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IN THE SUPREME COURT OF THE STATE OF IDAHO

LUIS ENRIQUE GONZALEZ,)	
)	NO. 45074
Petitioner-Appellant,)	
)	TWIN FALLS CO. NO. CV42-17-855
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
<hr/>		

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

HONORABLE RANDY J. STOKER
District Judge

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**ATTORNEYS FOR
PETITIONER-APPELLANT**

**ATTORNEY FOR
RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

Luis Enrique Gonzalez appeals from the district court's order summarily dismissing his petition for post-conviction relief. He submits that the district court erred by ruling that his petition was untimely and by denying his motion for appointment of counsel.

Statement of the Facts and Course of Proceedings

In 2014, Mr. Gonzalez was convicted of two counts of burglary and one count of grand theft, and was found to be a persistent violator. (R., 4; *see also State v. Gonzalez*, 2015 Unpublished Opinion No. 568 (Ct. App. July 29, 2015.)) He appealed, but his convictions and sentences were affirmed on appeal. *Id.*

Mr. Gonzalez subsequently filed a petition for post-conviction relief. (R., p.4.) He asserted that there were several biased jurors on the panel at trial. (R., p.4.) Further, he asserted that trial counsel was ineffective for failing to pursue an alibi witness and by not objecting to jurors on the panel. (R., p.5.) Mr. Gonzalez also moved for the appointment of counsel. (R., p.7.)

The district court entered an order denying the motion for appointment of counsel and issued a notice of intent to dismiss the petition. (R., p.9.) The court determined that the petition was frivolous because Mr. Gonzalez had not provided factual support of his claims, and "given this lack of factual support, the Court can detect no possibility of a valid post-conviction claim." (R., p.11.) Further, the court found that the petition was untimely. (R., p.11.) The court noted that the remittitur on Mr. Gonzalez's direct appeal was issued August 14, 2015, and that the petition in this case was filed on February 27, 2017. (R., p.11.) However, the court also noted

that Mr. Gonzalez had attempted to file a petition on July 18, 2016. (R., p.11 n.1.) The court gave Mr. Gonzalez twenty days to respond to the notice.

Mr. Gonzalez filed a response and supporting affidavit to the court's notice of intent to dismiss. (R., p.14.) Mr. Gonzalez asserted that he did in fact file a petition on July 18, 2016, and was told by the paralegal at the Idaho State Correction Center to put the criminal case number on the petition. (R., p.14.) Mr. Gonzalez stated that he did not hear back from the district court regarding the petition, but after several month wrote to the court. (R., p.14.) The court subsequently wrote back and advised Mr. Gonzalez that the petition was filed incorrectly. (R., p.14.) Mr. Gonzalez asserted that since a petition was timely filed, even if it was under the criminal case, the court should consider his petition timely. (R., pp.14-15.)

Two days later, the court dismissed the petition. (R., p.17.) Regarding the timeliness of the petition, the court held,

the fact of the matter is Gonzalez waited until July 18, 2016, to attempt to file his petition – 11 months into the 12-month statute of limitations. When he did so it was improperly captioned; this delayed the filing until well after the statute of limitations ran. This is not a showing that Gonzalez has the “inability” to timely file the petition. Therefore, equitable tolling does not apply.

(R., pp.17-18.) The court then noted that even if the doctrine of equitable tolling did apply, Mr. Gonzalez did not address the court's concern regarding the lack of factual support, and therefore the court dismissed the petition on that ground as well. (R., p.18.) Mr. Gonzalez appealed. (R., p.22.) Mr. Gonzalez asserts that the district court erred by dismissing his petition as untimely and erred by failing to appoint to counsel.

ISSUES

- I. Did the district court err when it held that Mr. Gonzalez's petition for post-conviction relief was untimely?
- II. Did the district court err by denying Mr. Gonzalez's motion for appointment of counsel because he raised the possibility of a valid claim?

ARGUMENT

I.

The District Court Erred When It Held That Mr. Gonzalez's Petition For Post-Conviction Relief Was Untimely

A. Introduction

Mr. Gonzalez timely filed a petition for post-conviction relief on July 18, 2016. He simply made a clerical error in the caption, and the petition was filed in the criminal case. The district court should have considered Mr. Gonzalez's petition as timely filed. The district court erred by exalting form over substance in determining that Mr. Gonzalez's petition was untimely.

B. The District Court Erred When It Held That Mr. Gonzalez's Petition For Post-Conviction Relief Was Untimely

The limitations period for filing a petition for post-conviction relief is "one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902. The appeal referenced in that section means an appeal in the underlying criminal case. *See Gonzalez v. State*, 139 Idaho 384, 385 (Ct. App. 2003). In this case, the remittitur for the appeal in the underlying criminal case was issued on August 14, 2015. (*See R.*, p.11.) Thus, to be timely, Mr. Gonzalez was required to file a petition for post-conviction relief by August 14, 2016. Mr. Gonzalez submits that he did.

The district court concluded that Mr. Gonzalez "attempted" to file a petition on July 18, 2016. (*R.*, p.11 n.1.) Mr. Gonzalez submits that he did file a petition on July 18, 2016. He simply made a clerical error in the caption. Mr. Gonzalez asserted in his response to the court's notice that he did in fact file a petition for post-conviction on July 18, 2016. (*R.*, p.14.) In his affidavit, he asserted that he was told by the paralegal at the prison to put the criminal case

number on the petition. (R., p.15.) He also asserted in his affidavit that he did not receive any kind of notification from the district court clerk that there was any problem with the filing until he asked the clerk in 2017. (R., p.15.) It was only after hearing back from the court clerk that he filed another petition without the criminal case number. (R., p.14.) The district court did not dispute Mr. Gonzalez's factual assertions. Rather, it held,

the fact of the matter is Gonzalez waited until July 18, 2016, to attempt to file his petition – 11 months into the 12-month statute of limitations. When he did so it was improperly captioned; this delayed the filing until well after the statute of limitations ran. This is not a showing that Gonzalez has the “inability” to timely file the petition. Therefore, equitable tolling does not apply.

(R., pp.17-18.) Mr. Gonzalez submits that the district court erred by determining that his July 18, 2016, was not a timely filed petition for post-conviction relief. Mr. Gonzalez asserts that the district court's conclusion exalts form over substance. Though improperly filed in the criminal case, Mr. Gonzalez filed a timely petition for post-conviction relief.

In *Dionne v. State*, 93 Idaho 235 (1969), the Idaho Supreme Court held that an application for a writ of habeas corpus could be considered as an application for post-conviction relief. “It is immaterial whether a petition or application is labeled Habeas Corpus or Post Conviction proceeding. Substance not form governs.” *Id.* at 237. Mr. Gonzalez acknowledges that in *State v. Jakoski*, 139 Idaho 352 (2003), the Idaho Supreme Court stated, “both habeas corpus and post-conviction relief, however, are civil in nature and are separate from criminal proceedings.” *Id.* at 355 (citing *State v. Creech*, 132 Idaho 1, 9–10 (1998)). In *Jakoski*, the defendant asserted that a motion to withdraw a guilty plea could be considered a petition for post-conviction relief. *Id.* The Idaho Supreme Court concluded, “it would be too much of a stretch to hold that a motion filed in a criminal case can be considered as a pleading commencing civil litigation.” *Id.*

This case, however, is not like *Jakoski*. Mr. Gonzalez is not asserting that a motion in a criminal case should be considered a petition for post-conviction. He is asserting that a petition for post-conviction relief should be treated as a petition for post-conviction relief. The register of actions (“ROA”) in the underlying criminal case shows that a Petition for Post Conviction Relief and Supporting Affidavit, as well as a Motion for Appointment of Public Defender, was filed on July 18, 2016.¹ The ROA also shows that that the district court took no action on either the petition or the motion for appointment of counsel, and that on January 3, 2017, Mr. Gonzalez sent a letter to the clerk of the court. The clerk responded to that letter on January 13, 2017. Mr. Gonzalez then filed another petition on February 27, 2017.² (R., p.4.)

Mr. Gonzalez submits that, because his July 28, 2016, petition for post-conviction relief and motion for appointment of counsel were clearly in substance a petition for post-conviction relief and a motion for appointment of counsel, the district court should have considered them timely filed once the clerical error was discovered and a civil case was opened.

II.

The District Court Erred When It Denied Mr. Gonzalez’s Motion For Appointment Of Counsel

A. Introduction

Mr. Gonzalez submits that the district court erred by denying his motion for appointment of counsel because he raised the possibility of a valid claim.

¹ A motion to take judicial notice of the ROA in the underlying criminal case is being filed contemporaneously with this Appellant’s Brief.

² The certificate of service indicates that the petition was delivered to the U.S. Mail system on February 22, 2017.

B. The District Court Erred When It Denied Mr. Gonzalez’s Motion For Appointment Of Counsel

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271 (Ct. App. 2002)(citing *State v. Bearshield*, 104 Idaho 676, 678 (1983); *Clark v. State*, 92 Idaho 827, 830 (1969); *Murray v. State*, 121 Idaho 918, 92 (Ct. App. 1992)). “Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56.” *Goodwin*, 138 Idaho at 271 (citations omitted). “Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based.” *Id.* Moreover, “[a]n application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than ‘a short and plain statement of the claim’ that would suffice for a complaint under I.R.C.P. 8(a)(1).” *Id.*

Also, “an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application.” *Id.* at 271-72 (citation omitted). “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Id.* at 272. To prevail on an ineffective assistance of counsel claim, an applicant must show that his attorney’s performance was deficient, and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Heilman v. State*, 158 Idaho 139, 145 (Ct. App. 2015).

I.C. § 19-4904 provides that a court-appointed attorney “may be made available” to a petitioner who is unable to pay for an attorney. If a petitioner “alleges facts to raise the possibility of a valid claim, the district court should appoint counsel in order to give the

petitioner an opportunity with counsel to properly allege the necessary supporting facts.” *Charboneau v. State*, 140 Idaho 789, 793 (2004). When applying this standard to *pro se* applications for appointment of counsel, “the trial court should keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim.” *Id.* at 792.

The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Fox v. State*, 129 Idaho 881 (Ct. App. 1997). Mr. Gonzalez submits that the district court abused its discretion by failing to reach its decision through an exercise of reason because it failed to heed the warning that petitions and affidavits filed by *pro se* petitions will often be conclusory and incomplete.

In this case, the district court denied the motion for appointment of counsel because it believed that Mr. Gonzalez “provides no facts in support of his claims. Given this lack of factual support, the Court can detect no possibility of a valid claim.” (R., pp.10-11.) Mr. Gonzalez submits that he provided sufficient facts for counsel to be appointed.

In his petition, Mr. Gonzalez submitted that there were biased jurors on his panel and that counsel was ineffective for failing to object to them. (R., pp.4-5.) Mr. Gonzalez did offer some factual support for this allegation – he identified the jurors and the reason for the bias. He stated that Juror 29 was friends with a witness and that Jurors 3 and 43 were friends with law enforcement. (R., p.4.) Thus, Mr. Gonzalez did provide facts in support of his petition. Further, he alleged that counsel was ineffective for not pursuing an alibi witness. (R.,p.5.) These are

possibly valid claims which appointed counsel could investigate and for which he or she could provide additional factual support.

CONCLUSION

Mr. Gonzalez requests that this court rule that his petition for post-conviction relief is timely. He further requests that his case be remanded for appointment of counsel on his petition for post-conviction relief.

DATED this 8th day of November, 2017.

_____/s/_____
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of November, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

LUIS GONZALEZ
INMATE #73450
ISCC
PO BOX 70010
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RANDY J STOKER
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JMC/eas»