

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36582

ALEKSEY STETSENKO,)	2011 Unpublished Opinion No. 548
)	
Petitioner-Appellant,)	Filed: July 15, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Order summarily dismissing an application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant. Sarah E. Tompkins argued.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent. John C. McKinney argued.

GRATTON, Chief Judge

Aleksey Stetsenko appeals the summary dismissal of his application for post-conviction relief. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On March 7, 2005, Stetsenko was charged with two counts of reckless driving, Idaho Code § 49-1401, two counts of leaving the scene of an accident, I.C. § 49-1301, and felony eluding an officer, I.C. § 49-1404. Stetsenko pled guilty to felony eluding an officer in exchange for dismissal of the other charges. The district court imposed a unified sentence of five years with two years determinate, but suspended the sentence and placed him on probation for a period of five years. Stetsenko did not file an appeal.

In May 2007, Stetsenko, a legal alien from Ukraine, was notified by the United States Citizenship and Immigration Services (USCIS) that his application for legal permanent residence

had been denied because of his criminal record. He was also notified that his work authorization had been denied and that he could be subject to deportation proceedings at any time.

On February 21, 2008, Stetsenko filed an application for post-conviction relief claiming that he received ineffective assistance of counsel for failing to advise him of the immigration consequences of his guilty plea and further claiming that the plea was involuntary because the court had not advised him of the potential immigration consequences. The State filed a motion for summary dismissal disputing the merits of Stetsenko's claim and arguing his application was barred by the statute of limitations. In response, Stetsenko claimed the statute of limitations should be tolled because he suffered from a psychotic disorder. The district court held that the application was untimely and, in the alternative, based on the facts alleged, the State was entitled to summary dismissal as a matter of law. Stetsenko appeals.

II.

DISCUSSION

Both parties acknowledge the threshold question in this case is whether the district court erred in concluding Stetsenko had failed to demonstrate that the statute of limitations should be tolled. We agree with the district court and so do not address Stetsenko's remaining claims.

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the 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. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). 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). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application 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. I.C. § 19-4903. In other words, the application must present or be

accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). "When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, we apply the same standard as that applied by the district court." *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010). On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, 148 Idaho at 250, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); see also *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those

inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition, but, rather, is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.*

Our review of the district court's construction and application of the limitation statute is a matter of free review. *Freeman v. State*, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992). The statute of limitations for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. *Freeman*, 122 Idaho at 628, 836 P.2d at 1089. The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

Idaho courts have recognized equitable tolling of the statute of limitations for post-conviction proceedings where mental disease and/or psychotropic medication renders an applicant incompetent and prevents the applicant from earlier pursuing challenges to his conviction. *Id.* at 960, 88 P.3d at 779. To toll the statute of limitations on account of mental illness or medication, an unrepresented applicant must show that he suffered from a serious mental illness which rendered him incompetent to understand his legal right to bring an action within a year or otherwise rendered him incapable of taking necessary steps to pursue that right. *Chico-Rodriguez v. State*, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005). "It is not enough to show that compliance was simply made more difficult on account of a mental condition." *Id.* Equitable tolling only applies to the period the applicant's mental illness actually prevented him from filing a post-conviction action. *Id.* A district court's determination as to the severity of the mental condition and whether it satisfies the requirements for tolling is a factual determination reviewed under the applicable standard for the procedural posture of the appeal. *See id.* (reviewing for substantial evidence the district court's determination, after two evidentiary hearings, that mental illness did not prevent the timely filing the application).

In this case, the district court took judicial notice of the transcripts of the hearings in the underlying criminal proceeding, as well as the presentence investigation report (PSI) and the psychological evaluation conducted by Chad Sombke, Ph.D. Stetsenko was arrested on March 7,

2005. On March 8, 2005, the jail removed Stetsenko from the dorm room and placed him in a holding cell because he was making other inmates uncomfortable by kneeling in the dining room crying and praying. On March 9, 2005, while in his cell, Stetsenko stripped naked, wiped feces all over his body, and was found hitting his head against the floor. On March 28, 2005, Stetsenko used blood from a cut on his finger to draw on the cell wall and write "I love u Nadia." He also smeared blood under his eyes.

On March 29, 2005, Chad Sombke, a Ph.D. licensed psychologist, interviewed Stetsenko at the jail and conducted a Georgia Court Competency Test Revised (GCCT-R) to evaluate Stetsenko's competency to stand trial. Dr. Sombke stated:

In my experience it's unusual to have the detailed biographical knowledge Mr. Stetsenko has in some areas but not in others. Individuals who answer questions in this manner are either severely organically or psychologically impaired or are blatantly and purposely attempting to present themselves as incompetent. I do not believe that a severe mental illness or organic impairment is the explanation for Mr. Stetsenko's presentation and his answers to the questions during the interview. It did not appear to me that Mr. Stetsenko was responding to internal stimuli or was suffering from a thought disorder. His answers appeared to be deliberately intended to present himself as more mentally ill and incompetent than he actually is.

Dr. Sombke ruled out psychosis and concluded:

It is my opinion that Mr. Stetsenko is purposely presenting himself as incompetent in an attempt to avoid criminal prosecution. His language barrier and his unwillingness to cooperate with answering questions honestly creates an unusual problem in answering the referral question of whether he is competent to stand trial. However, I believe Mr. Stetsenko has the capacity to understand the potential risk and benefits of treatment and can make treatment decisions on his own behalf.

Stetsenko bonded out of jail and saw Dr. Heyrend for treatment. Dr. Heyrend's medical report was included in the PSI with his diagnostic impression that Stetsenko likely had a schizoaffective disorder and histrionic behavior with narcissism. On May 18, 2005, Dr. Heyrend wrote a letter suggesting Stetsenko needed significant work to resolve his mental illness, but stated: "There is no question that Aleksey Stetsenko is competent to stand trial." Dr. Heyrend characterized Stetsenko as falling within the normal range of intelligence, but impaired in his cognition. On July 20, 2005, Dr. Heyrend wrote a letter that explained he had continued to

evaluate and follow Stetsenko's care and believed he was benefitting from taking the medication Abilify, an antipsychotic.

During the initial sentencing hearing, the court was unsatisfied with the completeness of the report from Dr. Heyrend and continued the hearing to allow the parties to supplement the report. After the continuance, the sentencing court was still not satisfied with Dr. Heyrend's submitted opinion. The sentencing court relied principally upon Dr. Sombke's diagnosis and concluded that Stetsenko's crime of fleeing from the police and driving in an extremely dangerous fashion had more to do with his seeking attention for having been prohibited from seeing the girl of his affection, than it did with any genuine substantial mental illness. The sentencing court recognized that Stetsenko had some mental illness, but also that Stetsenko's conduct in jail was an attempt to use his mental illness as a means of escaping responsibility.

Stetsenko's judgment of conviction for felony eluding a police officer, I.C. § 49-1404, was filed on October 5, 2005. His time to file an appeal expired forty-two days later on November 16, 2005. Idaho Appellate Rule 14(a). His time to file an application for post-conviction relief expired on November 16, 2006. I.C. § 19-4902(a). Stetsenko filed his application for post-conviction relief fifteen months later on February 21, 2008. Stetsenko had the burden of demonstrating to the district court that he suffered from a mental incompetence that prohibited him from filing his application for post-conviction relief by November 16, 2006, and that the statute of limitations should have been tolled during the time he was unable to file a petition. *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140 (equitable tolling applied during the period when mental illness actually prevented petitioner from filing).¹

Stetsenko submitted a number of affidavits to support his argument that the statute of limitations should be tolled. In his affidavits, Stetsenko asserted he developed a mental illness in 2005 and had since relied on his family, friends, and church for support. He claimed that he

¹ The State argues the only relevant time period is November 16, 2005 to November 16, 2006; however, if Stetsenko had regained his full capacity on November 17, 2006, he would not be allowed to wait fifteen months before filing his application. *Chico-Rodriguez*, 141 Idaho at 581, 114 P.3d at 139 ("the statute of limitation is tolled during periods when the plaintiff is 'insane'"); see also *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007) (dismissing a successive application for post-conviction relief based on new evidence because it was not filed within a reasonable time of discovering the new evidence). Stetsenko must therefore also demonstrate that the tolling of the statute of limitations should be extended to a time reasonably in advance of the filing of the application.

received medication and psychiatric counseling services that slowly improved his mental health. Stetsenko stated he became depressed in January 2005 when a girl he was attracted to was not interested in him. While depressed, he began to believe that others could read his thoughts and he became frightened and avoided people. In January 2008, Stetsenko decided that he wanted the fellowship of his friends, participated in church again, and sought out legal counsel to address his immigration situation.

Stetsenko's post-conviction counsel obtained a prescription from Mountain States Mental Health Services with a stated diagnosis for Stetsenko of psychotic disorder, paranoid type. The prescription was dated April 12, 2007, and completed by Gayle Detweiler, P.A. There is no evidence about how this assessment was made or the severity of the disorder. In his affidavit, Stetsenko claimed that he had been receiving treatment from Detweiler since December 2006, but no other records were produced. He also claimed to have received treatment from Dr. Heyrend but, again, no records of care after the time to appeal the underlying conviction were produced.

Stetsenko's mother, Anna Stetsenko, and sister, Alla Lapteva, submitted similar affidavits that discussed their observations of Stetsenko's health. According to these affidavits, Stetsenko had been employed as a dental technician and active in the Sulamita Church after arriving in the United States. He became depressed in January 2005, and in February of that year Stetsenko became confused and disoriented and unable to respond to simple questions. His answers would be illogical and he would jump from topic to topic. Stetsenko told Anna that he heard voices and that strange thoughts would intrude into his head. Sometimes Stetsenko would act very anxious and other times very tired. On February 5, 2005, Stetsenko left the house, over Anna's objection, and was discovered by police on the freeway attempting to stop cars to ask for help. Stetsenko's mental health continued to deteriorate for a period and his family kept him at home. On February 21, his health appeared to improve and he was allowed to drive to work. On March 7, 2005, Stetsenko left work early and was arrested for reckless driving. Stetsenko's family stated that his mental health providers recommended that he not be left alone with his thoughts, and Anna was consistently available to assist him following his conviction. Stetsenko avoided contact with people, locked himself in his room for days, and was unable to make necessary daily decisions such as completing rental paperwork or paying bills. Anna found it difficult to convince Stetsenko to complete his probation reports. He could not keep his job as a

dental technician because he thought he was receiving horses' teeth, instead of people's teeth to work on. Stetsenko had trouble recognizing streets and buildings and stated a belief that the mountains had moved. Stetsenko thought people could read his thoughts and laughed at him. Examples of Stetsenko's strange behavior included: placing food on the bottom shelf of the refrigerator so a little man could reach it, throwing away clothing because he did not remember owning it and thought someone put it in his room, and only walking in the subdivision when the streets were empty. Following his conviction, according to these family members, Stetsenko was unaware of what was going on around him and unable to work, conduct business, complete documents, or take part in his own life. In January 2008, Anna observed that Stetsenko improved and appeared to want to take part in life again and address his immigration situation, but in the weeks leading up to April 2008, his mental condition again deteriorated.

Andrey Rezanovich, the pastor for the Sulamita Church, asserted he knew Stetsenko through his involvement in the church. He conducted counseling sessions with Stetsenko after becoming aware of his mental illness in February 2005. While Stetsenko's health sometimes improved, it also worsened. Rezanovich observed Stetsenko as confused and disoriented and found him difficult to understand. Rezanovich did not believe Stetsenko could survive without his family's help.

Stetsenko's brother-in-law, Eduard Laptev, submitted an affidavit on September 24, 2008, which included mental health information for the time period after filing of the application for post-conviction relief. Stetsenko was living in Eduard's house, and Eduard had been providing housing, food, and other necessities for Stetsenko for approximately two and one-half years while Stetsenko was not working. He observed that Stetsenko's mental health had deteriorated after the filing of the application and on July 27, 2008, his family called 911 and admitted Stetsenko into Intermountain Hospital for seventeen days because he had not slept or eaten in several days. Stetsenko was discharged to the care of his family and began receiving injections of medications in addition to the single medication he took prior to his hospitalization.

Dr. Roberto Negron, a psychiatrist at Intermountain Hospital and Saint Alphonsus Regional Medical Center psychiatry facilities, treated Stetsenko during his involuntary commitment from July 27, 2008 to August 13, 2008. He found Stetsenko was gravely disabled and not eating because he believed his food was poisoned. Dr. Negron's initial impression was:

Axis I: Paranoid Schizophrenia, chronic, acute exacerbation.
Axis II: None.
Axis III: No acute medical problems.
Axis IV: Moderate stressors, *off his meds*, gravely disabled, unclear social support.
Axis V: GAF 20

(Emphasis added.) After some treatment, Stetsenko's condition improved, and Dr. Negron recommended that he be returned to his family's care. Dr. Negron's discharge diagnosis was:

Axis I: Chronic schizophrenia, acute exacerbation in partial remission.
Axis II: None.
Axis III: None.
Axis IV: Mild to moderate stressors.
Axis V: GAF 45

Dr. Negron did not provide an assessment of Stetsenko's ability to understand or protect his legal rights during any period of time.

In its May 7, 2009, order dismissing Stetsenko's application for post-conviction relief, the district court recounted facts from the underlying criminal record that were relevant to Stetsenko's mental condition at that time. The district court repeated Dr. Sombke's opinion that Stetsenko was "intentionally presenting himself as incompetent in an attempt to avoid criminal prosecution." The district court observed that Stetsenko asserted he regained competence in January 2008, approximately seven months after he was denied his application for permanent resident status. The district court pointed out that the judgment of conviction required Stetsenko to maintain his prescribed treatment on Abilify, and that Stetsenko did not provide any explanation of why or how he recovered from his mental condition in January 2008. The district court stated:

This Court has received no evidence that Petitioner had failed to take Abilify as prescribed or that he had failed to undergo psychotherapy. As stated previously, while on Abilify Petitioner filed a Rule 35 Motion For Reduction Of Sentence. Apparently, Petitioner may well also have filed at some point an application for permanent legal resident status in the United States. Moreover, Petitioner belatedly sought new counsel in order to file this petition. These actions individually and collectively indicate an ability to understand legal options and comply with legal requirements. Petitioner claims that he was incapable of understanding and complying with the requirements of the Post Conviction Procedure Act. Further, Petitioner claims that he has only recently regained the degree of self-awareness necessary to bring this action. This alleged return to lucidity happened to coincide with the timeframe of a few months after the denial

of his permanent legal resident application. Given the entire record including Petitioner's prior willingness to attempt to take advantage of his mental challenges in an attempt to avoid legal responsibility for his actions, the Court finds that Petitioner was competent to bring this action during the statutorily required time period from February 10, 2006 to February 9, 2007. Therefore, this petition is untimely.

Stetsenko argues the district court erred in deciding that he did not demonstrate a genuine issue of material fact as to whether the statute of limitations should be tolled and that he should have been given an evidentiary hearing. First, Stetsenko asserts the court did not credit his proffered evidence as true, but was evaluating the relative weight, credibility, and importance of the evidence as demonstrated by the district court considering his applying for legal permanent status and obtaining a post-conviction attorney to dispute his mental competence evidence. He characterizes the district court's decision as a determination that Stetsenko was not credible, which he argues was improper at the summary dismissal stage. Second, Stetsenko contends that the district court did not consider any of the affidavits he provided regarding the intervening period between entry of the judgment and filing of the post-conviction application. Third, he argues the district court primarily relied upon information prior to the judgment of conviction being entered, but the pertinent time period for considering mental incapacity is the period for which tolling was sought. Fourth, Stetsenko submits that the district court primarily relied upon Dr. Sombke's competency evaluation, which is a different standard than mental competence for equitable tolling purposes. Finally, he submits that he demonstrated the statute of limitations should have been tolled under *Chico-Rodriguez* with evidence that he: (1) had been diagnosed with schizoaffective disorder and later with a paranoid type of psychotic disorder; (2) suffered from disorganized thinking and difficulty in goal-oriented behavior; and (3) could not function alone without assistance or supervision from his family until January 2008.

The State argues that nowhere in Stetsenko's verified application or his two affidavits does he state that he was unable to file his application during the statutory limitations period. The State asserts Stetsenko failed to specifically allege he could not file an application between November 16, 2005 and November 16, 2006, and failed to explain what changed to enable him to file his application on February 21, 2008. The State contends that neither Dr. Negron's

assessment on July 27, 2008, nor the impression by Detweiler, P.A., dated April 12, 2007,² provided the necessary evidence regarding Stetsenko's ability to file his application prior to the statute of limitations expiring. The State contends that Stetsenko's claim for tolling the statute of limitations must fail because lay witnesses cannot testify about medical conditions³ and Stetsenko failed to provide any competent medical opinion for the relevant dates.

For equitable tolling to apply, Stetsenko was required to show that his mental incompetence prevented him from filing his application and rendered him unable to appreciate his legal rights. *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140. The evidence presented by Stetsenko demonstrated that he had difficulty, perhaps at times severe difficulty, in his day-to-day life attributable to his mental disorder. Nonetheless, he was still required to demonstrate that, during the relevant period, he was unable to understand his legal rights and unable to act, in a timely fashion, to protect those rights by filing his application. Stetsenko did not provide evidence tying his mental health issues to an inability to understand and protect his rights. The affidavits Stetsenko submitted only assert that he has continually sought treatment for his mental illness; they do not assert that the mental illness was of such severity that it continually prevented him from filing his application. Stetsenko submitted medical assessments before and after the applicable time frame, but no medical opinions during the time period in question, and none of the medical assessments assert that Stetsenko's disorder was of such a severity to render him incapable of filing an application or understanding his rights. It is significant that Stetsenko never avers that he had an inability to or that he did not understand his legal rights. Equitable tolling only applies to the period the applicant's mental illness actually prevented him from filing a post-conviction action. *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140. "It is not enough to show that compliance was simply made more difficult on account of a mental condition." *Id.*

² The form from Detweiler was titled "prescription" and stated Stetsenko was diagnosed with a psychotic disorder, paranoid type. There is no information about whether Detweiler made this assessment after interviewing Stetsenko, or if this impression was made by another person.

³ While a court should disregard lay opinion testimony relating to the cause of a complex medical condition in favor of an expert medical opinion, *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846, 934 P.2d 17, 19 (1997), a layperson may testify to the causation of medical symptoms when it is within the usual and ordinary experience of the average person and satisfies I.R.E. 701. *Dodge-Farra v. American Cleaning Services Co.*, 137 Idaho 838, 842, 54 P.3d 954, 958 (Ct. App. 2002).

It was Stetsenko's burden to provide sufficient facts to support this assertion. We conclude that the district court did not err in finding that Stetsenko failed to plead facts adequate to support his claim of tolling the statute of limitations due to mental impairment.

III.

CONCLUSION

Stetsenko has failed to demonstrate the district court erred in summarily dismissing his application as untimely under the statute of limitations. The district court's order dismissing Stetsenko's application for post-conviction relief is affirmed.

Judge MELANSON **CONCURS**.

Judge LANSING, **SPECIALLY CONCURRING**

I join in the Court's opinion, but somewhat reluctantly. If this post-conviction action were triable to a jury, like most civil cases, I would reach a different decision because when a jury will be the trier of fact, on a summary judgment motion all evidentiary facts are to be construed, and all reasonable inferences drawn, in favor of the party resisting the motion. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *G & M Farms v. Funk Irr. Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). If reasonable persons could reach different findings or draw conflicting inferences from the evidence, the motion would have to be denied. *Stevenson*, 125 Idaho at 272, 869 P.2d at 1367. Here, if the evidence were so construed and the inferences so drawn, the evidence is certainly sufficient to support an inference that Stetsenko was mentally incapacitated to understand his rights and pursue a post-conviction action throughout most of the period from his conviction to the filing of his post-conviction petition.

However, as the Court's opinion points out, because the fact-finder in the trial of a post-conviction claim will be the court, on a summary disposition motion the court may draw inferences that it deems most likely rather than only inferences favoring the party resisting the motion. Here, I cannot say that the district court's holding that Stetsenko failed to show mental incapacity for the entire relevant period is unsupported by reasonable inferences drawn from the evidence. Without drawing inferences in Stetsenko's favor, the evidence does not show that he suffered from incapacitating mental illness throughout the relevant time period. Particularly significant is the absence of any evaluative report or affidavit from either of the therapists who treated Stetsenko during the twenty-eight-month period between his conviction and the filing of

his post-conviction application. This gaping hole in the evidence proffered by Stetsenko lends support to the inferences, disadvantageous to Stetsenko, that were drawn by the district court.

Although another judge might have viewed the inferences differently, the district court here acted within the bounds of its authority. Accordingly, I conclude that the district court was justified in holding that Stetsenko did not make a prima facie showing that the statute of limitation should be tolled due to his mental illness.