

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37329

JAMES ROY JOHN, JR.,	)	2011 Unpublished Opinion No. 493
	)	
Petitioner-Appellant,	)	Filed: May 24, 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STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED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 Fifth Judicial District, State of Idaho, Twin Falls County. Hon. G. Richard Bevan, District Judge.

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

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

James Roy John, Jr. appeals the summary dismissal of his application for post-conviction relief on the ground that it was untimely. He contends the district court erred in failing to toll the statute of limitations for filing his application. We affirm.

I.

**FACTUAL AND PROCEDURAL BACKGROUND**

John and two co-conspirators robbed a number of convenience stores and a bank. John and another co-conspirator killed the third co-conspirator because they were concerned he would not keep the robberies a secret. John pled guilty to burglary and first degree murder. John filed an untimely appeal which was dismissed and a remittitur was issued on March 6, 2008.

On September 15, 2009, eighteen months later, John filed this application for post-conviction relief. He alleged ineffective assistance of counsel, violation of his due process, and other constitutional violations. The State filed a motion for summary dismissal because the

application was untimely. John argued the statute of limitations should be tolled. The district court held a hearing and heard the parties' arguments on tolling the statute of limitations. The district court held that tolling would not be appropriate and summarily dismissed John's application. John appeals.

## II. DISCUSSION

John argues the district court erred in summarily dismissing his application for post-conviction relief as untimely. 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. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483.

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. *Sayas*, 139 Idaho 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.* at 582-83, 114 P.3d at 140-41 (reviewing for substantial evidence the district court’s determination, after two evidentiary hearings, that mental illness did not prevent the timely filing the application).

The only evidence John presented to the district court in opposing the State’s motion for summary dismissal came from the psychological evaluation in his underlying criminal case and letters between John and his attorneys prior to the filing of his application. Richard Smith, Ph.D., psychologist, performed a psychological evaluation report on October 2, 2007. The report summarized an IQ test John had taken while in school, stating:

As noted above, [John] had been placed in Special Education programming while in school. As indicated above, the Report of Evaluation conducted on 12 Nov 98 was made available. In that examination he produced a Verbal IQ of 81, Performance IQ of 87, and Full Scale IQ of 83. The Verbal IQ of 81 falls in the range of Borderline Intellectual Functioning; the Performance IQ of 87 is in the low end of the Normal range, with the Full Scale IQ of 83 falling in the range of Borderline Intellectual Functioning.

He was, as well, administered an achievement test at that point reflecting Reading and Math scores concordant with the IQ scores; whereas he was significantly delayed with regard to Written Language. He was found to be eligible for Special Education placement via being learning disabled in the area of Written Language.

Dr. Smith also administered a test to John and summarized the results as:

On the [Wechsler Adult Intelligence Scale-3rd Edition], [John] produced a Verbal IQ of 78, which falls in the range of Borderline Intellectual Functioning. His Performance IQ is fairly comparable, i.e. Performance IQ 81, which is also in the range of Borderline Intellectual Functioning. The Full Scale IQ is a 78. Of note, these scores would be considered no [sic] significantly different from the IQ scores he attained in 1987 [sic]. Overall his intellectual functioning falls in the range of Borderline Intellectual Functioning. I would add, as well, that the content and sophistication on presentation is consistent with this level of function identified with the test instrument.

On the Reading subtest of the [Wide Range Achievement Test – Revision 3], he produced a raw score of 45. This score equates to fifth grade reading capabilities. This score is fairly concordant with his tested IQ scores at this juncture.

Dr. Smith also evaluated John for mental illnesses. Dr. Smith summarized his evaluation:

[John] is intellectually marginal. He had inconsistent structure while growing up. He is inherently impulsive and pleasure seeking. He tends to act without considering consequences, in part due [sic] personality structures as interfaced with the marginal intellect. He has a heavy loading for a history of drug and alcohol abuse. While he had some elevated scores on the PCL-R, it is my opinion that his is not legitimately psychopathic in his makeup, however. However, the composite factors reflect an antisocial quality about his makeup.

Dr. Smith's diagnostic impression:

Axis I:	Adjustment Disorder with Anxiety and Depression; History of Poly Substance abuse; Bereavement
Axis II:	Borderline Intellectual Functioning; Personality Disorder NOS; Mixed Personality Disorder: Antisocial Traits with Narcissistic, Impulsive, and Self-Defeating Features.

Dr. Smith concluded that John was not incompetent to stand trial, but did recognize that John was “mildly impaired with regard to his intellectual functioning.”

John also presented to the district court nine letters between himself and four different attorneys that discussed John's filing an application for post-conviction relief. John used the letters to show that he had attempted to file a timely application for post-conviction, but he

submitted the wrong form, merely sending a list of grievances rather than an application, and sent the application to his attorney rather than the court. John argued that the letters showed he was confused about the process and, together with Dr. Smith's report, demonstrated that John lacked the mental capacity to represent himself and file the correct forms. John did not supplement this assertion with an affidavit.

The district court conducted a hearing on the State's motion for summary dismissal and took judicial notice of Dr. Smith's evaluation. The court noted that the remittitur in John's direct appeal was issued on March 6, 2008, but the application for post-conviction relief was not filed until September 15, 2009. Noting that the application was filed more than twelve months after the remittitur and untimely, the district court correctly identified the issue: whether John could demonstrate he suffered from a 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 the necessary steps to pursue that right. The district court concluded John failed to demonstrate that tolling would be appropriate and dismissed the application.

On appeal, John argues the district court erred in summarily dismissing the application because a genuine issue of material fact existed regarding whether the statute of limitations should have been tolled for John's mental incompetence. John contends that the letters between him and his attorneys demonstrate that he did not understand simple instructions to file an application. As in the district court, John argues that the letters, together with Dr. Smith's report, established a genuine issue of material fact as to whether the statute of limitations should be tolled.

"[T]he bar for equitable tolling for post-conviction actions is high." *Chico-Rodriguez*, 141 Idaho at 582, 114 P.3d at 140. While John has impaired intellectual functioning, he did not show that it rendered him incompetent to understand his legal right to bring an action within a year, or otherwise rendered him incapable of taking the necessary steps to pursue that right. The letters submitted to the district court show that he understood his right to bring an action. Within the time for filing, John communicated with an attorney regarding his claims. The evidence does not connect John's impaired intellectual functioning to an inability to timely file. While the evidence perhaps shows some confusion on John's part, it does not raise a genuine issue of material fact as to an inability to understand or take steps to pursue his right. It is not enough for

him to show that compliance was simply made more difficult on account of a mental condition.  
*Id.*

**III.**  
**CONCLUSION**

John has failed to demonstrate that the district court erred in concluding that there was no genuine issue of material fact to support tolling of the statute of limitations. The district court's summary dismissal is affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR IN THE RESULT.**