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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JASON RYAN MCDERMOTT,)	
)	No. 41841
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2013-1926
)	
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 DARLA S. WILLIAMSON
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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FILED - COPY
APR 20 2015
Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

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STATEMENT OF THE CASE

Nature Of The Case

Jason Ryan McDermott appeals from the summary dismissal of his successive petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In 2003, the state charged McDermott and two others with first-degree murder and conspiracy to commit first-degree murder for the murder of Zachariah Street after Zachariah “was found dead in the desert south of Boise.” State v. McDermott, 2009 WL 9150885 *1 (Idaho App. July 2, 2009). The state also filed a notice of intent to seek the death penalty against McDermott. Id. at *2. “McDermott was ultimately found guilty by a jury of all the charges, but the jury was unable to reach a unanimous decision on the statutory aggravating circumstances that would have triggered the death penalty.” Id. The district court therefore imposed concurrent fixed life sentences. Id. McDermott unsuccessfully challenged his sentences on appeal. Id. at *2-5.

McDermott subsequently filed a post-conviction petition “asserting numerous claims for relief.” McDermott v. State, 2012 WL 9492794 *1 (Idaho App. May 17, 2012) (“McDermott II”). The district court summarily dismissed McDermott’s petition. Id. McDermott challenged the summary dismissal on appeal, but the Idaho Court of Appeals affirmed on May 17, 2012. See generally McDermott II.

On January 31, 2013, McDermott filed a successive petition for post-conviction relief. (R., pp.4-91.) In his successive petition McDermott alleged (1) ineffective assistance of counsel “in all stages of case – including first post

conviction and appeal”; (2) judicial and prosecutorial misconduct; and (3) cumulative error. (R., pp.4-5.) McDermott also filed a motion requesting the appointment of counsel. (R., pp.92-94.) The district court granted McDermott’s motion for counsel (R., p.104), after which the state filed a motion for summary dismissal and a supporting brief (R., pp.115-130). The court held a hearing on the state’s motion and subsequently entered a written order dismissing McDermott’s petition. (R., pp.131, 135, 139-152.) McDermott filed a timely notice of appeal and, although the court appointed counsel to represent McDermott on appeal, counsel was granted leave to withdraw on the basis that this appeal is “frivolous.” (R., pp.153-165; Motion for Leave to Withdraw and Suspend Briefing Schedule, filed September 18, 2014; Affidavit in Support of Motion for Leave to Withdraw and Motion to Suspend the Briefing Schedule, filed September 18, 2014; Memorandum in Support of Motion to Withdraw and Suspend Briefing Schedule, filed September 18, 2014; Order Granting Motion for Leave to Withdraw and Suspend Briefing Schedule, dated October 23, 2014.)

ISSUES

McDermott states the issues on appeal as follows:

- 1) Have the state and court failed to recognize the plaintiff's presentation of hard facts and evidence that establishes a genuine material factual dispute?
- 2) Has the plaintiff correctly and sufficiently raised proper arguments and facts to describe his issues; to include the violations of his due process rights?
- 3) Has the plaintiff correctly raised substantive grounds for relief from his conviction and sentence where such grounds were raised properly under claims of ineffective assistance of counsel?

(Appellant's Brief, p.8 (capitalization altered, punctuation original).)

The state rephrases the issue as:

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

ARGUMENT

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

A. Introduction

The district court dismissed McDermott's successive petition citing the following grounds: (1) some of McDermott's claims could have been raised on direct appeal or in his first petition; (2) some of the claims were previously decided; (3) the claims lack merit and/or were unsupported by evidence; and (4) some of the claims are "untimely." (R., pp.142-152.) On appeal, McDermott asserts the district court erred in summarily dismissing his successive petition, arguing his successive petition contains "proper foundation" and "extensive facts, evidence, and arguments to back up all points raised in his 1st post conviction petition." (Appellant's Brief, p.10; see also p.12 (arguing that he "sufficiently provided arguments and facts" to support his due process claims), p.17 (noting "concise claims under his IAC section of his successive post [conviction] petition").) McDermott has failed to show error in the summary dismissal of his successive petition because he has failed to claim any error in relation to several grounds on which his petition was dismissed, including the timeliness of his successive petition. In addition, as his argument indicates, McDermott's claims were or could have been raised in his initial petition, and many of those claims should have been raised on direct appeal. Summary dismissal was therefore appropriate.

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. McDermott's Successive Petition Was Untimely

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." The failure to file a timely post-conviction petition is a basis for dismissal. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (citing Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003)). 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)). 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).

McDermott did not file his successive post-conviction petition until December 24, 2012 (R., p.4), more than three years after the Court of Appeals issued its opinion on July 2, 2009, in McDermott's direct appeal, McDermott, supra. McDermott's successive petition was, therefore, clearly untimely based on the one-year statute of limitation. On appeal, McDermott does not dispute that his successive petition was untimely. (See generally Appellant's Brief, pp.9-19.) Instead, McDermott focuses on allegations that the district judge who presided over his case is biased and his belief that he has alleged a genuine issue of material fact entitling him to an evidentiary hearing. (Id.) Although McDermott may believe that he supported his successive post-conviction claims with "extensive facts, evidence, and arguments," this belief does not render his petition timely. The relevant inquiry in deciding if McDermott's successive petition was timely filed requires consideration of whether McDermott filed his successive petition within a reasonable time of when the claims raised in the petition were known or reasonably could have been known. Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). What constitutes a reasonable time is analyzed on a "case-by-case basis." Id.

By McDermott's own admission, the claims raised in his successive petition are the same claims he raised in his original petition. (Appellant's Brief, p.10 (contending his successive petition "correctly laid proper foundation and provided extensive facts, evidence, and arguments to back up all points raised in his 1st post

conviction petition).) Thus, McDermott's successive petition claims were known during his first post-conviction proceedings, which forecloses any assertion that he is not bound by the one-year limitation period set forth in I.C. § 19-4902(a). Nevertheless, McDermott asserted in district court that his successive petition was timely because it was filed within one year of the Court of Appeals' May 17, 2012 opinion in McDermott's initial post-conviction case. (Tr., p.2, L.19 – p.3, L.8.) This is not, however, the proper analysis. The question is not whether the successive petition was filed within one year of the appellate decision related to the initial post-conviction appeal; rather, as noted, it is whether the claims raised in the successive petition were filed within a reasonable time of when the claims were known or could have been known. Since the claims in McDermott's successive petition were known when he filed his original petition, his successive petition cannot be considered timely.

Because McDermott's successive petition was untimely and because McDermott has failed to challenge dismissal of his petition on that basis, the district court's order summary dismissing McDermott's petition should be affirmed.¹ See

¹ In its order dismissing McDermott's successive petition, the district court addressed each claim individually, but did not evaluate the timeliness of each claim, instead dismissing some claims on other grounds, including lack of merit and that the claim(s) were or could have been raised in McDermott's initial petition. (R., pp.142-151.) However, one of the grounds asserted by the state in support of its motion for summary dismissal was that McDermott's successive petition was untimely. (R., pp.116, 122.) Because McDermott received notice of dismissal on that basis, this Court may affirm the summary dismissal of any claim that it considers untimely. See State v. Hansen, 151 Idaho 342, 346, 256 P.3d 750, 754 (2011) ("Although the district court held that Kirsch had actual authority to consent to the home search, we decline to address this issue and affirm on the alternative grounds that the warrant was justified by apparent authority.").

State v. Goodwin, 131 Idaho 364, 366-367, 956 P.2d 1311, 1313-1314 (Ct. App. 1998) (appellate court may affirm on unchallenged basis).

D. In Addition To Being Untimely, McDermott's Successive Petition Was Properly Dismissed On Several Other Grounds

The district court also dismissed many of McDermott's claims on the bases that the claims (1) could have been raised on direct appeal, which would preclude raising them in post-conviction pursuant to I.C. § 19-4901(b); (2) could have been raised or were adjudicated in McDermott's original petition, which would preclude raising them again in a successive petition pursuant to I.C. § 19-4908; and (3) lacked merit. (R., pp.142-151.) To the extent McDermott does not challenge any of these grounds for dismissal, this Court should affirm on the unchallenged bases. Goodwin, 131 Idaho at 366-367, 956 P.2d at 1313-1314.

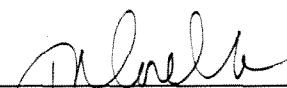
If McDermott's appellate brief and district court pleadings are construed as asserting that his successive petition should not have been dismissed due to the alleged ineffective assistance of post-conviction counsel in his initial proceeding, such an argument fails. In Murphy v. State, 156 Idaho 389, 391, 327 P.3d 365, 367 (2014), the Idaho Supreme Court held that "ineffective assistance of post-conviction counsel is not a sufficient reason under I.C. § 19-4908 for allowing a successive petition." Accordingly, any assertion by McDermott that he should be allowed to pursue any of his claims in a successive petition due to the alleged ineffective assistance of post-conviction counsel fails.

McDermott 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 McDermott's successive petition for post-conviction relief.

DATED this 20th day of April, 2015.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 20th day of April, 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:

JASON McDERMOTT, #62020
ICIO
381 W. Hospital Drive
Orofino, ID 83544



JESSICA M. LORELLO
Deputy Attorney General

JML/pm