

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock ____ M
CLERK OF THE DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

ALVIN BRUCE ERICKSON,)	
)	
<i>Petitioner,</i>)	Case No. CV 2006 6422
)	
vs.)	ORDER DENYING RESPONDENT'S
)	MOTION FOR SUMMARY
STATE OF IDAHO,)	DISMISSAL REGARDING
)	PETITION FOR POST-CONVICTION
<i>Respondent.</i>)	RELIEF
_____)	

On June 1, 2004, Erickson was sentenced in the underlying criminal matter, Kootenai County Case No. CRF 2004 8776 for the felony offense of possession of controlled substance (methamphetamine), and on that same day Erickson had his probation revoked and his previously imposed sentence imposed in Kootenai County Case No. CRF 2002 22195 on the felony offense injury to child. The parties proposed a binding Rule 11 plea agreement to which the court accepted. Erickson pled guilty pursuant to *Alford* and proceeded directly to sentencing, waiving his PSI. The court imposed concurrent sentences of six years, two years fixed and four years indeterminate, with retained jurisdiction. Erickson returned from his first retained jurisdiction in September 2004, with a recommendation from the State for imposition of sentence. The court imposed a second retained jurisdiction in both cases. Erickson returned for his second retained jurisdiction hearing in February 2005, and the court granted him probation at that time.

A probation violation was filed in September 2005. Erickson admitted three of the four

allegations, but denied an allegation that he battered and harassed a female he had recently met. An evidentiary hearing was held on that allegation in December 2005. The court found that the State had failed to prove the fourth allegation and proceeded to disposition on the three admitted allegations. The court imposed the six-year sentence on December 29, 2005.

Erickson filed a *pro se* "Petition and Affidavit for Post-Conviction Relief" with the court on September 7, 2006, alleging ineffective assistance of counsel. Erickson later obtained counsel, and an Amended Petition was filed on December 4, 2006. When the Amended Petition was filed, the only factual basis for Erickson's post-conviction relief in the record was a two-page, handwritten "Affidavit of Facts in Support of Post-Conviction Petition" filed by Erickson and attached to his first *pro se* petition. Erickson has since filed another hand-written affidavit, filed with the court on January 26, 2007, which alleges his attorney in the underlying criminal action pressured him into pleading guilty without fully explaining alternatives to him and failed to file an appeal as requested by Erickson after sentence was imposed in 2005. There are no other affidavits filed or evidence submitted in support of his petition.

The State is seeking summary dismissal of Erickson's Petition for Post-Conviction Relief arguing the Petition has stated no genuine issue of material fact and the State is entitled to judgment as a matter of law, that the Petition was not timely filed, and that Erickson's request for relief exceeds the scope of the statute.

Oral argument was held on February 8, 2007. After oral argument, the Court ruled on the record that the following claims were dismissed: 1) petitioner's claim in his amended petition that "While incarcerated in Boise, authorities have sanctioned me because of information contained in my PSI, concerning alleged crimes, which I have not been convicted of", is outside the scope of Idaho Code § 19-4901(a); and 2) petitioner's claims for post-conviction relief based on any events that occurred *before* July 27, 2005, were barred by the statute of limitation found

in Idaho Code §19-4902. Going backwards one year and 42 days from the September 7, 2006, filing date of his Petition and Affidavit for Post-Conviction relief leaves a date of July 27, 2005. Thus, any matters that happened at sentencing on June 1, 2004, are time barred. The only hearing and action by the Court that is not time barred is the probation violation and imposition of sentences on December 29, 2005. When a court has retained jurisdiction, the time for filing a post-conviction application challenging a judgment of conviction or sentence does not start anew from the entry of a probation revocation order. *Gonzalez v. State*, 139 Idaho 384, 79 P.3d 743 (Ct.App. 2003). In *Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct.App. 1993), the Court of Appeals had held that the time in which to file for post-conviction relief begins to run upon the revocation of probation and not upon the earlier imposition of judgment. The *Gonzales* court further explained:

Any post conviction action filed within the limitations period connected to the probation revocation order, but beyond the limitations period measured from the appeal period for the judgment of conviction, *may address only issues that arose from the probation revocation proceeding.*

139 Idaho at 386. (emphasis added).

Petitioner filed an affidavit on January 26, 2007, which states:

On or about Dec. 29, 2005 when Judge Mitchel sentenced me, right afterwards in the court room, I asked my attorney Ed Lawler to file an appeal and a rule 35 he said he would. On or about Jan 3rd 2006 I was moved from Kootenai County Jail. I tried to contact my atty. by phone. The public defenders office would not accept a collect call fro Shoshone county. I put in a concern form was told to write him a letter, so I did. Again stateing my wishes to appeal and why and to also file a rule 35. I also sent a letter to Judge Mitchel. I still have not received an answer to either letter. By the time I got thru R.D.U. in Boise, and to where I could file on my own and have legal access. The time had expired, my daughter was in the courtroom with me. She heard Mr. Lawler agree to file also.

January 26, 2006, Affidavit of Alvin Erickson, p. 2. The Amended Petition for Post-Conviction Relief states as a ground: “Pressure exerted on me by my attorney to plead guilty, without fully explaining to me, my alternatives.” Amended Petition, p. 2. This is barred by Idaho Code § 19-

4901(a) since it relates to a plea that was entered back on June 1, 2004. The Amended Petition for Post-Conviction Relief states as another ground: “My attorney negligently failed to file an Appeal and/or a Rule 35, as I requested him to do. This request and his acknowledgement of this request were both made within a time frame, which would have allowed for timely filings.” Amended Petition, p. 2. This, coupled with the January 29, 2007, Affidavit of Alvin Erickson quoted above, show petitioner is referring to events that occurred on the December 29, 2005, hearing and are not time barred.

At oral argument, Erickson’s attorney claimed that it is per se ineffective assistance of counsel for a defendant to ask for an appeal or a Rule 35 motion, and not have the attorney investigate such. When asked, Erickson’s attorney could cite to no case law supporting such a claim. Erickson’s attorney cited no such authority in his Petitioner’s Response Brief to Respondent’s Motion & Brief for Summary Dismissal, filed January 30, 2007. The Court took the matter under advisement.

Petitioner Erickson has established that on December 29, 2005, he requested that his trial lawyer timely file an appeal of his conviction and that the lawyer failed to file such appeal. At that time, Erickson had an opportunity to file a timely appeal. I.A.R. 11(c)(1), (4) and (6). Whether meritorious or not, a lawyer's failure to file a requested appeal is deemed to be ineffective assistance of counsel. *Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993), citing *Sanders v. State*, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct.App. 1990); *State v. Dillard*, 110 Idaho 834, 838, 718 P.2d 1272, 1276 (Ct.App. 1990). Thus, as in *Mata*, the appropriate remedy is to allow an evidentiary hearing as to whether Erickson “...asked his attorney to appeal and whether the failure to appeal resulted from the attorney’s dereliction or from a decision made between counsel and [Erickson].” *Id.* “If the district court finds that ineffective assistance of counsel deprived [Erickson] of his opportunity to appeal, the proper remedy is for the court to vacate and reenter the judgment of

conviction so that [Erickson] may perfect a timely appeal. *Id. citing Flores v. State*, 104 Idaho 191, 195, 657 P.2d 488, 492; *State v. Dillard*, 110 Idaho 834, 837-38, 718 P.2d 1272, 1275-76 (Ct.App. 1990).

As to the issue of trial counsel's refusal to file an I.C.R. 35 motion, it is clear that trial counsel's failure to file an I.C.R. 35 motion is ineffective assistance of counsel which may be brought under the post-conviction procedure. *Murray v. State*, 121 Idaho 918, 828 P.2d 1323 (Ct.App. 1992). However, the December 29, 2005, hearing was on a probation violation revocation as to both matters. Idaho Criminal Rule 35 allows reduction of the sentence "upon" revocation of probation. It does not authorize reduction in response to a motion after probation has been revoked. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct.App. 1987). When a reduction of a sentence is sought upon revocation of probation, the motion cannot be filed after revocation and after the prison sentence has been ordered into execution. *State v. Morris*, 119 Idaho 448, 8807 P.2d 1286 (Ct.App. 1991); *State v. Fox*, 122 Idaho 550, 835 P.2d 1361 (Ct.App. 1992). To satisfy Rule 34, petitioner "had to file his motion 'upon revocation of probation,' or simultaneously with revocation." *State v. Joyner*, 121 Idaho 376, 379, 825 P.2d 99, 102 (Ct.App. 1992). Erickson has alleged in his January 26, 2007 Affidavit that "On or about Dec. 29, 2005, when Judge Mitchel sentenced me, right afterwards in the court room, I asked my attorney Ed Lawler to file an appeal and a rule 35 he said he would." Petitioner has set forth sufficient facts to survive respondent's motion for summary dismissal regarding the I.C.R. 35 issue.

IT IS ORDERED, that Respondent's Motion for Summary Dismissal is GRANTED as to all claims raised by petitioner, except petitioner's ground enumerated 6(c) in his Amended Petition for Post Conviction Relief which reads: "My attorney negligently failed to file an Appeal and/or a Rule 35, as I requested him to do. This request and his acknowledgement of this request were both made within a time frame, which would have allowed for timely filings." As to that ground

only, less the bracketed portion, Respondent's Motion for Summary Dismissal is DENIED.

Dated this 12th day of February, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2007 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Kootenai County Prosecuting Attorney,
Ken Brooks Deputy

Robert R. Romero, counsel for petitioner

Clerk of the District Court

By _____
Jeanne Clausen, Deputy

