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Gould v. State Respondent's Brief Dckt. 42433

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRANDON GRANT GOULD,)	
)	No. 42433
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2012-17684
)	
STATE OF IDAHO,)	
)	
Defendant-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 JASON D. SCOTT
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

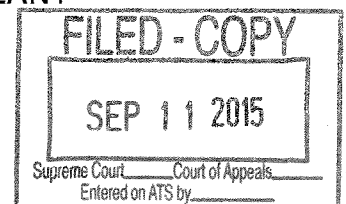
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PETITIONER-APPELLANT



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STATEMENT OF THE CASE

Nature Of The Case

Brandon Grant Gould appeals from the judgment entered on the district court's order summarily dismissing Gould's successive petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

"Following allegations by Gould's seven-year-old daughter that Gould had inappropriate sexual contact with her, a grand jury indicted Gould on one count of lewd conduct with a minor child under sixteen and one count of sexual abuse of a child under the age of sixteen years." Gould v. State, Docket No. 39738, 2013 Unpublished Opinion No. 736 *1 (Idaho App. Oct. 31, 2013) ("Gould II"). See also State v. Gould, Docket No. 35797, 2009 Unpublished Opinion No. 653 (Idaho App. Oct. 27, 2009) ("Gould I"). At trial, a jury found Gould guilty of lewd conduct, but could not reach a unanimous verdict on the sexual abuse charge. Id. at 2. The district court imposed a unified 10-year sentence with three years fixed, which the Idaho Court of Appeals affirmed. Gould I.

"Thereafter, Gould timely filed a pro se petition for post-conviction relief." Gould II at 2. "Gould raised three overarching claims in his petition and addendum: prosecutorial misconduct, ineffective assistance of defense counsel, and ineffective assistance of appellate counsel." Id. The district court summarily dismissed the prosecutorial misconduct claim on the basis that it could have been raised on direct appeal, but held an evidentiary hearing on Gould's ineffective assistance of counsel claims. Id. After the evidentiary hearing, the

district court denied relief on Gould's remaining claims, and the Idaho Court of Appeals affirmed. Gould II at 3-13.

On September 28, 2012, while his initial post-conviction appeal was still pending, Gould filed a successive petition in which he alleged, in relevant part, that the state filed a criminal complaint on October 11, 2007, charging him with two counts of lewd conduct, and then filed an "Amended Indictment" on October 16, 2007, charging him with one count of lewd conduct and one count of sexual abuse. (R., p.6.) Based on these factual allegations, Gould asserted that, because sexual abuse is not a lesser included offense of lewd conduct, the state had "no authority to file an amended indictment charging a crime that that [sic] was not an included offense under the complaint." (R., p.7.) Gould further alleged "the trial court never properly obtained jurisdiction . . . in the underlying criminal case" because the record does not reflect an "original" indictment, but only reflects an amended indictment. (R., pp.7-8.) Absent an "original" indictment, Gould believes he was entitled to a preliminary hearing on the criminal complaint filed October 11, 2007. (R., p.8.) Finally, Gould alleged the court lacked jurisdiction because the amended indictment "did not contain the proper endorsements" under I.C. § 19-1404. (R., p.9.) Gould also restated the substance of his jurisdictional allegations as ineffective assistance of counsel claims and claimed counsel was ineffective in other respects. (R., pp.10-13.) The "sufficient reason" Gould provided for filing a successive petition was the alleged ineffective of assistance of "prior post conviction counsel." (R., p.10.)

Gould and the state filed motions for summary dismissal, after which the district court granted Gould's request for counsel. (R., pp.74-79, 82-86, 88-91.) After being appointed, successive post-conviction counsel was granted additional time to investigate Gould's allegations and, on April 15, 2013, he filed a motion to stay Gould's case pending resolution of Gould's first post-conviction action, which was pending on appeal at that time. (R., pp.106-114, 119-121.) The district court granted the motion and stayed the case. (R., p.123.)

Gould, with the assistance of counsel, ultimately filed an amended successive petition on November 13, 2013, claiming counsel was ineffective for failing to (1) "address subject matter jurisdiction" based on the state "only" filing an amended indictment; (2) "object to the prosecuting attorney's presentation of evidence to the grand jury in the absence of witness testimony"; (3) "object to the state's amendment of the charge in count two of the criminal complaint" (4) "call expert witness, Phillip Esplin, Ed.D. to testify as to the process of memory as a reconstructive enterprise with a focus on the triggering circumstances accompanying an alleged child sex abuse victim's initial disclosure," and (5) "object to Witness Mydell Yeager's testimony." (R., pp.125-131.) With respect to his first claim, Gould advised the court that, contemporaneous with his successive amended petition, he also "filed a motion to correct an illegal sentence," which motion raised the same underlying jurisdictional argument

alleged as part of his ineffective assistance of counsel claim.¹ (R., pp.126-127.) The state filed a motion to summarily dismiss Gould's amended successive petition (R., pp.140-147), and the district court issued a notice of intent to dismiss Gould's successive amended petition "for the reasons stated in the State's motion" (R., pp.150-151).²

In response to the court's notice, Gould filed a response "object[ing]" to dismissal, but acknowledging the Idaho Supreme Court's recent opinion in Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014), foreclosed any argument that the alleged ineffective assistance of initial post-conviction counsel constituted a sufficient reason for filing a successive petition. (R., pp.153-155.) Gould, however, argued that the fifth claim in his amended successive petition alleging ineffective assistance of counsel in relation to Mydell Yeager's testimony "relates back" to a claim raised in his initial petition and is a claim that he did not "voluntarily waive" in his first post-conviction action. (R., p.155.) Gould

¹ As noted in his amended successive petition, in his Rule 35 motion, Gould claimed his "indictment was deficient because it did not list the names of the witnesses who testified before the grand jury, as required by statute." State v. Gould, Docket No. 42051, 2015 Unpublished Opinion No. 394 (Idaho App. March 6, 2015) ("Gould III"). According to Gould, the alleged defect deprived the district court of subject matter jurisdiction. Id. at 1-2. "The district court agreed that the indictment failed to comply with the relevant statute and rule, but held that this deficiency did not invalidate the judgment." Id. at 2. The Court of Appeals agreed and held "that the defect in Gould's indictment was not jurisdictional." Id. at 3. The Court of Appeals issued its opinion in Gould's Rule 35 appeal on March 6, 2015. Gould III.

² The court also took judicial notice "of the case files in the underlying criminal case and the original post-conviction case," Ada County Case Nos. CR-FE-2007-1313 [Docket No. 35797] and CV-PC-2011-122 [Docket No. 39738]." (R., p.150 n.1.)

requested an evidentiary hearing on this claim. (R., p.155.)

In its Order Dismissing Successive Petition, the district court noted that Gould's response to the court's notice "appears to concede that all but one of the successive petition's claims fail in light of the intervening holding of *Murphy*" (R., p.157.) With respect to the claim on which Gould sought an evidentiary hearing, the court denied relief, concluding the claim "was known at the time of trial," and Gould failed to show a "'sufficient reason' for not raising the issue long before the filing of his successive petition." (R., pp.158-159.) The district court entered judgment dismissing Gould's successive amended post-conviction petition, from which Gould filed a timely notice of appeal. (R., pp.161-164.)

Although the district court appointed counsel to represent Gould on this appeal, appellate counsel filed a motion to withdraw, which the Idaho Supreme Court granted. (R., p.168; Motion to Withdraw as Counsel of Record and to Allow Appellant to Proceed *Pro Se*, filed November 21, 2014; Order Granting Motion to Withdraw and Suspend Briefing Schedule, dated December 12, 2014.)

ISSUE

Contrary to I.A.R. 35(a)(4), Gould's brief does not include a statement of issues on appeal. (See generally Opening Brief of Appellant ("Appellant's Brief").) The state rephrases the issue on appeal as: Has Gould failed to show error in the summary dismissal of his untimely amended successive post-conviction petition?

ARGUMENT

Gould Has Failed To Show Error In The Summary Dismissal Of His Untimely Amended Successive Petition

A. Introduction

The district court summarily dismissed Gould's successive post-conviction petition because Gould conceded he did not have a sufficient reason to overcome the prohibition against successive petitions with respect to four of his five claims, and because Gould failed to establish a sufficient reason to proceed on the single claim he did not concede. (R., pp.157-159.) Notwithstanding his concession below, on appeal Gould contends the district court erred in summarily dismissing all of his claims. (Appellant's Brief, pp.6-29.) This Court should decline to consider Gould's argument that the court erred in dismissing all of his claims because the argument is waived. Alternatively, application of the correct legal standards to the facts of this case shows Gould has failed to show the district court erred.

B. Standard Of Review

This Court freely reviews the district court's application of the statute of limitation to a post-conviction petition. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (citing Freeman v. State, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992)).

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any

affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. Gould Has Failed To Show Error In The Summary Dismissal Of His Untimely Amended Successive Petition

1. Gould Waived Consideration Of All But One Of His Claims By Conceding That He Did Not Provide A Sufficient Reason To Pursue Those Claims In A Successive Petition

The state’s motion to dismiss Gould’s amended successive petition was based, in part, on Idaho Code § 19-4908, which 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.

(R., pp.141-142.)

In response to this asserted basis for dismissal, Gould conceded that the alleged ineffective assistance of original post-conviction counsel is not a sufficient reason for purposes of I.C. § 19-4908, but contended this bar did not apply to his claim that counsel was ineffective for failing to object to Mydell Yeager’s testimony. (R., p.155.)

Despite his concession below, on appeal Gould advances arguments in support of all of the claims in his amended successive petition. (Appellant’s Brief, pp.9-29.) Gould contends he can properly do so based on his reading of the United States Supreme Court’s opinions in Martinez v. Ryan, 132 S.Ct. 1309

(2012), and Trevino v. Thaler, 133 S.Ct. 1911 (2011), and because he does not believe the Idaho Supreme Court's opinion in Murphy, supra, is applicable. (Appellant's Brief, pp.7-8.) This Court should decline to consider Gould's arguments because they are being raised for the first time on appeal, and Gould's current position that Murphy is inapplicable is directly contrary to his concession below; consequently, the district court's application of Murphy was invited. Serrano v. Four Seasons Framing, 157 Idaho 309, 315, 336 P.3d 242, 248 (2014) (appellate court will not consider arguments raised for the first time on appeal); State v. Abdullah, 158 Idaho 386, ___, 348 P.3d 1, 35 (2015) ("The invited error doctrine precludes a criminal defendant from 'consciously' inviting district court action and then successfully claiming those actions are erroneous on appeal.").

Even if this Court were to consider Gould's assertion that Martinez and Trevino govern his case instead of Murphy, this argument lacks merit. The Supreme Court's opinions in 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; those cases have no bearing on whether a post-conviction petitioner in Idaho can overcome the successive petition bar set forth in I.C. § 19-4908. Murphy, on the other hand, directly controls that question and clearly establishes that "ineffective assistance of post-conviction counsel is not a sufficient reason under I.C. § 19-4908 for allowing a successive petition." Murphy, 156 Idaho at 391, 327 P.3d at 367. Gould's claim to the contrary fails.

2. The “Sufficient Reason” Gould Asserts As Grounds For Proceeding On Claim Five Of His Amended Successive Petition Fails

In response to the state’s motion for summary dismissal and the district court’s notice of intent to dismiss, Gould asserted his fifth claim could survive the successive petition bar because it “relates back to the original petition” he filed on January 4, 2011. (R., p.155.) Gould elaborated on this argument as follows:

Petitioner believes trial counsel in the original case litigated the issue as appellate ineffective assistance of counsel. Petitioner’s issue was that trial counsel had failed to preserve the issue, and the court had abused its discretion regarding Ms. Yeager’s testimony. He did not knowingly, intelligently and voluntarily waive his original issue. Furthermore, it was not ineffective assistance but rather possible confusion that resulted in the issue not being addressed the way it is plead [sic] in the successive petition. Ultimately the Petitioner argues he is entitled to an evidentiary hearing on the matter.

Conclusion

It seems settled that ineffective assistance of post conviction counsel is not a sufficient reason to have an opportunity to seek a second chance at relief through a successive petition. Regardless, the Petitioner believes there is sufficient reason for his case to be heard by the district court. It does not relate to the performance of his appointed counsel on the post conviction matter. At least one of the claims relate back to his original petition. The petition prepared without the assistance of an attorney. The Petitioner respectfully asks this court not to dismiss is petition.

(R., pp.155-156.)

The district court rejected Gould’s argument, stating:

. . . [T]he particular issue with respect to Yeager’s testimony that is raised in the successive petition is different from the issue with respect to Yeager’s testimony that was raised in the original petition. Gould first raised the issue he is now pursuing on September 28, 2012 – the date his successive petition was filed. His underlying conviction was affirmed on appeal on October 27, 2009. Idaho law gave him one year from then to seek post-

conviction relief, I.C. § 19-4902(a), but he did not raise this particular issue for nearly three years. No justification for that delay is apparent. The issue Gould now raises—trial counsel's failure to object to testimony that allegedly violated an *in limine* ruling—is one that, by nature, was known at the time of trial. Gould's explanation for the delay—that "possible confusion" in the original post-conviction case "resulted in the issue not being addressed the way it is plead [sic] in the successive petition" (Reply to Court's Notice of Intent to Dismiss Successive Petition 3)—does not establish that the issue was raised within a reasonable period of time. He simply has not shown "sufficient reason" for not raising the issue long before the filing of his successive petition.

(R., pp.158-159.)

On appeal, Gould argues that "the district court erred in dismissing the claim by saying that it wasn't timely raised in Gould's original petition for post-conviction relief filed on December 28, 2010," because, according to Gould, he "did raise the issue" as "Ground 3" in his "original petition." (Appellant's Brief, p.25.) Gould further contends that, under Palmer v. Dermitt, 102 Idaho 591, 635 P.2d 955 (1981), he can pursue a claim previously raised if it was "inadequately raised" in his original petition and was not voluntarily waived. (Appellant's Brief, p.27.) Gould is incorrect.

Although the Court in Palmer held that "allegations of ineffective assistance of prior postconviction counsel, if true, would warrant a finding that the omission in the prior postconviction proceeding of the allegations now being raised anew . . . was not a result of an active, knowing choice made by [petitioner] through this prior court-appointed attorney," and would "provide sufficient reason for permitting the allegations to be raised in a successive petition," Palmer, 102 Idaho at 596, 635 P.2d at 960, that is no longer the law. In Murphy, the Court expressly overruled Palmer, stating: "We hold that

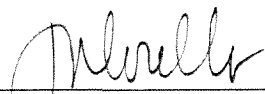
ineffective assistance of post-conviction counsel is not a sufficient reason under I.C. § 19-4908 for allowing a successive petition, and thus, overrule *Palmer v. Dermitt*.” Murphy, 156 Idaho at 391, 327 P.3d at 367. Palmer does not, therefore, allow consideration of a claim Gould believes was “inadequately” raised in his original post-conviction case. The district court properly dismissed Claim Five.³

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

CONCLUSION

The state respectfully requests that this Court affirm the district court’s order summarily dismissing Gould’s untimely amended successive petition for post-conviction relief.

DATED this 11th day of September, 2015.



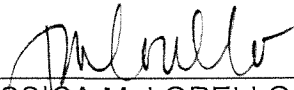
JESSICA M. LORELLO
Deputy Attorney General

³ The district court also properly dismissed Gould’s other claims, as Gould conceded below. Even if this Court were to consider Gould’s other claims despite his concession, Gould has failed to show error in the court’s summary dismissal decision because all of Gould’s claims could and should have been raised in Gould’s initial petition and are barred by I.C. § 19-4908. The claims are also untimely; however, it does not appear the state asserted that as a basis for dismissal (R., pp.140-147), nor did the district court cite it as separate basis in its notice of intent to dismiss (R., pp.150-151 (noting intent to dismiss “for the reasons stated in the State’s motion)). The state also notes that the merits of Gould’s jurisdictional claims were resolved in Gould III.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 11th day of September, 2015, 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:

BRANDON G. GOULD, #90834
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P.O. Box 70010
Boise, ID 83707



JESSICA M. LORELLO
Deputy Attorney General

JML/dd