



ORIGINAL

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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 23-0344

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0344

FILED

JUL 11 2023

Bowen Greenwood
Clerk of Supreme Court
State of Montana

MAKUEEYAPEE DELENE WHITFORD,

Petitioner and Appellant,

v.

ORDER

STATE OF MONTANA,

Respondent and Appellee.

Representing himself, Makueeyapee Delene Whitford has filed a verified Petition for an Out-of-Time Appeal and requests discovery, an evidentiary hearing, and appointment of counsel in order “to present a sufficient record upon which this Court might rely on[.]” Whitford states that his *pro se* status, misrepresentation by the office of the Clerk of the Supreme Court, COVID-19 pandemic, and the Appellate Defender’s Office’s legal representation prevented him from filing a timely appeal with this Court. He provides a copy of the judgment he seeks to appeal.

Whitford seeks to appeal a November 13, 2019 Lake County District Court Order dismissing his petition for postconviction relief.

M. R. App. P. 4(6) allows this Court to grant an out-of-time appeal “[i]n the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice[.]” “Extraordinary circumstances do not include mere mistake, inadvertence, or excusable neglect.” M. R. App. P. 4(6).

Whitford contends that the District Court erred in not considering his Petition because it was filed in the District Court only one day later than it was due. As both he and the court’s Order mention, this Court decided his direct appeal on August 7, 2018, affirming his conviction of deliberate homicide. *State v. Whitford*, Cause No. DA 15-0379, 2018 MT 195N, 2018 Mont. LEXIS 260 (Aug. 7, 2018). “A person convicted of an offense

who has no adequate remedy of appeal but claims that a sentence was imposed in violation of Montana law or their constitutional rights may petition for postconviction relief. Section 46-21-101, MCA.” *Mascarena v. State*, 2019 MT 78, ¶ 6, 395 Mont. 245, 438 P.3d 323. “An individual petitioning for relief pursuant to § 46-21-101, MCA, must file his or her claim ‘within 1 year of the date that the conviction becomes final.’” Section 46-21-102(1), MCA. *Mascarena*, ¶ 6.

Section 46-21-102(1)(b), MCA, provides that a conviction becomes final after “an appeal is taken to the Montana supreme court, [and] when the time for petitioning the United States supreme court for review expires[.]” The time frame for petitioning the U.S. Supreme Court is ninety days or three months. U.S. Sup. Ct. Rule 13.1. (Eff. Jul. 1, 2019). Whitford’s petition was not due until November 7, 2019, or when his conviction became final. Contrary to the District Court’s conclusion, Whitford’s Petition for Postconviction Relief was timely filed.

Even though his Petition for Postconviction relief was timely filed in District Court, the court provided other reasons for its denial and dismissal. Pointing to §§ 46-21-101 and -201, MCA, the District Court outlined:

This [c]ourt has made that review, and determines the files and record filed by Mr. Whitford in this action conclusively show the Petitioner is not entitled to the relief requested. Mr. Whitford has not made the requisite factual showing. His conclusory statements and accusations are insufficient for the required factual showing.

Therefore, the Petition is DENIED.

“A court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the procedural threshold set forth in § 46-21-104(1)(c), MCA, is not satisfied.” *Herman v. State*, 2006 MT 7, ¶ 15, 330 Mont. 267, 127 P.3d 422. A district court may dismiss a petition without ordering a response when the petitioner is not entitled to relief. *Herman*, ¶ 15 (citing § 46-21-201(1)(a), MCA).

Turning to his Petition for an Out-of-Time Appeal, Whitford’s reasons for his untimely appeal do not survive scrutiny. Whitford has not provided any dates or supporting

documentation. We point out that Whitford had appellate legal counsel only during his direct appeal and until this Court's decision in August 2018. The Clerk of the Supreme Court correctly informed Whitford that, while represented by counsel, Whitford should not file pleadings on his own behalf. M. R. App. P. 10(1)(c). Whitford would not have been able to file a Notice of Appeal here until he first sought relief in the District Court in late 2019. The court entered its order November 13, 2019. Though Whitford references Covid-19 reasons for his delay, it would be several months before the pandemic slowed court matters in late March 2020. He could have sought a timely appeal at any time before Monday, January 13, 2020. Whitford could have sought leave for an out-of-time appeal at any point during the last three and a half years. He did not do so.

This Court does not hold evidentiary hearings or allow discovery. As an appellate court of review, this Court does not find facts; we review the records and issues before us. Whitford is not entitled to appointment of counsel. Section 46-8-104(3), MCA. We conclude that denial of his Petition will not cause a gross injustice.

IT IS THEREFORE ORDERED that Whitford's Petition for an Out-of-Time Appeal is DENIED and DISMISSED.


IT IS FURTHER ORDERED that this matter is CLOSED as of this Order's date.


The Clerk of this Court is directed to provide a copy of this Order to counsel of record and to Makueeyapee Delene Whitford personally.

DATED this 11th day of July, 2023.



Chief Justice





Augustus Gustaf

John M. Sullivan

Justices