

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0084

DARRELL DEAN SHARP,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Ninth Judicial District Court,
Toole County, The Honorable Robert G. Olson, Presiding

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STATEMENT OF THE ISSUE

Did the district court correctly deny Sharp's postconviction relief petition?

STATEMENT OF THE CASE

Darrell Dean Sharp (Sharp) was charged and convicted in two separate cases in 2009: Cause Nos. DC 09-010 and DC 09-032. (Doc. 159, attached as App. A.) Ultimately, Sharp pled guilty to two of the six charged felonies in Cause No. DC 09-010 and one felony in Cause No. DC 09-032. (*Id.*) On August 12, 2010, the court sentenced Sharp to the Montana State Prison (MSP) as follows: in Cause No. DC 09-010, Sharp was sentenced to 20 years with 10 years suspended for aggravated assault and a consecutive term of 10 years with 5 years suspended for criminal endangerment; and in Cause No. DC 09-032, he received a consecutive term of 10 years with 5 years suspended for assault on a peace officer. (*Id.*)

On October 1, 2018, Sharp filed a petition for postconviction relief in both Cause Nos. (Docs. 202, 203.) The court denied his petition on October 30, 2018. (Doc. 204, attached as App. B.) The court later denied Sharps subsequent motion for reconsideration on December 18, 2018. (Doc. 208, attached as App. C.) Sharp appeals from those orders.

STATEMENT OF THE FACTS

On June 1, 2010, Petitioner (Sharp) pled guilty to Count II: Aggravated Assault, a felony, and Count VI: Criminal Endangerment, a felony. (Doc. 159.) Additionally, Sharp pled guilty to: Assault of a Peace Officer or Judicial Officer, a felony. (Doc. 159 at 2.)

The State agreed to dismiss multiple counts, including: Count I: Kidnapping, a felony, in violation of Mont. Code Ann. § 45-5-302 (2007); Count III: Aggravated Burglary, a felony, in violation of Mont. Code Ann. § 45-6-204 (2007); Count IV: Assault on a Minor Child, a felony, in violation of Mont. Code Ann. § 45-5-212 (2007); and Count V: Assault with a Weapon, a felony, in violation of Mont. Code Ann. § 45-5-213 (2007). (Doc. 159 at 2.)

At sentencing on August 12, 2010, Sharp appeared with counsel, Daniel Minnis, and the district court asked Sharp if he had any legal cause why the district court should not pronounce the sentence and at that time he had none. (Doc. 159 at 3.) The district court considered a presentence investigation for sentencing. (*Id.*) At sentencing Sharp received 20 years with 10 suspended to MSP for Count II: Aggravated Assault; 10 years with 5 suspended, to run consecutive to Count II, for Count VI: Criminal Endangerment, and for Assault of a Peace Officer, 10 years with 5 years suspended to run consecutive with Counts II and IV.

(Doc. 159.) Sharp did not appeal the district court's sentence within the required 60 days.

On December 30, 2010, Sharp filed a Motion to Withdraw a Plea of Guilty. (Doc. 168.) Sharp alleged several claims including: that the judge had a conflict of interest in his case due to previously handling Sharp's divorce case; his attorney provided ineffective assistance of counsel on the basis that counsel "never fought for [Sharp's] rights"; and that the State coerced Sharp due to the "threat" of being charged as a persistent felony offender (PFO). (*Id.*)

On February 15, 2011, the district court denied Sharp's Motion to Withdraw Guilty Plea. (Doc. 170.) The district court determined that Sharp's attorney was effective, that he was advised of his rights, and he entered into his plea knowingly, intelligently, and voluntarily. (*Id.*) The district court concluded that Sharp failed to set "forth any facts which would provide a basis for [the] court to find that good cause existe[d]" to withdraw the plea. (Doc. 168 at 2.)

Sharp has filed multiple petitions for an out-of-time appeal; one on August 30, 2013, and another on February 17, 2015. (8/30/13 Pet. App., attached as App. D; 2/17/15 Petition for out of time appeal; attached as app. E.) Both petitions were denied, as was his follow up petition for a rehearing in DA 15-0100. (9/25/13 Sup. Ct. Order, attached as App. F; 2/25/15 Sup. Ct. Order, attached as App. G; 3/17/2015 Sup. Ct. Order, attached as App. H.)

I. Procedural history in the instant case

On October 1, 2018, Sharp filed a Petition for Postconviction Relief alleging again that the 2010 plea was induced by the State’s threat of PFO and that his counsel was ineffective. (Doc. 202.) In addition, Sharp asserted numerous complaints based on Mont. Code Ann. § 46-7-102, stating his “stand in” counsel at his arraignment did not tell him “how to make bail, counsel of choice, or how to get pretrial release.” (Doc. 202 at 5.)

Additionally, Sharp asserted that there is newly-discovered evidence that proves he did not commit the criminal conduct for which he was convicted. (Doc. 205.) In this claim, Sharp alleged his “counsel and [the] prosecution had to admit State could not use P.F.O. to induce plea bargain.” (*Id.*) Sharp also argued he was sentenced in violation of Mont. R. Evid. 410. (*Id.*) Sharp asserts that this new evidence was discovered “[b]efore my habeas corpus [was] filed [in] 2013”. (*Id.*)

On October 30, 2018, the district court issued an order denying the petition for postconviction relief for being untimely in violation of Mont. Code Ann. § 46-21-102 as it had been “over eight (8) years since the Defendant’s conviction was final.” (Doc. 204.)

Sharp filed a motion to reconsider on November 7, 2018. (Doc. 205.) Sharp asserted the court misquoted Mont. Code Ann. § 46-21-102 and that he had the right to relief “on newly discovered evidence” stating there was “evidence [sic]

discovered and the court in DC-15-19 accepted improper use by attorneys in using P.F.O. to induce plea.” (Doc. 205.) Additionally, Sharp asserted that the plea agreement was void due to a breach by the State and that Sharp is innocent of the charges. (*Id.*) Sharp raised numerous other claims in his motion for reconsideration. (Doc. 205: 2-3.)

The district court denied Sharp’s motion of reconsideration on December 13, 2018. (Doc. 208.) In addition to being untimely, the district court concluded that Sharp’s petition was not appropriate for postconviction relief. (*Id.*) The district court relied on Mont. Code Ann. § 46-21-102 which classifies newly discovered evidence as “evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.” The district court concluded that Sharp offered “no facts in the Petition that he did not engage in the criminal conduct in which he voluntarily entered a plea of guilty.” (Doc. 208.)

Sharp currently has two matters before this Court. Sharp filed an appeal of the court’s order denying his postconviction petition. (*See* Case No. DA 19-0084, instant matter). Additionally, Sharp filed a petition for a writ of state habeas relief in Case No. DA 19-0130, which remains pending.

SUMMARY OF THE ARGUMENT

Sharp addresses numerous concerns, which mimic the concerns raised in DA 19-0130, but fails to address the district court's orders denying his postconviction claims. Sharp fails to establish how the district court erred in denying his petition, namely the court's conclusion that his petition was untimely. Further, the court properly determined that even if it were timely, the petition failed to contain any new evidence that would meet the requirements of Mont. Code Ann. § 46-21-102 as there were no facts alleging that Sharp did not engage in the criminal conduct in which he entered into the plea agreement for.

ARGUMENT

I. Standard of review

Generally, this Court reviews a district court's denial for postconviction relief to determine whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *State v. Marble*, 2015 MT 242, 380 Mont. 366, 355 P. 3d 745, *Beach v. State*, 2009 MT 398, ¶ 14, 353 Mont. 411, 220 P.3d 667 (citing *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118).

II. The district court properly denied Sharp's petition for postconviction relief as untimely.

A. Applicable Law

Montana Code Annotated § 46-21-102 provides:

Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

- (a) the time for appeal to the Montana supreme court expires;
- (b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires;
or
- (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

B. Timeliness

Sharp was sentenced in August 2010. Therefore, his conviction became final in October 2010 when the time for filing an appeal expired. (Mont. R. App. P. 4(5)(b)(i).) Sharp's petition for postconviction relief, which asserts similar issues already addressed by the district court in the order denying defendant's motion to withdraw guilty plea, was filed on October 1, 2018; nearly eight years after his conviction became final. There is no question Sharp's petition was untimely.

C. Sharp's claim of newly-discovered evidence

The district court also correctly determined that the narrow exception to the filing deadlines for postconviction found at Mont. Code Ann. § 46-21-102(2) did not apply. That provision provides:

A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

Mont. Code Ann. § 46-21-102(2).

In *Marble* this Court held that a district court shall use the test in Mont. Code Ann. § 46-21-102 to determine whether the “newly discovered evidence . . . if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct” for which they were convicted. *State v. Marble*, 2015 MT 242, ¶ 15, 380 Mont. 366, 355 P.3d 742 (citing Mont. Code Ann. § 46-21-102.) This Court has also held that the district court has a statutory right to “dismiss a PCR petition without ordering a response if the petition and records ‘conclusively show that the petitioner is not entitled to relief’ as stated in 46-21-201(1)(a), MCA.” (*Id.* ¶ 38.)

Sharp’s claims of new evidence are actually procedural deficiencies that would not establish that Sharp did not engage in the criminal conduct for which he was convicted. Thus, he failed to establish that the narrow exception under subsection (2) applied to him. The district court correctly found that Sharp “offers no facts in the Petition that he did not engage in the criminal conduct in which he voluntarily entered a guilty plea.” (Doc. 208.)

D. Ineffective assistance of counsel

Montana Code Annotated § 46-21-105(2) provides:

When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original or amended petition under this part may not be raised in a second or subsequent petition under this part.

In Sharp's motion to withdraw a plea of guilty he raises a claim of ineffective assistance of counsel. (Doc. 168 at 4.) The issue was briefed and ultimately addressed in Judge McKinnon's order denying the motion on February 15, 2011. (Doc. 170.) Sharp has filed multiple petitions for an out-of-time appeal, which have also addressed ineffective assistance of counsel claims and have been denied by this Court. (*See* DA 13-0581 and DA 15-0100.) In accord with Mont. Code Ann. § 46-21-105(2), this matter is not appropriate for consideration under the statute and should not be considered on appeal.

This matter should be denied as untimely. To the extent any of these issues are approved for review in Sharp's related habeas action they will be addressed in the State's response.

The district court's orders denying Sharp's request for postconviction relief were based on substantial evidence and the proper conclusion of applicable law.

CONCLUSION

The State respectfully requests this Court to affirm the orders of the district court in all regards.

Respectfully submitted this 26th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2,100 words, excluding certificate of service and certificate of compliance.

/s/ Damon Martin
DAMON MARTIN

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APPENDIX

Sentence and Judgment of Conviction, Doc. 159

Cause Nos. DC-09-010 and DC-09-032App. A

Order denying Petition for Post-Conviction Relief,

Doc 204; Cause Nos. DC-09-010 and DC-09-032App. B

Order Denying Motion to Reconsider Petition for
Post-Conviction Relief, Doc. 208

Cause Nos. DC-09-010 and DC-09-032App. C

Petition for an Out-of-Time Appeal, filed 8/30/2013App. D

Petition for an Out-of-Time Appeal, filed 2/17/2015App. E

9/25/2013 Supreme Court Order.....App. F

2/25/2015 Supreme Court Order.....App. G

3/17/2015 Supreme Court Order.....App. H

CERTIFICATE OF SERVICE

I, W. R. Damon Martin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-26-2019:

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