

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41705

RONALD LEE MACIK, ) 2015 Unpublished Opinion No. 318  
 )  
 Petitioner-Appellant, ) Filed: January 23, 2015  
 )  
 v. ) Stephen W. Kenyon, Clerk  
 )  
 STATE OF IDAHO, ) THIS IS AN UNPUBLISHED  
 ) OPINION AND SHALL NOT  
 Respondent. ) BE CITED AS AUTHORITY  
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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Judgment of the district court summarily dismissing petition for post-conviction relief, affirmed.

Ronald Lee Macik, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Judge

Ronald Lee Macik appeals from the judgment of the district court summarily dismissing his petition for post-conviction relief. For the reasons that follow, we affirm.

**I.**

**FACTS AND PROCEDURE**

In 1972, Macik pled guilty to first degree murder for a homicide that occurred at the Idaho State Penitentiary in 1971, and the district court imposed a life sentence. In 2011, Macik mailed a letter to the district court that was treated as a motion to withdraw his guilty plea from nearly forty years prior, and counsel was appointed to represent Macik. In that matter, the district court denied the motion to withdraw the guilty plea, determining that it lacked jurisdiction to consider the merits of the motion. We affirmed in *State v. Macik*, Docket No. 39233 (Ct. App. May 24, 2012) (unpublished). Macik then filed a pro se petition for post-

conviction relief in 2012 that alleged several claims relating to the entry of his guilty plea in 1972. The State moved for summary dismissal, and the district court granted the motion five days after its filing. In *Macik v. State*, Docket No. 40321 (Ct. App. Oct. 24, 2013) (unpublished), we held that the district court erred by summarily dismissing Macik’s petition for post-conviction relief without providing Macik twenty days to respond to the motion, and we remanded the case for further proceedings.

This appeal arises from the remanded post-conviction case. On remand, Macik filed an affidavit that claimed that he was on the drug Thorazine from 1969 to 1972, which he asserted affected his perception for many years.<sup>1</sup> Macik also explained that in September 2007, he suffered a stroke that gave him the “extraordinary unexplained ability to remember most everything that occurred” while he was on Thorazine. Macik referred to the fact that he was transferred to a federal prison in Pennsylvania, asserting that he had “no access to Idaho Law.”<sup>2</sup> The district court filed a notice of intent to dismiss the petition on the basis that the petition was untimely. Macik did not respond to the district court’s notice, and after the twenty-day notice period, the district court entered an order dismissing the petition as untimely.<sup>3</sup> Macik appeals.

## II.

### ANALYSIS

In his appellate brief, Macik raises two issues. He argues that the district court erred by dismissing the petition without applying an actual innocence standard.<sup>4</sup> He also contends that

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<sup>1</sup> Thorazine is an antipsychotic medication. *Workman v. State*, 144 Idaho 518, 527, 164 P.3d 798, 807 (2007).

<sup>2</sup> In the affidavit included with his post-conviction petition, Macik relayed that he had been on Thorazine and that he had been transferred to Pennsylvania. In neither the original affidavit nor the post-remand affidavit did Macik state when he returned to Idaho.

<sup>3</sup> Macik did file a notice of appeal in the twenty-day period that appealed the order denying appointment of counsel on remand. It is not apparent from the record what occurred with this notice of appeal.

<sup>4</sup> Although the issue statement in Macik’s briefing is entitled “The district court erred in dismissing [Macik’s] petition without applying an actual innocence standard of review. And/or allowing an amendment prior to dismissal,” the brief does not contain any argument about how the district court abused its discretion by denying Macik’s motion to amend his petition for post-conviction relief.

the district court erred in determining that his plea was voluntary. Initially, we note that Macik did not assert an actual innocence claim in his petition for post-conviction relief in the district court, and thus the district court had no reason to examine an actual innocence claim under the applicable standards.<sup>5</sup> Accordingly, that issue is waived on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991) (explaining that, generally, issues not raised below may not be considered for the first time on appeal). As to the second issue, Macik does not provide a citation to the record where the district court determined that his plea was constitutionally sound. In fact, the sole basis for dismissal articulated by the district court was the untimeliness of the petition. Because Macik’s second issue was not preserved for appeal through an adverse ruling in the district court, we will not consider the issue on appeal. *Ada Cnty. Highway Dist. v. Total Success Invs., LLC*, 145 Idaho 360, 368, 179 P.3d 323, 331 (2008) (“This Court does not review an alleged error on appeal unless the record discloses an adverse ruling forming the basis for the assignment of error.”).

Even though Macik does not expressly argue that the district court erred by dismissing his petition as untimely, we will nonetheless review this issue. Macik’s post-conviction claims relate back to his guilty plea in 1972, and any petition for post-conviction relief that was not equitably tolled had to be filed by July 1, 1984. *See LaFon v. State*, 119 Idaho 387, 389, 807 P.2d 66, 68 (Ct. App. 1991) (explaining that a 1979 amendment added a limitation period to Idaho’s post-conviction procedure act and that for judgments of conviction entered prior to the 1979 amendment, the then-applicable five-year limitation period began to run on July 1, 1979, the effective date of the amendment).

Macik’s affidavit before the district court on remand explained that he was on Thorazine until 1972, had a stroke in 2007 that resulted in a clear memory, and that he was transferred to a federal penitentiary in Pennsylvania without access to Idaho legal materials. These assertions

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<sup>5</sup> Macik also filed a successive petition for post-conviction relief while this appeal was pending. It appears that on appeal from the summary dismissal of his successive petition, Macik also attempted to assert an actual innocence claim that he had not first raised below. We affirmed the summary dismissal of his successive petition on procedural grounds in *Macik v. State*, Docket No. 41154 (Ct. App. Oct. 8, 2014) (unpublished). Nonetheless, this Court discussed the merits of Macik’s actual innocence arguments in a footnote for the benefit of interested readers and to allay potential concerns that we were ignoring credible evidence of actual innocence. *See Macik*, Docket No. 41154 at 5 n.5. This Court commented at the end of our discussion that “although this reasoning is not the basis for our disposition of the case, it is apparent that Macik did not present even a colorable claim of actual innocence.” *Id.*

were likely made in an attempt to assert equitable tolling. Equitable tolling has been recognized in Idaho: (1) where the petitioner was incarcerated in an out-of-state facility without legal representation or access to Idaho legal materials; and (2) where mental disease, or psychotropic medication, or both prevented the petitioner from timely pursuing challenges to the conviction. *Schultz v. State*, 151 Idaho 383, 386, 256 P.3d 791, 794 (Ct. App. 2011). In addition, we have noted that “in some circumstances commencement of the limitation period may be delayed until the petitioner discovers the facts giving rise to the claim.” *Id.*

We begin with Macik’s assertion regarding his out-of-state incarceration and lack of access to Idaho legal materials. We take judicial notice of the fact that Macik filed a letter with the Ada County District Court in March 2011, which was later treated as a motion to withdraw his guilty plea, stating his address as the Idaho Correction Center in Boise. This letter was part of the record in Docket No. 39233. Moreover, as the district court pointed out on remand, Macik was appointed counsel (specifically, the Ada County Public Defender) in April 2011 to address the motion to withdraw the guilty plea. Thus, at least as of April 2011, Macik was no longer incarcerated at an out-of state facility and no longer lacked access to Idaho legal materials; yet, Macik’s petition was not filed until September 2012, more than one year later. Because Macik did not file his petition within one year of the date any equitable tolling would have ended, his incarceration out-of-state does not excuse the untimeliness of his petition. *See* Idaho Code § 19-4902(a) (as of 1993, establishing a one-year limitation period); *Martinez v. State*, 130 Idaho 530, 536-37, 944 P.2d 127, 133-34 (Ct. App. 1997) (“Since Martinez did not file his post-conviction application within one year of gaining the ability to access the Idaho courts through his counsel, his application is barred by the limitation period of I.C. 19-4902.”); *see also Reyes v. State*, 128 Idaho 413, 414-16, 913 P.2d 1183, 1184-86 (Ct. App. 1996) (per curiam) (affirming the dismissal of Reyes’ application as untimely and applying the one-year limitation period, even though Reyes was convicted prior to the 1993 amendment).

Macik’s assertion regarding being medicated with Thorazine also does not excuse the untimeliness of his petition. Macik himself acknowledged that he was on the medication until only 1972, and thus the petition had to be filed by July 1, 1984. *See LaFon*, 119 Idaho at 389, 807 P.2d at 68. For Macik’s next averment relating to equitable tolling, even if we *assumed* that equitable tolling started the limitation period at the 2007 episode in which Macik developed an “extraordinary unexplained ability” to recall his life events from 1969 until 1972, Macik still had

to file his petition for post-conviction relief by September 2008. *See* I.C. § 19-4902(a). Because Macik did not file his petition until 2012, Macik’s stroke in 2007 does not excuse the untimeliness of his petition.

In short, Macik’s petition was filed after any limitation period required the petition to be filed, even if equitable tolling applied. Thus, the petition was untimely and was subject to summary dismissal. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003) (“The failure to file a timely petition is a basis for dismissal of the petition.”). Accordingly, we affirm the judgment of the district court summarily dismissing Macik’s petition for post-conviction relief.

Chief Judge MELANSON and Judge LANSING, **CONCUR.**