IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41551

BRENT N. TORTOLANO,	)	**2015 Unpublished Opinion No. 434**
	)	
Petitioner-Appellant,	)	**Filed: March 25, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Summary dismissal of successive petitions for post-conviction relief, affirmed.

Brent N. Tortolano, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Brent N. Tortolano appeals from the district court's summary dismissal of his successive petitions for post-conviction relief. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Tortolano was found guilty by a jury of second degree murder, Idaho Code §§ 18-4001, 18-4002, 18-4003. The district court sentenced Tortolano to a unified term of thirty years with twenty years determinate. This Court affirmed Tortolano's judgment of conviction and sentence on direct appeal. *State v. Tortolano*, Docket No. 30089 (Ct. App. June 7, 2006) (unpublished).

Tortolano filed his initial petition for post-conviction relief in 2007, asserting claims of ineffective assistance of trial counsel. After an evidentiary hearing, the district court denied the petition and we affirmed. *Tortolano v. State*, Docket No. 35987 (Ct. App. July 26, 2010) (unpublished).

In June 2012, Tortolano filed a successive petition for post-conviction relief and was appointed counsel. This petition asserted claims of ineffective assistance of trial and post-conviction counsel. In 2013, while his successive petition was pending, Tortolano filed a pro se second successive petition for post-conviction relief. This petition asserted claims of newly discovered evidence based on the affidavit of Fred Latham, prosecutorial misconduct, and ineffective assistance of trial counsel. The State filed a motion for summary dismissal in each case, and following a hearing, the district court summarily dismissed the petitions, concluding Tortolano failed to state a claim upon which relief could be granted.[1] Tortolano timely appeals the dismissal of his petitions.

II.
ANALYSIS

Idaho Code § 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). Generally, all allegations relating to a request for post-conviction relief must be asserted in one petition. I.C. § 19-4908. A successive petition for post-conviction relief may be summarily dismissed "if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding." *Griffin v. State*, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (citing I.C. § 19-4908).

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." If an initial post-conviction action was timely filed, an inmate may file a

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[1] Tortolano, relying on I.C. § 49-4906(a), challenges the State's filing of a motion for summary dismissal in lieu of filing an answer. This argument is without merit as I.C. § 49-4906(a) requires the State to respond to a petition for post-conviction relief "by answer *or* by motion" (emphasis added). Tortolano also contends that the State failed to file relevant portions of the record as required by I.C. § 49-4906(a). However, this claim is also without merit as he fails to identify any relevant portions of the record that should have been submitted or how any such failure resulted in an adverse decision on his petitions.

subsequent petition outside of the one-year limitation period if the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended petition. I.C. § 19-4908; *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). There is no statutory or constitutional right to the effective assistance of counsel in post-conviction relief proceedings. *Murphy v. State*, 156 Idaho 389, 327 P.3d 365 (2014). Moreover, ineffective assistance of prior post-conviction counsel is not a "sufficient reason" under I.C. § 19-4908 for allowing a successive post-conviction petition. *Murphy*, 156 Idaho at 396, 327 P.3d at 372. Analysis of "sufficient reason" permitting the filing of a successive petition includes an analysis of whether the claims being made were asserted within a reasonable period of time. *Charboneau*, 144 Idaho at 905, 174 P.3d at 875. In determining what a reasonable time is for filing a successive petition, we will simply consider it on a case-by-case basis. *Id.*

The district court found that Tortolano failed to state a claim upon which relief could be granted in his successive petitions for post-conviction relief. Specifically, the court found that Tortolano's successive petition was "an attempt to relitigate issues and claims previously raised and litigated in [his] original petition," and that his second successive petition "fail[ed] to demonstrate a reasonable or sufficient basis for not having raised or addressed this issue in prior-post conviction proceedings." In essence, the district court found that Tortolano's claims in his successive petitions for post-conviction relief were not timely raised.[2]

Tortolano provides little to no argument on appeal regarding dismissal of the first successive petition, concentrating primarily on the claim of newly discovered evidence set out in the second successive petition. In any event, his claims of ineffective assistance of trial counsel have been waived, as they should have been raised in his first petition. *See* I.C. § 19-4908. Tortolano knew of the claims of ineffective assistance of trial counsel at the time of his trial in 2003, and such claims should have been raised in his initial petition for post-conviction relief. In fact, Tortolano did claim ineffective assistance of trial counsel in his initial petition for post-

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[2] Although not a basis for the district court's decision, we note that the first successive petition was untimely. The petition was filed nine years after the trial and nearly two years after the conclusion of the appeal on his first post-conviction petition. Claims of ineffective assistance of counsel, and any ineffectiveness of post-conviction counsel, to the extent cognizable, are known at the conclusion of the proceeding. *See Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009).

conviction relief. The relevant facts underlying claims of ineffective assistance of counsel are presumed known at the time of such alleged ineffective assistance. *Rhoades v. State*, 148 Idaho 247, 220 P.3d 1066 (2009). Tortolano further argues that his post-conviction counsel provided ineffective assistance. However, because as set forth in *Murphy*, there is no statutory or constitutional right to effective assistance of post-conviction counsel, these claims are not permissible. Thus, because Tortolano's successive petition sought to relitigate claims of ineffective assistance of counsel from his original post-conviction petition, he failed to state a claim upon which relief could be granted.

In his second successive petition, Tortolano alleged that newly discovered evidence warranted relief from his conviction. In opening statements to the jury at trial, Tortolano claimed the prosecutor indicated that an individual named Fred Latham would be called as a witness and testify that he overheard Tortolano say that he was going to kill the victim. Latham did not testify at trial. In support of the petition, Tortolano submitted Latham's affidavit, ostensibly obtained after a discussion in prison eleven days before the filing of the second successive petition. In his affidavit, Latham stated that he initially denied to police and prosecutors having heard Tortolano say he was going to kill the victim. After being pressured, he told prosecutors that he did hear the statement and, although reluctant to testify for fear of being a snitch, agreed to testify. Thereafter, Latham stated that prior to trial, he told prosecutors that he did not hear the statement and would not testify, as to which he was told he would be subpoenaed. He did not indicate whether he was so subpoenaed and there is no further indication as to why he did not testify at trial.

Based upon the Latham affidavit, Tortolano asserts that he is entitled to relief because the information is newly discovered evidence of prosecutorial misconduct, a *Brady*[3] violation, and ineffective assistance of trial counsel.[4] In its oral ruling, the district court stated that "this is not newly discovered evidence that would make out a claim that would entitle the petitioner to any

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[3] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[4] Tortolano contends that because the Latham information was truly newly discovered evidence and/or the product of a *Brady* violation, the second successive petition should be deemed timely. *See Rhoades*, 148 Idaho at 251, 220 P.3d at 1070; *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). The district court did not dismiss the petition on this basis and we, therefore, need not further address the issue.

relief." As to the question of whether newly discovered evidence warrants relief, generally a motion based on newly discovered evidence must disclose: (1) that the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) the evidence is material, and not merely cumulative or impeaching; (3) it will probably produce an acquittal; and (4) the failure to learn of the evidence was not due to the defendant's lack of diligence. *State v. Drapeau*, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976).

While the district court did not elaborate on its finding that the evidence was not newly discovered, Tortolano failed to make the necessary showing. As to the first factor of the *Drapeau* test, what Latham was or was not going to testify about at trial was apparently unknown to Tortolano at the time of trial. Tortolano did not learn of Latham's anticipated testimony or the nature of how it was procured or subsequently recanted until eleven days before submitting his second successive petition. However, Tortolano has not shown that the information was material evidence likely to produce an acquittal. There is nothing in the record by which to evaluate any potential impact that the prosecutor's alleged representation regarding Latham had on Tortolano's trial. Ostensibly the jury was told at opening that Latham would testify, but he did not. Since we do not have the trial transcript, we know of no further reference to Latham. Thus, from the jury's perspective, there is nothing to indicate that a reference to a witness that did not materialize had any impact. Further, testimony from Latham that he heard nothing would be immaterial. Therefore, even evidence that the prosecutor knew Latham would not so testify, evidence we do not have, has not been shown to be prejudicial or material to the conviction.

Related to the fourth factor of the *Drapeau* test is the question of sufficient reason under I.C. § 19-4908 for allowing a successive post-conviction petition. In its order, the district court found that Tortolano failed "to demonstrate a reasonable or sufficient basis for not having raised or addressed this issue in prior post-conviction proceedings."[5] Indeed, while Tortolano indicated that he did not talk to Latham until shortly before filing the second successive petition, he provided nothing in regard to why he could not have done so within the time frame to file an

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[5] Tortolano contends that his trial counsel was ineffective in failing to object to the opening statement of the prosecutor or object at the end of the trial when Latham was not called to testify. However, he presented no argument or evidence as to what counsel knew or did not know as to Latham or his potential testimony. Further, the fact that trial counsel did not object was known at the time of trial.

initial post-conviction petition. Tortolano has presented no allegation or argument that he could not have timely discovered the information provided by Latham, particularly given the fact that he knew the prosecutor ostensibly intended to call Latham as a witness but did not do so. The fact that Tortolano did not talk to Latham until years after the time allowed to file an initial petition for post-conviction relief had expired does not itself provide a sufficient reason to allow his successive post-conviction petition. Tortolano failed to present any evidence that the failure to learn of the evidence was not due to a lack of diligence on his part. Accordingly, Tortolano has failed to make the necessary showing that would entitle him to relief.

III.

CONCLUSION

Tortolano failed to demonstrate that the district court erred in granting summary dismissal of his petitions for post-conviction relief. Therefore, the district court's orders dismissing Tortolano's petitions for post-conviction relief are affirmed.

Chief Judge MELANSON and Judge GUTIERREZ **CONCUR.**