

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37659

DENISE RENEE WHITTLE,	)	2011 Unpublished Opinion No. 457
	)	
Petitioner-Appellant,	)	Filed: May 6, 2011
	)	
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STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED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 First Judicial District, State of Idaho, Kootenai County. Hon. John T. Mitchell, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed.

Daniel G. Cooper, Coeur d’Alene for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Denise Renee Whittle appeals the district court’s summary dismissal of her petition for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

On December 10, 2003, Petitioner Denise Whittle (hereinafter “Whittle”) pled guilty pursuant to an *Alford*<sup>1</sup> plea to felony injury to child, Idaho Code § 18-1501. On May 11, 2004, the district court imposed a unified ten-year sentence with eight years fixed, retaining jurisdiction for 180 days. At the completion of retained jurisdiction, often referred to as a rider, the district court suspended Whittle’s sentence and placed her on probation. Whittle thereafter filed an appeal with the assistance of counsel, on December 17, 2004, from the judgment and sentence

<sup>1</sup> See *North Carolina v. Alford*, 400 U.S. 25 (1970).

for felony injury to child. The Idaho Supreme Court dismissed Whittle's appeal as untimely on February 4, 2005, because the appeal was not filed within forty-two days, as required by Idaho Appellate Rule 14(a). Whittle's attorney, however, did not inform Whittle that her direct appeal had been dismissed.

While on probation, Whittle was charged in a separate case with fourteen counts of grand theft for stealing and cashing checks, I.C. §§ 18-2403, -2407. On May 25, 2006, the district court held a joint hearing to address disposition in Whittle's probation violation case as well as sentencing for the new charges of grand theft. Regarding the 2003 injury to child case, the district court revoked Whittle's probation and executed her sentence. For the charges of grand theft, the district court imposed indeterminate five-year sentences for each of the fourteen counts to run consecutive to one another and to the ten-year injury to child sentence.

Whittle filed a timely appeal from the district court's May 25, 2006, orders contending that her combined sentences were excessive. This Court refused to consider the reasonableness of Whittle's 2003 injury to child sentence as originally imposed because the issue was untimely per I.A.R. 14(a). *State v. Whittle*, 145 Idaho 49, 52, 175 P.3d 211, 214 (Ct. App. 2007). Nevertheless, the Court considered Whittle's appeal as timely from the date Whittle's probation was revoked. Thus, the Court construed Whittle's appeal as a challenge to the district court's decision to revoke probation without reducing her sentence sua sponte pursuant to Idaho Criminal Rule 35. *Whittle*, 145 Idaho at 52, 175 P.3d at 214. After reviewing all of the circumstances leading to the revocation of Whittle's probation and execution of her sentence, the Court affirmed the sentence imposed for felony injury to child. *Id.* at 53, 175 P.3d at 215. On review of Whittle's sentences for grand theft, the Court concluded that the sentences were excessive. *Id.* Accordingly, the Court modified the grand theft sentences to a cumulative indeterminate term of ten years to be served consecutive to the ten-year sentence for injury to a child. *Id.* at 53-54, 175 P.3d at 215-16.

On December 10, 2008, Whittle filed a pro se petition and affidavit for post-conviction relief, alleging, among other things, that her defense counsel was ineffective for failing to file a timely notice of appeal from her judgment of conviction in the 2003 felony injury to child case. The state moved for summary dismissal on the basis that Whittle's petition was not filed within the one-year statute of limitation, I.C. § 19-4902(a). At the hearing on the state's motion for summary dismissal, Whittle asserted that the time for filing her petition should be equitably

tolled until she discovered that her direct appeal had been dismissed, and that her petition was timely because she filed it within a reasonable time thereafter. The district court rejected Whittle's claim of equitable tolling and summarily dismissed the action. Whittle appeals.

## II.

### ANALYSIS

Summary dismissal of an application for post-conviction relief pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 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. *Baxter v. State*, 149 Idaho 859, 862, 243 P.3d 675, 678 (Ct. App. 2010). 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. *Amboh v. State*, 149 Idaho 650, 651, 239 P.3d 448, 449 (Ct. App. 2010); *Goodwin v. State*, 138 Idaho 269, 272, 61 P.3d 626, 629 (Ct. App. 2002). In an appeal from a summary dismissal, we independently review the district court's application of law to undisputed facts. *Loman v. State*, 138 Idaho 1, 2, 56 P.3d 158, 159 (Ct. App. 2002); *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions, together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *State v. Ochieng*, 147 Idaho 621, 624, 213 P.3d 406, 409 (Ct. App. 2009).

The district court dismissed Whittle's petition for post-conviction relief, characterizing the issues as largely related to her sentences in the 2003 and 2006 cases. The district court ruled that, to the extent that Whittle's petition raised issues not related to sentencing, such issues could not be relitigated in a post-conviction proceeding, nor could issues be considered in post-conviction proceedings that could have been raised on appeal. Whittle argues that the district court erred in dismissing her petition for post-conviction relief because she has not been afforded an opportunity to appeal from her 2003 injury to child case. The state argues that Whittle's claims for post-conviction relief are time-barred as they pertain to her 2003 felony injury to child case.

A district court's determination of the timeliness of a petition for post-conviction relief is based upon the application of I.C. § 19-4902(a), the provision defining the statute of limitation. 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). According to I.C. § 19-4902(a), a petition may be filed at any time 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, whichever is later. 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).

Recently in *Amboh*, 149 Idaho 650, 239 P.3d 448, this Court clarified the application of I.C. § 19-4902(a) as it pertains to when the statute of limitation begins to run for bringing an action for post-conviction relief. In *Amboh*, the defendant's late-filed notice of appeal from his judgment of conviction was dismissed as untimely. Because the defendant's counsel failed to inform him of the dismissal, the defendant did not seek post-conviction relief until sixteen months later. The district court summarily dismissed the action as untimely, presuming that the defendant's petition would have been timely if filed within one year of the date the appeal was dismissed and the remittitur issued. On review of the district court's dismissal of the post-conviction action, this Court rejected the presumption that the petition would have been timely if filed within one year from the dismissal. *Amboh*, 149 Idaho at 652, 239 P.3d at 450. Instead, the Court concluded that the period for filing a post-conviction action began when the time for appeal from a judgment of conviction lapsed. *Id.*; *Loman*, 138 Idaho at 2, 56 P.3d at 159.

This Court's conclusion in *Amboh* relied on the reasoning from *Loman* where a defendant argued that the timeliness of his application for post-conviction relief should be based on the "determination" of his untimely appeal, as determined by when the Supreme Court issued its remittitur. *Loman*, 138 Idaho at 2, 56 P.3d at 159. There, the Court concluded:

The reference in I.C. § 19-4902(a) to "the determination of an appeal" contemplates a valid appeal that the appellate court possessed jurisdiction to consider. *Loman*'s attempted appeal from his judgment of conviction was untimely, and its untimeliness deprived the appellate courts of jurisdiction. I.A.R. 21; *State v. Payan*, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996); *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983). There was never a valid appeal for an appellate court to "determine." If *Loman*'s argument were

accepted, one convicted of a crime could restart the limitation period merely by filing an untimely notice of appeal from the judgment of conviction; the statute of limitation for post-conviction actions would be rendered meaningless. The limitation period for Loman's post-conviction action began to run from the expiration of the time for his appeal in the criminal action. It could not be restarted by the filing of an untimely notice of appeal on his behalf.

*Loman*, 138 Idaho at 2, 56 P.3d at 159.

Whittle's notice of appeal from her 2003 judgment of conviction was untimely. Therefore, the limitation period for her post-conviction action from that case would ordinarily expire one year and forty-two days after the entry of the judgment of conviction. However, I.A.R. 14(a) provides that "the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction pursuant to Idaho Code. *See also State v. Ward*, 150 Idaho 446, 448, 247 P.3d 673, 675 (Ct. App. 2010) (holding that the time to file a notice of appeal from the judgment of conviction begins to run at the expiration of the retained jurisdiction period). As such, the forty-two days permitted for filing an appeal in Whittle's 2003 injury to child case commenced on November 8, 2004, the date the district court placed Whittle on probation. Any post-conviction claims raised to challenge Whittle's 2003 felony injury to child case needed be filed within one year and forty-two days from the date she was placed on probation, or no later than December 20, 2005.

In her original petition for post-conviction relief, Whittle raised numerous claims of ineffective assistance of counsel, judicial misconduct, and prosecutorial misconduct as grounds for relief from her 2003 injury to child case and her 2006 grand theft case. However, in her briefing before this Court, Whittle's request for post-conviction relief goes no further than to argue that the district court erred in dismissing her petition, addressing only her claim of ineffective assistance of counsel as it relates to her 2003 injury to child case. Whittle does not raise issues on appeal regarding any of her claims relating to her 2006 case, nor does she challenge the district court's characterization of her claims in the order dismissing her petition. Therefore, we consider these issues to be waived and decline to address them. I.A.R. 35(a)(6); *Vavold v. State*, 148 Idaho 44, 45, 218 P.3d 388, 389 (2009); *Smith v. State*, 129 Idaho 162, 166, 922 P.2d 1088, 1092 (Ct. App. 1996).

**III.**  
**CONCLUSION**

We conclude that Whittle's petition for post-conviction relief was not timely as it relates to her 2003 felony injury to child case and should therefore be dismissed on these grounds. We also conclude that Whittle's challenge to summary dismissal of claims related to her 2006 grand theft case are waived because Whittle did not raise any issues on appeal related to the 2006 case. Accordingly, the district court's order summarily dismissing Whittle's petition for post-conviction relief is affirmed.

Chief Judge GRATTON and Judge LANSING **CONCUR.**