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Brown v. State Respondent's Brief Dckt. 43407

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

ALEXANDER T. BROWN,)	
)	No. 43407
Petitioner-Appellant,)	
)	Ada Co. Case No.
v.)	CV-2015-7600
)	
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

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State of Idaho

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PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature Of The Case

Alexander T. Brown appeals from the district court's judgment summarily dismissing his untimely petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

In 2009, the state charged Brown with, and he pled guilty to, rape. (See R., p.21.) On October 13, 2009, the court imposed a unified life sentence with 10 years fixed. (*Id.*) The district court denied Brown's I.C.R. 35 motion for a reduction of his sentence, and the Idaho Court of Appeals affirmed Brown's sentence on July 9, 2010. State v. Brown, Docket No. 37088, 2010 Unpublished Opinion No. 546 (Idaho App. July 9, 2010). The Remittitur issued on August 17, 2010. (R., p.21.)

"Nearly five years later, on May 4, 2015, Brown filed a petition for post-conviction relief and moved for appointment of counsel." (R., p.21.) In his petition, Brown asserted his counsel was ineffective for "allow[ing]" him to "waive" his right not to participate in a psychosexual evaluation and for failing to "protect his 5th and 6th Amendment rights." (R., p.5.) Brown also claimed the prosecutor "purposeful[ly] overcharg[ed] the crime" and that "he should not have been charged with the crime of Rape pursuant to I.C. § 18-6101(1)" and instead should have been charged pursuant to I.C. § 18-1508A(1) "because the crime occurred on or about June and December of 2008, when the victim was 17 years of age and [he] was 21 years of age, within the 5 years [sic] limitation period of I.C. § 18-1508A(1)." (R., p.6.)

The district court issued a notice of intent to dismiss, advising Brown his petition was subject to dismissal because it was not timely filed. (R., pp.21-22.) The district court further explained the standard for equitable tolling of the limitation period and advised Brown his allegations did “not make out a case for equitable tolling.” (R., p.22.) The court notified Brown he had 20 days to respond to the court’s notice. (R., p.23.) “Brown did not respond to the notice.” (R., p.25.) The court, therefore, entered an order and a separate judgment dismissing Brown’s petition. (R., pp.25, 27.) Brown filed a timely notice of appeal. (R., pp.34-38.)

ISSUES

Brown states the issues on appeal as:

1. DID COUNSEL FULFILL HIS OBLIGATION UNDER THE 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PLEA BARGAIN PROCESS?
2. DID THE PROSECUTOR ABUSE HER DISCRETIONARY AUTHORITY BY OVERCHARGING BROWN WITH THE CHARGE OF RAPE JUST TO SECURE A GUILTY PLEA TO THE PROBATION VIOLATION WHEN THE ENCOUNTER WAS CONSENSUAL?

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

The state rephrases the issue on appeal as:

Has Brown failed to show error in the summary dismissal of his untimely post-conviction petition because he has failed to challenge the basis for dismissal?

ARGUMENT

Brown Has Failed To Establish Error In The Summary Dismissal Of His Untimely Post-Conviction Petition Because He Has Failed To Challenge The Basis For Dismissal

A. Introduction

The district court dismissed Brown's petition as untimely. (R., pp.21-25.) On appeal, Brown does not challenge the district court's basis for dismissal, but instead argues the merits of some of the complaints included in his petition and supporting affidavit. (See generally Appellant's Brief, pp.2-6.) Brown has failed to show any error in the summary dismissal of his untimely post-conviction petition because he has failed to address the reason his petition was dismissed.

B. Standard Of Review

"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) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Brown Has Failed To Show Error In The Summary Dismissal Of His Untimely Petition

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." Absent a showing by the petitioner that the limitation period should be tolled, the failure to

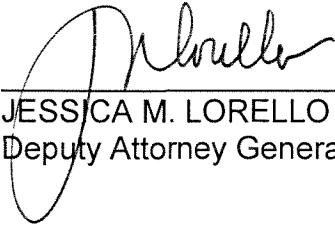
file a timely petition for post-conviction relief is a basis for dismissal of the petition. Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009); Evensiosky v. State, 136 Idaho 189, 190-191, 30 P.3d 967, 968-969 (2001). “In Idaho, equitable tolling of the statute of limitation for filing a post-conviction petition has been recognized” in two circumstances: (1) “where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials”; and (2) “where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction.” Kriebel, 148 Idaho at 190, 219 P.3d at 1206 (citations omitted).

As noted by the district court, Brown’s petition is untimely because he did not file it until “[n]early five years” after the Remittitur issued in his direct appeal. (R., p.21.) Moreover, Brown’s allegations do not support a claim of tolling. (R., pp.3-10, 22.) On appeal, Brown does not dispute that his petition is untimely or disagree with the court’s determination that his “allegations do not make out a case for equitable tolling.” (R., p.22.) Instead, Brown argues the merits of some of his complaints. (Appellant’s Brief, pp.2-6.) Because Brown has not challenged the district court’s reason for dismissal, this Court should affirm on the unchallenged basis that Brown’s petition was not timely filed. State v. Goodwin, 131 Idaho 364, 366-367, 956 P.2d 1311, 1313-1314 (Ct. App. 1998) (appellate court may affirm on unchallenged basis).

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Brown's untimely petition for post-conviction relief.

DATED this 29th day of December, 2015.

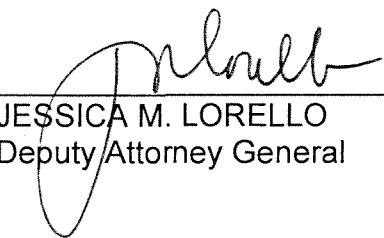


JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 29th day of December, 2015, served a true and correct copy of the foregoing RESPONDENT'S BRIEF by placing the copy in the United States mail, postage prepaid, addressed to:

ALEXANDER T. BROWN
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JESSICA M. LORELLO
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JML/dd