

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0102

BRIAN D. SMITH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Leslie Halligan, Presiding

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STATEMENT OF ISSUE

1. Did the district court correctly deny the Appellant's second petition for postconviction relief based on claims that could have reasonably been raised in his original or amended original postconviction petition?

STATEMENT OF THE CASE

The Appellant, Brian Smith (Smith), is appealing the district court's denial of his second or successive petition for postconviction relief (PCR petition). (D.C. Doc. (Doc.) 20.) This Court affirmed the denial of Smith's first PCR petition in *Smith v. Montana*, 2018 MT 115N, 392 Mont. 553, 416 P.3d 1054.¹ The only claim Smith raised in his second PCR petition is attorney abandonment. (Doc. 19.) This claim is based primarily on a district court order from January 2013 and a letter he received from the Office of the Public Defender (OPD) in July 2012. (*Id.*)

The facts and procedural history of Smith's underlying conviction and subsequent collateral attacks to the judgment are detailed in this Court's prior opinions and orders. *See Smith v. Frink*, No. OP 13-0278 (June 5, 2013 order denying petition for writ of state habeas corpus); *State v. Smith*, No. DA 13-0399 (July 10, 2013 order denying petition for out-of-time appeal); *Smith v. Fender*,

¹ The State relies on this Court's noncite opinion in *Smith v. Montana*, 2018 MT 115N, only to the extent it is necessary for the legal analysis and the history of this case.

No. OP 16-0205 (April 12, 2016 order denying petition for writ of state habeas corpus); *Smith v. Montana*, 2018 MT 115N (affirming the denial of Smith’s first PCR petition); *Smith v. McTighe*, No. OP 18-0532 (Sept. 25, 2018 order denying petition for writ of state habeas corpus); *Smith v. McTighe*, No. OP 19-0503 (Sept. 17, 2019 order denying petition for writ of state habeas corpus).

In its most recent order, this Court prohibited Smith from making any further direct filings with this Court without an order granting leave. *Smith v. McTighe*, No. OP 19-0503 (Sept. 17, 2019 order denying petition for writ of state habeas corpus at 5). Three months later Smith filed his second PCR petition in district court. (Doc. 19.)

STATEMENT OF FACTS

On January 25, 2012, Smith pleaded guilty to the underlying offense of felony aggravated assault. (Docs. 11 at 2-4, 13 at 2-3.) “Smith had assaulted his girlfriend with a hammer at her residence whereby he caused permanent damage and disfigurement to her.” *Smith v. McTighe*, No. OP 19-0503 (Sept. 17, 2019 order denying petition for writ of state habeas corpus at 1). On May 9, 2012, Smith was sentenced to 20 years in the Montana State Prison (MSP) without parole. (Docs. 11 at 4, 13 at 3.) On June 1, 2012, Smith filed a motion to withdraw his

guilty plea. (Doc. 13 at 3.) The district court denied Smith's motion on July 26, 2012. (*Id.*) Smith did not file a timely appeal of his conviction or sentence. (*Id.*)

On April 24, 2013, Smith filed a petition for writ of state habeas corpus challenging the jurisdiction of the trial court and the legitimacy of his change of plea proceedings, which this Court denied. *Smith v. Frink*, No. OP 13-0278.

On June 11, 2013, Smith filed a petition for out-of-time appeal based on an ineffective assistance of counsel claim, which this Court denied. *State v. Smith*, No. DA 13-0399. On April 4, 2016, Smith filed a petition for writ of state habeas corpus again challenging the legitimacy of the underlying proceedings based on due process, which this Court denied. *Smith v. Fender*, No. OP 16-205.

On August 16, 2016, Smith filed his first PCR petition. (Doc. 2.) This Court affirmed the district court's denial of Smith's petition as time barred and held he did not satisfy the newly discovered evidence requirements to avoid the statutory time bar. *Smith v. Montana*, 2018 MT 115N, ¶ 9. On June 30, 2017, Smith filed a notice of appeal, but this Court later dismissed the appeal because Smith failed to timely file an opening brief. *Smith v. State*, No. DA 17-0385. On September 10, 2018, Smith filed his third petition for writ of state habeas corpus raising various challenges to his sentence, which this Court denied. *Smith v. McTighe*, OP 18-0532. On August 29, 2019, Smith filed his fourth petition for writ of state habeas corpus, which was over length, and raised various issues, including attorney

abandonment. *Smith v. McTighe*, OP 19-0503. On September 17, 2019, this Court denied his petition and prohibited Smith from making any further direct filings with this Court without an order granting leave. *Id.* (order denying petition at 5).

On January 13, 2020, Smith filed a second PCR petition and again raised an attorney abandonment claim. (Doc. 19.) The district court denied Smith's petition without a hearing or a response from the State. (Doc. 20.) The district court rejected Smith's reliance on two documents to support his petition. (*Id.*)

Smith alleged he failed to receive the district court's order dated January 18, 2013, that denied Smith's request for assistance to obtain a full transcript of the sentencing hearing and denied his request for assistance to obtain representation from the Appellate Defender's Office. (Doc. 19 at Appellant's Appendix A; Appellant's Appendix B to his brief on appeal (App. B).) The district court found the order did not support his ability to file a second or successive PCR petition, because "Smith has not demonstrated how his timely receipt of that Order would have made a difference on his various and hypothetical legal actions following his conviction." (Doc. 20 at 2-3.) The district court noted the deadline to file a direct appeal expired on approximately July 21, 2012, six months prior to the date of the order Smith alleges he did not timely receive. (*Id.* at 2.)

Smith relied on a letter dated July 12, 2012, from OPD to support his argument of attorney abandonment. (Docs. 19 at 8, 20 at 3.) The district court

found Smith provided “no reason to conclude that he did not receive the letter at the time or that he only learned of it later.” (Doc. 20 at 3.) The district court noted:

Smith’s latest attempt for relief through his Petition is no longer time well spent by either him or the Court. The Court has carefully considered all that Smith has had to say on the subject of his treatment under the law, including his new theories, and still finds that he is not entitled to the relief that he is seeking here.

(*Id.* at 3-4.)

SUMMARY OF ARGUMENT

The district court correctly dismissed Smith’s second PCR petition without an evidentiary hearing because the case record shows his only claim of attorney abandonment reasonably could have been raised in his first PCR petition. The facts supporting Smith’s claim occurred within one year of Smith’s conviction, and he relied on his complaints about his counsel in his petition for out-of-time appeal filed on June 11, 2013. More than three years later he untimely filed his first PCR petition and failed to raise an attorney abandonment claim despite raising 15 other grounds for ineffective assistance of counsel. Smith’s various postconviction challenges show he reasonably could have raised his attorney abandonment claim in his first PCR petition, and the district court correctly dismissed it.

Smith is not entitled to any equitable or statutory relief from the one-year statutory time limit, because he has failed to provide any evidence that would

undermine his conviction or show that he did not commit the offense. The district court did not abuse its discretion by dismissing Smith’s second PCR without an evidentiary hearing, because no factual development was necessary based on the files and records of the case.

ARGUMENT

I. Standard of review

This Court reviews “the denial of a petition 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. Evert*, 2007 MT 30, ¶ 12, 336 Mont. 36, 152 P.3d 713. “Discretionary rulings, including rulings relating to whether to hold an evidentiary hearing, are reviewed for abuse of discretion.” *Id.* (citing *State v. Hanson*, 1999 MT 226, ¶ 9, 296 Mont. 82, 988 P.2d 299).

II. The district court correctly dismissed Smith’s second PCR petition without an evidentiary hearing.

In *Smith v. Montana*, 2018 MT 115N, ¶ 6, this Court affirmed the district court’s denial of Smith’s first PCR petition as untimely because it was filed more than four years after his conviction became final. Smith’s second PCR petition is also time barred because the one-year period of limitations in Mont. Code Ann. § 46-21-102(1) applies to “the initiation of all postconviction proceedings,

including those initiated by second or subsequent petitions.” *State v. Root*, 2003 MT 28, ¶ 16, 314 Mont. 186, 64 P.3d 1035.

Smith was sentenced for the underlying offense on May 9, 2012. (Docs. 11 at 4, 13 at 3.) As this Court explained in *Smith v. Montana*, 2018 MT 115N, ¶ 6, Smith did not appeal his conviction, so it became final in July of 2012 for purposes of calculating the limitations period for postconviction petitions. *See* Mont. Code Ann. § 46-21-102(1). Instead of timely filing a direct appeal or PCR petition, Smith filed a motion to withdraw his plea on June 1, 2012. The district court denied Smith’s motion, and Smith did not appeal that order.

The one-year limitations period for Smith’s PCR petition expired in July 2013. *See* Mont. Code Ann. § 46-21-102(1). As this Court explained in *Peterson v. State*, 2017 MT 165, ¶ 11, 388 Mont. 122, 398 P.3d 259:

[F]iling a motion to withdraw a plea or a petition for postconviction review does not toll the deadlines for any of the other options. If a defendant files only a motion to withdraw a plea, without pursuing direct appellate review or a concurrent petition for postconviction relief, she risks the expiration and waiver of her rights to direct appeal and postconviction relief.

Despite his many failed attempts to collaterally attack his conviction, Smith now asks this Court to consider his second PCR petition, which is filed more than six years late. Smith does not, however, present any claim or evidence to support a departure from the one-year time bar.

A. Smith failed to meet the statutory standard for untimely second or successive PCR petitions or provide any grounds to ignore the one-year limitations period.

A district court is required to “dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.” Mont. Code Ann. § 46-21-105(b).² Smith’s only claim in his second PCR petition is “attorney abandonment,” which is rooted in ineffective assistance of counsel (IAC). Smith does not, however, sufficiently explain why this claim could not have been raised in his first PCR petition.

On June 11, 2013, Smith filed his petition for out-of-time appeal in *State v. Smith*, No. DA 13-0399, and alleged he did not file a timely notice of appeal because of his alleged struggles to communicate with his counsel and OPD. These allegations are also the basis for his claims now and reasonably could have been raised in his first PCR petition. *See* Mont. Code Ann. § 46-21-105(b).

On August 16, 2016, Smith filed his first PCR petition. He did not raise attorney abandonment but did raise IAC claims based on 15 different factual allegations. Smith understood four years ago that IAC claims could be raised in his

² Although the district court did not cite the standard in Mont. Code Ann. § 46-21-105(b), the dismissal of Smith’s petition was correct and this Court “will affirm a court’s decision even if it reaches the right result for the wrong reason.” *State v. Case*, 2007 MT 161, ¶ 40, 338 Mont. 87, 162 P.3d 849.

first PCR petition but failed to raise attorney abandonment despite knowing the facts he now relies on to support it. He provides no reason why this new IAC claim could not have reasonably been raised in his first PCR petition along with his other IAC allegations. *See* Mont. Code Ann. § 46-21-105(b).

The district court correctly pointed out that Smith relies primarily on two documents to support his second PCR petition and they do not entitle him to the untimely relief he requests. The first document is a July 10, 2012, letter from Ed Sheehy with OPD. (Doc. 19 at 7-8.) Smith does not, however, claim this letter was unknown to him in 2012. (*See id.*) Smith's reliance on this letter and the subsequent letter from Ed Sheehy dated August 7, 2012, is merely used as a segue to his prior allegations regarding his difficulty communicating with his counsel after his conviction. (*Id.*) Smith raised these same factual allegations in his petition for writ of state habeas corpus in June 2013, *State v. Smith*, No. DA 13-0399, so he reasonably could have raised this issue in his first PCR petition. *See* Mont. Code Ann. § 46-21-105(b).

The second document Smith relies on is the district court's order dated January 18, 2013. (Doc. 19 at 4-5, 9, App. B.) This document highlights the timing problem that Smith asks this Court to ignore. In the order denying Smith's petition for out-of-time appeal, this Court informed Smith "[h]e may be able to raise his claims in a postconviction proceeding." *State v. Smith*, DA 130399 (July 10, 2013,

order denying petition at 2.) Despite this guidance, Smith failed to make any further challenges to his sentence for almost three years, *Smith v. Fender*, OP-0205 (petition for writ of state habeas corpus), and he did not file his first PCR petition until August 16, 2016. (Doc. 2.) Smith cannot ignore the one-year limitations period for three years and then get relief in a second PCR petition based on a district court order filed seven years prior. *See* Mont. Code Ann. § 46-21-105(b).

Smith argued below that he is entitled to equitable tolling or equitable estoppel because he was never served with the district court's January 18, 2013, order and he was unaware of it until 2019. Smith cited federal habeas precedent below to support equitable tolling, but to the extent this Court provides for equitable tolling it considers "whether the failure to toll on equitable grounds would work a clear miscarriage of justice, one so obvious that the imposition of the time bar would compromise the integrity of the judicial process." *Davis v. State*, 2008 MT 226, ¶ 25, 344 Mont. 300, 187 P.3d 654 (quoting *State v. Redcrow*, 1999 MT 95, ¶ 34, 294 Mont. 252, 980 P.2d 622) (internal quotations omitted). "[W]aiver of the time bar is only justified by 'a clear miscarriage of justice, one so obvious that the judgment is rendered a complete nullity.'" *Redcrow*, ¶ 34 (quoting *In re Grey*, 908 P.2d 1352).

The January 18, 2013, district court order does nothing to undermine Smith's conviction. The order denied Smith's request for a full transcript of the

sentencing hearing and denied his request for assistance to obtain counsel from the Appellate Defender's Office. (App. B.) As the district court noted, the order did not impact Smith's ability to appeal because it was filed approximately six months after Smith's deadline to appeal had expired. (Doc. 20 at 2.) Further, Smith's arguments that the existence of this order, known or unknown to him, somehow hindered his ability to pursue postconviction claims is undermined by the record. Smith timely filed a motion to withdraw his plea on June 1, 2012, and later filed various collateral attacks. Smith's choice to timely pursue one avenue of postconviction relief at the expense of another does not toll or allow Smith to ignore the statutory time limit for PCR petitions. *See Peterson*, ¶ 11.

Smith argues his second PCR petition should be deemed timely filed because he did not learn of the January 18, 2013, order until 2019. This alleged late discovery is irrelevant. To the extent it supports any factual basis for Smith's claim, any abandonment by his trial counsel, or OPD, happened within the first year after Smith was convicted. Smith's petition for out-of-time appeal shows he knew of those facts at least three years before he untimely filed his first PCR petition. *See State v. Smith*, No. DA 13-0399. This supports the district court's denial of Smith's second PCR petition under Mont. Code Ann. § 46-21-105(b), because this claim reasonably could have been raised long before he filed his second PCR petition on January 13, 2020.

For the first time on appeal, Smith uses the phrase “newly presented evidence.” (Appellant’s Br. (Br.) at 6.) Smith did not bring his petition under Mont. Code Ann. § 46-21-102(2), and any attempt to raise this for the first time on appeal is waived. However, Smith cannot meet this onerous statutory standard based on his claims. The statute requires a petitioner to show “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 he or she was convicted.” *Marble v. State*, 2015 MT 242, ¶ 36, 380 Mont. 366, 355 P.3d 742 (quoting Mont. Code Ann. § 46-21-102(2)). Nothing forwarded by Smith suggests he did not assault his girlfriend with a hammer and cause her permanent damage and disfigurement. The limited relief in Mont. Code Ann. § 46-21-102(2) does not allow him to file an untimely successive PCR petition.

The district court correctly denied Smith’s second PCR petition, because Smith failed to meet the standard for second or successive petitions in Mont. Code Ann. § 46-21-105(b) and failed to show he is entitled to any other exception to the one-year limitation period for PCR petitions.

B. The district court did not abuse its discretion in dismissing Smith’s second PCR petition without an evidentiary hearing.

Smith argues the district court was required to hold an evidentiary hearing before denying his petition. (Br. at 6-7, 12-13.) The decision to hold an evidentiary

hearing on a postconviction petition is within the district court's discretion. Mont. Code Ann. § 46-21-201(5). "A district court is permitted to dismiss a petition for post-conviction relief based solely upon the files and records of the case." *Griffin v. State*, 2003 MT 267, ¶ 12, 317 Mont. 457, 77 P.3d 545. A district court may dismiss a petition for postconviction relief without ordering a response if the petition, files, and records "conclusively show that the petitioner is not entitled to relief." Mont. Code Ann. § 46-21-201(1)(a).

Here, Smith failed to raise any issue in his second PCR petition that could not have reasonably been raised in his first PCR petition as required by Mont. Code Ann. § 46-21-105(b). No factual development was necessary to determine Smith could have raised his attorney abandonment claim in his first PCR petition, and the district court did not abuse its discretion by dismissing his second PCR petition on these grounds without an evidentiary hearing. *See Griffin*, ¶ 12.

CONCLUSION

The State respectfully requests this Court affirm the district court's denial of Smith's second PCR petition.

Respectfully submitted this 29th day of January, 2021.

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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 3,203 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-29-2021:

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