

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0204

EMMANUEL F. GOMEZ,

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 John W. Larson, Presiding

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STATEMENT OF THE ISSUES

1. Whether this appeal should be dismissed because the district court's order denying the Appellant's motion for an extension of time was not an appealable order.

2. Whether the district court correctly denied the Appellant's motion for an extension of time because he still had five months to timely file his postconviction petition.

STATEMENT OF THE CASE

On February 6, 2017, a jury convicted the Appellant, Emmanuel Gomez (Gomez), of deliberate homicide and misdemeanor PFMA. (D.C. Docs. (Docs.) 3, 116.)¹ On March 31, 2020, this Court affirmed those convictions. *State v. Gomez*, 2020 MT 73, 399 Mont. 376, 460 P.3d 926. Gomez has not filed a petition for postconviction relief (PCR petition). However, on March 12, 2021, Gomez filed a document titled "Petition for Equitable Tolling Or Extension of Time To File Petition for Postconviction Relief." (Doc. 167.) Gomez acknowledged his PCR petition was not due until June 30, 2021, but he asked for more time to file due to prior COVID-19 restrictions to library access and access to legal research

¹ All citations are to the district court record in the underlying criminal cause (DC 16-17) because Gomez has not filed a PCR petition to initiate a new action.

materials. (*Id.*) The State filed a response in opposition, and the district court denied Gomez’s motion on March 23, 2021. (Doc. 170.) Gomez appealed. (Doc. 171.) Gomez appeals the district court’s denial of that motion. (Appellant’s Br. (Br.) at 1-6.)

STATEMENT OF THE FACTS

On February 6, 2017, a jury convicted Gomez of deliberate homicide, in violation of Mont. Code Ann. § 45-5-102(1), and misdemeanor PFMA, in violation of Mont. Code Ann. § 45-5-206. (Docs. 3, 116.) On May 4, 2017, the district court sentenced Gomez and a judgment was issued on June 7, 2017. (Docs. 146, 149.) Gomez appealed, and this Court affirmed his convictions by opinion dated March 31, 2020. *State v. Gomez*, 2020 MT 73, 399 Mont. 376, 460 P.3d 926.

On March 12, 2021, Gomez filed a “Petition for Equitable Tolling Or Extension of Time To File Petition for Postconviction Relief.” (Doc. 167.) The document was filed in the underlying criminal case because Gomez had not filed a PCR petition to initiate a separate proceeding. (*Id.*) Gomez claimed:

In early March of 2020, Crossroads Correctional Facility began to initiate lockdown procedures in response to the Coronavirus Epidemic. Photocopies, notary, mailing, etc., where [sic] limited or completely inaccessible. Access to the law library and Lexis Nexis was either closed altogether or limited to one 45-minute session per week.

(Appellant’s App. at 9.) Gomez said the facility began lifting the lockdown restrictions near the end of 2020, and on January 2, 2021, they “implemented inhouse wifi tablet access to the Lexis Nexis program.” (*Id.* at 10.)

Gomez asked the district court to “grant equitable tolling in which the 1-year limitation period began to run on January 2, 2021.” (*Id.* at 11.) Alternatively, Gomez requested an extension of time “in the amount of 120 to 180 days” pursuant to Mont. R. Civ. P. 6(b)(1). (*Id.*) The State filed a response in opposition, and the district court denied Gomez’s motion on March 23, 2021. (Doc. 170.) Gomez filed a notice of appeal on April 30, 2021. (Doc. 171.) He challenges the district court’s denial of his motion for extension of time. (Br. at 1-6.)

SUMMARY OF THE ARGUMENT

Gomez’s appeal should be dismissed. The district court’s order denying Gomez’s request for an extension of time to file his PCR petition is not an appealable order in a civil or criminal case. It was not an order after judgment that affected his substantial rights because it was not directly related to the underlying criminal cause and the district court’s order was filed more than five months before Gomez’s deadline to file his PCR petition.

If this Court considers the merits, the district court correctly determined it was not necessary to extend the rigid and categorical time prescription that governs

PCR petitions. On the date of the challenged order, Gomez still had more than five months to file a timely petition. The district court did nothing to prevent Gomez from properly filing his petition, and the order did not otherwise cause a clear miscarriage of justice so obvious that the judgment is rendered a complete nullity.

If the appeal is not dismissed, the district court's denial of Gomez's motion for an extension of time to file his PCR petition should be affirmed.

ARGUMENT

I. Gomez's appeal should be dismissed because the order denying his request for an extension of time is not an appealable order.

A party may only appeal as provided by statute and appellate rules. Mont. R. App. P. 6; Mont. Code Ann. §§ 46-20-103, -104. Different standards apply to civil and criminal cases. Mont. R. App. P. 6(2), (3); Mont. Code Ann. §§ 46-20-103, -104. The standard that applies to Gomez's case is not clear because he filed a motion for an extension of time to file a PCR petition, which is civil in nature, in the underlying criminal case. However, under either standard the district court's order denying Gomez's motion for extension of time is not an appealable order.

Orders appealable in civil cases are addressed in Mont. R. App. P. 6(3). The district court's order denying Gomez's motion for an extension of time to file his PCR petition is not an order appealable in a civil case because it is not one of the orders referenced in Mont. R. App. P. 6(3).

Orders appealable in criminal cases are addressed in Mont. R. App. P. 6(2), which directs parties to Mont. Code Ann. §§ 46-20-103, -104. In a criminal case, “[a]n appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.” Mont. Code Ann. § 46-20-104. The district court’s order denying Gomez’s request for an extension of time to file his PCR petition is not a final judgment of conviction, so the denial of his motion must be an order after judgment that affects his substantial rights. *See id.* The district court’s order does not meet this standard.

The challenged order is not an order after judgment in the criminal case because it is not directly related to it. A PCR proceeding is a civil cause filed to collaterally attack an underlying criminal judgment. *See Pena v. State*, 2004 MT 293, ¶ 34, 323 Mont. 347, 100 P.3d 154 (quoting *State v. Calhoun*, 1999-Ohio-102, 86 Ohio St. 3d 279, 714 N.E.2d 905, 909 (Ohio 1999) (“a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment”). Gomez has not filed a PCR petition, and “orders after judgment” do not include orders seeking relief in a collateral action that has not been initiated by the petitioner. *See* Mont. Code Ann. § 46-20-104(1).

The challenged order does not affect Gomez’s substantial rights because it was filed more than five months before the one-year time limit for filing a PCR

petition expired under Mont. Code Ann. § 46-21-102(1). A PCR petition “may be filed at any time within 1 year of the date that the conviction becomes final.” Mont. Code Ann. § 46-21-102(1). Because Gomez filed a direct appeal, his conviction did not become final until “the time for petitioning the United States supreme court for review expire[d].” Mont. Code Ann. § 46-21-102(1)(b). Typically, an appeal to the United States Supreme Court must be taken within 90 days after the entry of this Court’s opinion. U.S. Sup. Ct. R. 13(1), (3); *Raugust v. State*, 2003 MT 367, ¶ 15, 319 Mont. 97, 82 P.3d 890. Gomez considered this and asserted in his motion that his filing deadline was June 30, 2021. (Appellant’s App. at 10.) The district court’s order was filed on March 23, 2021, which was more than three months before the deadline Gomez acknowledged in his motion.

Gomez’s substantial rights were not affected because the district court’s order did nothing to prevent Gomez from timely filing his PCR petition in the subsequent months. Further, Gomez had 60 additional days to timely file his PCR petition. On March 19, 2020, the United States Supreme Court issued an order in response to COVID-19 that modified U.S. Sup. Ct. R. 13(1) and 13(3). U.S. Sup. Ct. Or. (March 19, 2020), available at <https://www.supremecourt.gov/announcements/COVID-19.aspx>.

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

Id. The United States Supreme Court ended this extension by order dated July 19, 2021. U.S. Sup. Ct. Or. (July 19, 2021), available at <https://www.supremecourt.gov/announcements/COVID-19.aspx>. However, the 150-day rule still applies to “any case in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued prior to July 19, 2021.” *Id.* The 150-day rule applies to Gomez, because this Court affirmed Gomez’s convictions in an opinion dated March 31, 2020. *State v. Gomez*, 2020 MT 73, 399 Mont. 376, 460 P.3d 926.

Based on the date of this Court’s opinion and the rules and orders of the United States Supreme Court, Gomez’s deadline to file a PCR petition did not expire until August 28, 2021. *See id.*; Mont. Code Ann. § 46-21-102(1); *Raugust*, ¶ 15. The district court’s order, which was filed more than five months before Gomez’s deadline to file his PCR petition, is not appealable because it did not affect his substantial rights. Gomez’s appeal should be dismissed.

II. If this Court considers the merits, the district court correctly denied Gomez’s motion for an extension of time.

A. Standard of review

“A district court’s discretionary decisions are reviewed for abuse of discretion.” *State v. Colvin*, 2016 MT 129, ¶ 10, 383 Mont. 474, 372 P.3d 471.

“A district court abuses its discretion if it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice.” *State v. Kaarma*, 2017 MT 24, ¶ 6, 386 Mont. 243, 390 P.3d 609 (quoting *Ammondson v. Nw. Corp.*, 2009 MT 331, ¶ 30, 353 Mont. 28, 220 P.3d 1).

B. The district court correctly found there was not good cause to extend Gomez’s one-year deadline to file a PCR petition because Gomez still had more than five months to timely file.

The district court found Gomez did not show “good cause for equitable tolling or extension of time, which is required by M.R. Civ. P. Rule 6(b)(1), and no sufficient circumstances to delay filing has occurred.” (Doc. 170.)

The district court was correct that there was not good cause to grant an extension because Gomez still had five months to file his petition. Understandably, Gomez was unaware of the United States Supreme Court order that extended the 90 days in U.S. Sup. Ct. R. 13 to 150 days. However, Gomez explained in his brief below that he understood his petition was not due until June 30, 2021. (Appellant’s App. at 10.) Even without the extra 60 days granted by the United States Supreme Court order, the district court still denied Gomez’s motion three months prior to the date his petition was due. The district court should not be held in error for denying a motion for an extension of time more than three months ahead of the due date.

Neither of the grounds relied on by Gomez supported his preemptive request for additional time. Gomez cited federal habeas precedent and *Davis v. State*, 2008 MT 226, 344 Mont. 300, 187 P.3d 654, to argue for “equitable tolling.” (Appellant’s App. at 5.) However, Montana state PCR proceedings are not subject to the same equitable tolling rules as federal habeas cases. To the extent Montana law allows tolling on equitable grounds, this Court 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*, ¶ 25 (quoting *State v. Redcrow*, 1999 MT 95, ¶ 34, 294 Mont. 252, 980 P.2d 622) (internal quotations omitted).

In *Redcrow*, ¶ 34, this Court explained the clear miscarriage of justice must be “so obvious that the judgment is rendered a complete nullity.” This Court has also explained, a “miscarriage of justice” argument requires a showing that the defendant is actually innocent. *State v. Root*, 2003 MT 28, ¶ 18, 314 Mont. 186, 64 P.3d 1035 (defendant did not argue “miscarriage of justice” exception premised upon conviction of one who is actually innocent); *Raugust*, ¶ 20 (miscarriage of justice exception applies to a constitutional violation that has likely resulted (“in the conviction of one who is actually innocent”)); *Redcrow*, ¶ 33 (miscarriage of justice exception “is extremely rare and is limited to extraordinary cases” when actual innocence is demonstrated).

Gomez does not argue he is actually innocent, and it was not otherwise a clear miscarriage of justice for the district court to deny Gomez's request for additional time to file a PCR petition that was not due for another five months. Gomez acknowledges he had legal research capability with a tablet beginning on January 2, 2021, and he does not argue that access was inhibited at the time he filed his motion or was going to be inhibited during the five subsequent months. Instead of finishing his PCR petition within those five months, he chose to appeal an order that did not deny him his statutory right to seek postconviction relief. The district court correctly found there was no basis to grant an extension of time based on the standards in *Davis*, ¶ 25, and *Redcrow*, ¶ 34.

For these same reasons, the district court correctly found Gomez was not entitled to relief under Mont. R. Civ. P. 6(b)(1), which provides:

(b) Extending Time.

(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires. . .

There was not good cause for an extension of time because Gomez still had five months to file a timely PCR petition.

Further, although Mont. R. Civ. P. 6(b)(1) applies to civil proceedings generally, the rules of civil procedure only apply in postconviction proceedings to

the extent they “are not inconsistent with” the postconviction statutes. Mont. Code Ann. § 46-21-201(1)(c). The postconviction statutes are “demanding in their pleading requirements,” *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 473, and the one-year time bar in Mont. Code Ann. § 46-21-102 is a “rigid categorical time prescription that governs post-conviction petitions.” *Davis*, ¶ 23. The good cause requirement in Mont. R. Civ. P. 6(b)(1) does not trump the statutory time bar, and the district court’s order did nothing to prevent Gomez from filing a timely PCR petition or to otherwise justify a departure from the rigid and categorical time prescription. *See Davis*, ¶ 23.

CONCLUSION

The State respectfully requests this Court affirm the district court’s denial of Gomez’s motion for extension of time to file his PCR petition.

Respectfully submitted this 8th day of October, 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 2,532 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature and any appendices.

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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 10-08-2021:

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