

Uldaho Law

Digital Commons @ Uldaho Law

Not Reported

Idaho Supreme Court Records & Briefs

11-30-2017

Gonzalez v. State Respondent's Brief Dckt. 45074

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

Recommended Citation

"Gonzalez v. State Respondent's Brief Dckt. 45074" (2017). *Not Reported*. 4298.
https://digitalcommons.law.uidaho.edu/not_reported/4298

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

LUIS ENRIQUE GONZALEZ,)	
)	No. 45074
Petitioner-Appellant,)	
)	Twin Falls County Case No.
v.)	CV42-2017-855
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
<hr style="border: 1px solid black;"/>		

BRIEF OF RESPONDENT

**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

LAWRENCE G. WASDEN
Attorney General
State of Idaho

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

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEYS FOR
DEFENDANT-RESPONDENT**

JUSTIN M. CURTIS
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712

**ATTORNEY FOR
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
ISSUES	3
ARGUMENT	4
The Petition Does Not Set Forth The Possibility Of A Valid Claim	4
A. Introduction.....	4
B. Standard Of Review	4
C. Gonzalez’s Claims Could Not Be Developed Into Viable Claims Even With The Assistance Of Counsel	4
1. Gonzalez’s Claims Were Not Potentially Viable Because They Were Unsupported By Fact	5
2. Gonzalez’s Claims Were Not Potentially Viable Because They Were Untimely	7
CONCLUSION.....	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	7
<u>Charboneau v. State</u> , 140 Idaho 789, 102 P.3d 1108 (2004)	4
<u>Charboneau v. State</u> , 144 Idaho 900, 174 P.3d 870 (2007)	7
<u>Goodwin v. State</u> , 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002)	5
<u>Hall v. State</u> , 156 Idaho 125, 320 P.3d 1284 (Ct. App. 2014)	6
<u>Kriebel v. State</u> , 148 Idaho 188, 219 P.3d 1204 (Ct. App. 2009).....	7
<u>Leer v. State</u> , 148 Idaho 112, 218 P.3d 1173 (Ct. App. 2009).....	8
<u>Monahan v. State</u> , 145 Idaho 872, 187 P.3d 1247 (Ct. App. 2008).....	5
<u>Newman v. State</u> , 140 Idaho 491, 95 P.3d 642 (Ct. App. 2004)	5
<u>Rhoades v. State</u> , 148 Idaho 247, 220 P.3d 1066 (2009).....	7, 8
<u>Roman v. State</u> , 125 Idaho 644, 873 P.2d 898 (Ct. App. 1994)	9
<u>Schultz v. State</u> , 151 Idaho 383, 256 P.3d 791 (Ct. App. 2011).....	8
<u>State v. Abdullah</u> , 158 Idaho 386, 348 P.3d 1 (2015).....	6
<u>State v. Jakoski</u> , 139 Idaho 352, 79 P.3d 711 (2003).....	9
<u>State v. Payne</u> , 146 Idaho 548, 199 P.3d 123 (2008).....	5
<u>State v. Wolfe</u> , 158 Idaho 55, 343 P.3d 497 (2015).....	9
<u>Swader v. State</u> , 143 Idaho 651, 152 P.3d 12 (2007).....	4
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007).....	5
 <u>STATUTES</u>	
I.C. § 19-4902(a).....	7
I.C. § 19-4903	5

STATEMENT OF THE CASE

Nature Of The Case

Luis Enrique Gonzalez appeals from the summary dismissal of his petition for post-conviction relief. He challenges the denial of his motion for appointment of counsel.

Statement Of The Facts And Course Of The Proceedings

On February 27, 2017, Gonzalez filed a petition for post-conviction relief challenging his convictions for two counts of burglary and one count of grand theft, with a persistent violator sentencing enhancement. (R., p. 4.) Gonzalez moved for counsel to be appointed to represent him. (R., pp. 7-8.) The district court denied appointment of counsel and provided notice of intent to dismiss the petition. (R., pp. 9-12.) The denial of appointment of counsel was on two bases: first, “the Petitioner provides no facts in support of his claims,” and, second, the petition is “untimely and could not be granted in any event.” (R., pp. 10-11.)

Gonzalez responded to the denial of counsel and notice of intent to dismiss stating that he had previously attempted to file a petition,¹ but that he had been instructed to put the criminal case caption on the petition and did not learn until “many months” later that the petition had been “filed incorrectly.” (R., p. 14.) Gonzalez argued that the limitation period should have tolled from the filing in the criminal case until he received notice of the inadequacy of the prior filing. (R., pp. 14-15.)

The district court concluded that Gonzalez’s reasons for not filing a timely petition did not rise to the level of an inability to file timely, and therefore did not toll the limitation

¹ The district court noted the attempted filing in its original denial of counsel and notice of intent to dismiss. (R., p. 9.)

period. (R., pp. 17-18.) The district court also stated that Gonzalez had not responded to the court's other ground for denying counsel and potentially dismissing, that the claims were not supported by facts, and concluded the "petition is subject to dismissal for that reason as well." (R., p. 18.)

Gonzalez filed a notice of appeal timely from the entry of judgment. (R., pp. 20-24.)

ISSUES

Gonzalez states the issues on appeal as:

- I. Did the district court err when it held 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?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Gonzalez failed to show error in the denial of his motion for counsel where his petition does not set forth the possibility of a valid claim because it is untimely and fails to support any claims with facts?

ARGUMENT

The Petition Does Not Set Forth The Possibility Of A Valid Claim

A. Introduction

The district court denied Gonzalez's motion for the appointment of counsel after finding the petition "frivolous" because of "lack of factual support" for the claims and because the petition was "untimely and could not be granted." (R., pp. 10-11.) Gonzalez claims error on appeal, asserting that he did provide "sufficient facts" to merit appointment of counsel and the untimeliness of his petition was excused by "a clerical error in the caption." (Appellant's brief, pp. 4-9.) Review of the record shows Gonzalez has failed to demonstrate error by the district court.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004).

C. Gonzalez's Claims Could Not Be Developed Into Viable Claims Even With The Assistance Of Counsel

Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." Swader v. State, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); see also Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If the claims are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel, the court may deny the motion for counsel and proceed with the

usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Newman v. State, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). Review of the record in light of these standards shows no error by the district court because Gonzalez’s claims were unsupported and time-barred and therefore frivolous.

1. Gonzalez’s Claims Were Not Potentially Viable Because They Were Unsupported By Fact

The district court denied counsel after concluding the petition was frivolous because Gonzalez provided “no facts in support of his claims.” (R., pp. 10-11; see also p. 18.) Review supports the district court’s conclusion.

In post-conviction cases, the “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).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903). A request for counsel is properly denied where:

- (a) the claim is conclusory and based upon alleged facts that are not or could not possibly be within the petitioner’s personal knowledge, and no source of such information is indicated; (b) the district court has given notice that the petitioner’s claim is inadequate because it is conclusory and not supported by any evidence; and (c) after receiving such notice from the trial court, the petitioner still fails to present a response indicating a source of information or basis of knowledge that, with the assistance of counsel, might develop into evidence that would substantiate the conclusory allegation.

Hall v. State, 156 Idaho 125, 131, 320 P.3d 1284, 1290 (Ct. App. 2014).

In this case Gonzalez asserted direct claims of “bias[ed] jurors on the panel at trial” and that he was “denied his Constitutional Right to have [an] alibi witness testify at trial” and claims of ineffective assistance of counsel for “not pursuing [an] alibi witness” and “not objecting to bias[ed] jurors on the panel.” (R., pp. 4-5.) He provided no additional information regarding the alibi claims, but did state that juror “29” was biased because she was “friends with witness” and jurors “3” and “43” were “friends with Law Enforcement.” (R., p. 4.)

All three factors from Hall are met here: The claims are conclusory and based upon alleged facts that are not or could not possibly be within the petitioner’s personal knowledge, and no source of such information was indicated; Gonzalez was given notice that his claims were not supported by facts; and Gonzalez did not respond to the notice by providing any additional bases for his claims. Although Gonzalez claimed the three jurors were biased, he failed to show he personally knew of such bias or demonstrate what source of information would lead him to conclude they were biased. Even accepting as true that one juror knew a witness in the case and two jurors knew members of law enforcement, such is not enough to claim actual bias. See State v. Abdullah, 158 Idaho 386, 421-22, 348 P.3d 1, 36-37 (2015) (juror who can “lay aside his impression or opinion” need not be excused). Gonzalez also claims a right to an alibi witness but provides no information about who the witness would be or what that witness would testify to. Gonzalez failed to establish a non-frivolous claim by stating, without any underlying evidence, that jurors were biased and that no alibi evidence was presented at trial.

Gonzalez argues he did present non-frivolous claims because he “identified the jurors and the reason for the bias” and that “counsel was ineffective for not pursuing an alibi witness.” (Appellant’s brief, p. 8.) As noted, however, merely stating conclusory allegations is insufficient to show a non-frivolous claim. The district court did not err in concluding that the claims were frivolous.

2. Gonzalez’s Claims Were Not Potentially Viable Because They Were Untimely

A petition for post-conviction relief must be filed within one year of the determination of an appeal. Idaho Code § 19-4902(a). “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 v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009) (citations omitted). The Idaho Supreme Court has also stated that, in cases involving “important due process issues,” equitable tolling of the post-conviction statute of limitation may be appropriate. Rhoades v. State, 148 Idaho 247, 251, 220 P.3d 1066, 1070 (2009) (citations omitted).

However, even if tolling is permitted to allow consideration of an “important due process” claim, the claim “must still be pursued in a timely fashion,” meaning within a reasonable time from when the claim is discovered. Rhoades, 148 Idaho at 251, 220 P.3d at 1070 (citing Charboneau v. State, 144 Idaho 900, 174 P.3d 870 (2007)). Thus, for example, tolling may be warranted in a case involving a claim that the state suppressed exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), until a reasonable time

after the factual basis of the alleged misconduct is discovered. See Rhoades, 148 Idaho at 251, 220 P.3d at 1070. On the other hand, if the factual basis of a claim is known, or should have been known, within the limitation period, tolling is not appropriate. Id. at 253, 220 P.3d at 1072. Ineffective assistance of trial counsel is an example of a claim that “should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition.” Id. (quotations and citations omitted).

The district court relied on Leer v. State, 148 Idaho 112, 218 P.3d 1173 (Ct. App. 2009), when it concluded that the attempt to file a petition did not toll the statute of limitations for filing a post-conviction petition. (R., pp. 11-12, n. 1.) In Leer the petitioner filed a motion for appointment of counsel, and the district court held that this was sufficient to toll the statute of limitations. Id. at 114, 218 P.3d at 1175. In reversing, the Idaho Court of Appeals stated that equitable tolling applied “only in rare and exceptional circumstances beyond the petitioner’s control that prevented him or her from filing a timely petition.” Id. at 115, 218 P.3d at 1176. In this case the district court was correct because an unsuccessful initial attempt to file a petition was not a rare and exceptional circumstance beyond Gonzalez’s control that prevented him from filing a timely petition. Gonzalez’s failed attempt to initiate a post-conviction action tolled the limitation period no better than Leer’s. See also Schultz v. State, 151 Idaho 383, 256 P.3d 791 (Ct. App. 2011) (“mistaken belief” petitioner had more time to file because of filing of untimely notice of appeal did not toll time for filing petition). The district court’s conclusion that the petition was untimely and that Gonzalez had not presented a viable claim of tolling is supported by the record.

Gonzalez does not contest, or even address, the district court’s determination that the statute of limitations did not toll, but rather claims that the case was actually initiated

by the filing in the criminal case on July 18, 2016, within the limitation period. (Appellant’s brief, pp. 5-6.) This argument lacks merit.

First, Gonzalez has failed to establish that this Court has jurisdiction to consider his argument. State v. Wolfe, 158 Idaho 55, 60, 343 P.3d 497, 502 (2015) (court “must have appellate jurisdiction over a claim before it can reach the claim’s merits”). “A timely appeal is necessary to vest jurisdiction in this Court to review issues raised with respect to the district court’s actions.” Id. at 60, 343 P.3d at 502. The record in this case shows a petition filed on February 27, 2017. (R., p. 4.) It contains no other petition. The only evidence of another petition is in a motion to augment with the register of action in a different case (the underlying criminal case). The notice of appeal is only from this case. (R., p. 22.) Whether a different document, not filed in this case, was sufficient to initiate a post-conviction case is not an issue this Court has jurisdiction to consider.

Second, the record does not establish the July 18, 2016, attempted filing was sufficient to open a post-conviction case. “A post-conviction proceeding is not an extension of the criminal case from which it arises. Rather, it is a separate civil action in which the applicant bears the burden of proof imposed upon a civil plaintiff.” Roman v. State, 125 Idaho 644, 648, 873 P.2d 898, 902 (Ct. App. 1994). “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.” State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003). Gonzalez has failed to establish that whatever document he attempted to file in the criminal case was sufficient to initiate a post-conviction civil case, regardless of form or substance.

Third, even accepting the merits of Gonzalez's argument that the attempted filing of a petition in the criminal case initiated a valid post-conviction case, the argument is irrelevant. The existence of a previously filed post-conviction case would make this one successive, but not timely. Because the petition in this case is untimely regardless of whether the July 18, 2016, attempted filing initiated a post-conviction case, Gonzalez's argument fails because it does not show that he was entitled to counsel to represent him on *this* petition in *this* case.

The district court concluded that Gonzalez's allegations were frivolous because they were untimely. Gonzalez's argument that a different filing in a different case should have been treated as a post-conviction petition is irrelevant and without merit. Gonzalez has failed to show error in the denial of his motion for appointment of counsel.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of Gonzalez's petition for post-conviction relief.

DATED this 30th day of November, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of November, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd