19/2008	Motion to Release Trial Counsel's File to the State and Motion to Release Copy of Presentence Investigation Report to State				
08/19/2008	State's Motion for Summary Judgment of Dismissal				
08/19/2008	State's Brief in Support of Motion for Summary Judgment of Dismissal				
08/20/2008	Motion to Strike Answer				
08/20/2008	Hearing Scheduled (Motion 10/03/2008 09:30 AM) for Default Summary (Telephonic)				
08/25/2008	Waiving Attorney Client Privilege				
08/25/2008	Order to Release Trial Counsel's File and Pre-Sentence Investigation Report				
08/25/2008	Notice Of Hearing				
08/25/2008	Hearing Scheduled (Motion 10/03/2008 09:30 AM) re: Respondent's Motions, Briefs, & Answer				
08/28/2008	Affidavit of Amber D. Suman				
09/02/2008	Objection to Order Releasing Trial Counsels File				
09/05/2008	Notice Of Hearing				
09/09/2008	Objection to State's Motion for Summary Judgment of Dismissal				
09/29/2008	Transcript Filed - in cases CRFE03-1506, CRFE03-1629				
10/03/2008					

Hearing result for Motion held on 10/03/2008 09:30 AM:
District Court Hearing Held Court Reporter: Hohenleitner
Number of Transcript Pages for this hearing estimated:
for Default Summary (Telephonic) less than 50

10/03/2008 Hearing result for Motion held on 10/03/2008 09:30 AM:
District Court Hearing Held Court Reporter: Number of
Transcript Pages for this hearing estimated:
re: Respondent's Motions, Briefs, & Answer

10/03/2008 Hearing Scheduled (Hearing Scheduled 11/17/2008 03:00
PM)

10/03/2008 Order to Transport

10/20/2008 Notice Of Hearing

10/20/2008 Hearing Scheduled (Hearing Scheduled 11/10/2008 03:00
PM) Respondent's Motion for Summary Dismissal

10/22/2008 Amended Notice of Hearing (11/17/08@3:00pm)

10/27/2008 Affidavit of David A. Dalrymple

11/06/2008 Hearing result for Hearing Scheduled held on 11/10/2008
03:00 PM: Hearing Vacated Respondent's Motion for
Summary Dismissal

11/10/2008 Motion To continue Summary Dismissal Hearing

11/13/2008 Order to Continue Summary Dismissal Hearing

11/13/2008 Continued (Hearing Scheduled 12/16/2008 03:00 PM)

11/13/2008 Amended Order to Transport

11/13/2008 Amended Notice of Hearing (12/16/08 @ 3:00pm)

11/17/2008 Reset Notice Of Hearing (12/16/08 at 3:00 PM
(Respondent's Motion for Summary Dismissal)

12/16/2008 Hearing result for Hearing Scheduled held on 12/16/2008
03:00 PM: District Court Hearing Held Court Reporter:
Hohenleitner Number of Transcript Pages for this hearing
estimated: 50-100pgs

12/16/2008 Case Taken Under Advisement

12/18/2008 Motion to Reconsider the Courts Taking Judicial Notice of
the Trial Transcripts

12/24/2008 Objection to State's Motion to Reconsider the Court's
Taking Judicial Notice of Trial Transcripts

01/06/2009 Memorandum Decision on the State's Motion for Summary
Dismissal

01/06/2009 Hearing Scheduled (Status by Phone 01/26/2009 02:45
PM)

01/26/2009 Hearing result for Status by Phone held on 01/26/2009
02:45 PM: Hearing Held

01/27/2009 Order to Transport 8/10/09 at 9am (3 days)

01/29/2009 Hearing Scheduled (Post Conviction Relief 08/10/2009
09:00 AM) 3 days

01/29/2009 Hearing Scheduled (Civil Pretrial Conference 07/20/2009
03:00 PM)

01/29/2009 Scheduling Order

03/11/2009 Motion to Continue UPCA Trial by One Day

03/16/2009 Continued (Post Conviction Relief 08/11/2009 09:00 AM)
3 days

03/16/2009 Order to Continue UPCA Trial - begin on Tues. August 11,
2009

05/28/2009 Motion to Appear Via Telephone at Pre-Trial Conference

06/02/2009 Order to Appear Via Telephone at Pre-Trial Conference

07/21/2009 Hearing result for Civil Pretrial Conference held on
07/20/2009 03:00 PM: District Court Hearing Held Court
Reporter: Penny Tardiff Number of Transcript Pages for
this hearing estimated: less than 50

Hearing result for Post Conviction Relief held on
08/11/2009 08/11/2009 09:00 AM: Hearing Held 1 days - Penny
Tardiff
08/17/2009 Order Dismissing Petition for Post Conviction Relief
08/17/2009 Civil Disposition entered for: State Of Idaho, Other Party;
Dalrymple, David Allen, Subject. Filing date: 8/17/2009
08/17/2009 STATUS CHANGED: Closed
09/25/2009 Appealed To The Supreme Court
12/18/2009 Notice Of Lodging Appeal Transcript - Supreme Court
Docket No. 36973
10/27/2010 Remittitur-Dismissed Supreme Court Docket No. 36973
06/27/2012 10 Day Notice of Intent to Release Exhibits/Depositions

Connection: Public

APPENDIX B

IDAHO SUPREME COURT



IDAHO COURT OF APPEALS

Clerk of the Courts
(208) 334-2210

P.O. Box 83720
Boise, Idaho 83720-0101

JESSICA MARIE LORELLO
DEPUTY ATTORNEY GENERAL
STATEHOUSE MAIL
BOISE ID 83720-0010

ORDER GRANTING MOTION TO DISMISS

Docket No. 36973-2009

DAVID ALLEN DALRYMPLE v. STATE OF IDAHO
Ada County District Court #2008-11760

An Appellant's MOTION TO DISMISS / WITHDRAW APPEAL having been filed on September 21, 2010; therefore, good cause appearing, IT IS HEREBY ORDERED that Appellant's MOTION TO DISMISS is **** GRANTED, **** and this appeal is hereby **** DISMISSED. ****

Dated this 23rd day of September, 2010.

For the Supreme Court / Court of Appeals

/s/ STEPHEN W. KENYON, Clerk

cc: Counsel of Record
Clerk of the District Court
District Court Judge
Court Reporter (if applicable)

RECEIVED
SEP 23 2010

CLERK OF THE DISTRICT COURT
STEPHEN W. KENYON

For the Court:
Stephen W. Kenyon
Clerk of the Courts

09/23/2010 SV

