

IN THE SUPREME COURT OF THE STATE OF IDAHO

SCOTT CAMERON FREELAND,)
) **No. 46783-2019**
 Petitioner-Appellant,)
) **Twin Falls County Case No.**
 v.) **CV42-2018-4416**
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

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 BENJAMIN J. CLUFF
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Scott Cameron Freeland appeals from the summary dismissal of his petition for post-conviction relief. He challenges the dismissal and the district court's failure to rule on his request for counsel.

Statement Of The Facts And Course Of The Proceedings

Freeland pled guilty to grand theft. State v. Freeland, 162 Idaho 532, 533, 400 P.3d 620, 621 (Ct. App. 2017). The Idaho Court of Appeals rejected his claim of error in the denial of his motion to suppress and affirmed his conviction. Id. at 533-34, 400 P.3d at 621-22. The remittitur issued in the appeal in his criminal case on September 8, 2017. (44593 Remittitur (copy attached as appendix, motion for judicial notice of this document filed contemporaneously with this brief).)

Freeland petitioned for post-conviction relief from his conviction, filing his petition on October 25, 2018. (R., pp. 4-72.) Freeland also applied for appointment of counsel. (Aug., pp. 4-6.) The district court provided notice of intent to dismiss because the petition was untimely and the issues could have been raised in the underlying criminal case. (R., p. 74.) Freeland responded and stated that he believed he had a year and 42 days from when he received the remittitur and was sorry for his mistake and promised to be timely in the future. (R., p. 77.) The district court dismissed the appeal as untimely. (R., p. 88.) Freeland appealed. (R., pp. 90-93.)

ISSUES

Freeland states the issues on appeal as:

1. Whether the district court erred by summarily dismissing Mr. Freeland's Petition For Post-Conviction Relief?
2. Whether the district court erred by failing to consider Mr. Freeland's request for counsel before dismissing his Petition For Post-Conviction Relief?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Freeland failed to show reversible error in the district court's failure to rule on the motion for appointment of counsel because the petition is untimely and therefore frivolous?

ARGUMENT

Freeland's Request For Counsel Is Frivolous Because His Petition Is Untimely

A. Introduction

The district court did not rule on the motion for appointment of counsel prior to summarily dismissing the petition, and therefore erred. Melton v. State, 148 Idaho 339, 341-42, 223 P.3d 281, 283-84 (2009) (“the district court erred in failing to address [the] motion for appointment of counsel”). However, the error was harmless because it “did not affect [petitioner’s] substantial rights because [Petitioner’s] ... petition for post-conviction relief did not raise the possibility of a valid claim.” Id. at 342, 223 P.3d at 284.¹ Specifically, because the petition was not timely and because Freeland did not offer the possibility of a valid tolling claim the petition was frivolous and Freeland was not entitled to the appointment of counsel to pursue it.

B. Standard Of Review

“The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court.” Green v. State, 160 Idaho 657, 658, 377 P.3d 1120, 1121 (Ct. App. 2016). “Although the appointment of counsel is discretionary, counsel ‘should’

¹ Because “the threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition,” Judd v. State, 148 Idaho 22, 24, 218 P.3d 1, 3 (Ct. App. 2009), if Freeland’s claim is frivolous the summarily dismissal was necessarily proper. See Melton, 148 Idaho at 345, 223 P.3d at 287 (finding dismissal proper where there was no possibility of a valid claim because surviving summary dismissal imposes “greater” burden). The state will therefore address only the claim regarding appointment of counsel and stipulate that if Freeland was entitled to counsel the case should be remanded for appointment of counsel and reconsideration of the dismissal.

be appointed when there is the possibility of a valid claim; failure to do so is an abuse of discretion.” Andrus v. State, 164 Idaho 565, ___, 433 P.3d 665, 669 (Ct. App. 2019).

C. The District Court’s Error Of Dismissing The Petition Without Addressing The Motion For Appointment Of Counsel Was Harmless

“The standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim.” Shackelford v. State, 160 Idaho 317, 325, 372 P.3d 372, 380 (2016) (quoting Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014)). “In determining whether the appointment of counsel would be appropriate, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Id. (quoting Melton, 148 Idaho at 342, 223 P.3d at 284). “The petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims; however, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where he has alleged facts supporting some elements of a valid claim.” Nelson v. State, 157 Idaho 847, 854, 340 P.3d 1163, 1170 (Ct. App. 2014). Applying this standard to the record shows the district court did not commit reversible error because Freeland’s claim is frivolous because it is untimely, and therefore the error in failing to rule on the motion for appointment of counsel before dismissing the petition was harmless.

“Idaho Code § 19-4902 requires that post-conviction petitions be filed within one 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.” Charboneau v. State, 144

Idaho 900, 904, 174 P.3d 870, 874 (2007); see I.C. § 19-4902. This statute “‘expressly limits a party’s time to bring a claim for post-conviction review to one year.’” Vavold v. State, 148 Idaho 44, 45, 218 P.3d 388, 389 (2009) (quoting Evensiosky v. State, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001)). A petition filed outside the one-year limitation is “‘facially barred by operation of I.C. § 19-4902(a)’” and thus subject to summary dismissal. Id.; see Cuc Phuoc Ho v. State, 163 Idaho 173, 180, 408 P.3d 928, 935 (Ct. App. 2017) (holding petition for post-conviction relief filed outside one-year limitation “‘was untimely and should have been dismissed’”).

Freeland filed his petition on October 25, 2018 (R., p. 4), one year and 47 days after the remittitur issued. (Appendix.) Freeland’s stated reason for the untimely filing was a mistake of law: the belief that he had a year and 42 days from when he received the remittitur. (R., p. 77.) The petition was frivolous because it was facially untimely and Freeland offered no viable justification for the delay in filing.

Freeland contends the district court erred by not ruling on his motion for appointment of counsel prior to dismissing his petition and because he presented sufficient grounds to have counsel represent him on a claim that the limitation period for filing his petition tolled. (Appellant’s brief, pp. 8-11.) His argument fails on both claims. Freeland presented no viable claim for tolling the time for filing.

“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). Neither of these circumstances apply to Freeland. Freeland was incarcerated at S.I.C.I. in Boise and never alleged he was incarcerated out of state or without access to inmate legal services. (R., pp. 76-77.) He did not allege any incompetence such as mental disease or other incapacitation. (Id.) Rather than rely on the inmate legal services or appointed trial or appellate counsel, Freeland chose to rely on the advice of a fellow inmate who (wrongly) informed him that he had one year and 42 days to file and also (wrongly) assumed that the time started when he received the remittitur rather than when it was issued. (R., p. 77.) Freeland offered no reason why he waited until what he thought was the last day to file rather than doing so within weeks or months of knowing that he had not prevailed on his appeal.

Freeland argues “that he was deprived of the opportunity to bring his post-conviction claims in a timely fashion based solely on his indigency.” (Appellant’s brief, p. 8.) He cites no authority, however, that indigence is a basis for tolling. As set forth above, it is not a reason for tolling.

There are many good reasons to not make indigence a ground for tolling. First, indigent inmates and criminal defendants do have resources to file post-conviction actions. Like most inmate petitions, Freeland’s petition was filed on a form made available by the Idaho Department of Correction. (R., pp. 4-10; Aug., pp. 4-7.) Freeland had access to the same legal resources as other inmates and defendants who manage to file timely petitions. In addition, Freeland was represented by counsel at all stages of his criminal case, including the appeal. State v. Freeland, 162 Idaho 532, 400 P.3d 620 (Ct. App. 2017).

Second, the vast majority of inmates are indigent, because they do not have jobs and therefore generally do not have sources of income. It would make no sense, especially in a system that provides for legal representation of the indigent with potentially viable claims, to toll the limitation period until the petitioner was no longer indigent.

Finally, it is clear on the record that indigence was not the reason Freeland failed to file his petition on time. He was, on the face of the record, not less indigent when he filed the petition than he was during the almost fourteen months between issuance of the remittitur and the filing of the petition. (Aug., p. 5 (affidavit of indigence).) The fact he was able to file the petition while indigent shows that indigence was not the reason for the *timing* of the filing.

Rather, as set forth in Freeland's response to the notice of intent to dismiss, the reason Freeland filed his petition 47 days after the one-year limitation period ran was because he chose to rely on bad legal advice he received from a fellow inmate and because he made an erroneous assumption about when the period started running. (R., p. 77.) This fails to show the possibility of a valid claim that the limitation period for filing the petition was tolled. Although the district court erred by not addressing the motion for appointment of counsel, the error was harmless because the petition is frivolous on its face because it was untimely.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 25th day of July, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of July, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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Deputy Attorney General

KKJ/dd

EXHIBIT A

In the Court of Appeals of the State of Idaho

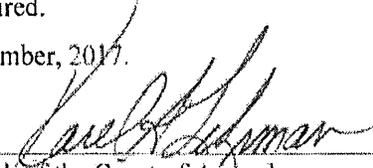
STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	REMITTITUR
)	
v.)	Supreme Court Docket No. 44593
)	Twin Falls County D.C. No. CR-
SCOTT CAMERON FREELAND,)	42-16-1074
)	
Defendant-Appellant.)	

TO: FIFTH JUDICIAL DISTRICT, COUNTY OF TWIN FALLS.

The Court having announced its Opinion in this cause May 4, 2017, and having denied Appellant's Petition for Rehearing on June 15, 2017; and the Court having denied Appellant's Petition for Review on September 8th, 2017; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required.

DATED this 8th day of September, 2017.


Clerk of the Court of Appeals
STATE OF IDAHO

cc: Counsel of Record
District Court Clerk
District Judge
Publisher(s)

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