

2017

**Gaspar Avila, Petitioner and Appellant, vs. Taylorsville City,
Respondent and Appellee**

Utah Court of Appeals

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Case No. 20160612-CA

IN THE
UTAH COURT OF APPEALS

GASPAR AVILA,
Petitioner/Appellant,

v.

CITY OF TAYLORSVILLE,
Respondent/Appellee.

Brief of Appellee

Appeal from a post-conviction court's decision, in the Third Judicial District, Salt Lake County, the Honorable Su Chon presiding, granting the City's summary judgment motion, in response to Avila's petition for post-conviction relief, on grounds that Avila's petition was procedurally barred by the one-year statute of limitations set forth in the Post-Conviction Remedies Act.

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Oral Argument Not Requested

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STATEMENT OF JURISDICTION

Avila appeals from a summary judgment decision following a petition for post-conviction relief in a criminal case. This Court therefore has jurisdiction under Utah Code § 78A-4-103(2)(e).

STATEMENT OF THE ISSUES

1. Under the Post-Conviction Remedies Act (PCRA), and Rule 56(a) of the Utah Rules of Civil Procedure, will the Utah Court of Appeals affirm the decision of the district court in granting a respondent's motion for summary judgment, denying and dismissing a petition for post-conviction relief, where the petition was filed over seven years after the statute of limitations for filing such had run, no new evidentiary facts had been shown since the date of conviction and sentencing, and no material facts are in genuine dispute?

Standard of Review. Avila appeals the district court's decision on a motion for summary judgment. Where a motion for summary judgment is at issue, this Court reviews the district court's decision for correctness, and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See, e.g., Dowling v. Bullen*, 2004 UT 50 ¶7.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The constitutional provisions, statutes, and rules that are of central importance for the issues raised in this appeal include the following:

1. Statutes:

- Utah Code Ann. § 78B-9-107, Statute of limitations for post-conviction relief.

2. Rules:

- Utah Rules of Civil Procedure, Rule 56. Summary judgment.

STATEMENT OF THE CASE

On February 27, 2007, in case number 061117770 of the Taylorsville Justice Court, Petitioner Gaspar Avila pled guilty to, was convicted of, and was sentenced on the charge of Driving Under the Influence of Alcohol/Drugs, a Class B Misdemeanor. (R. 93-95). At the time of Avila's plea, Avila signed a waiver of rights in support of his knowing and voluntary plea, indicating that he understood and waived all the listed rights. (R. 100-104). The waiver contained, inter alia, an

acknowledgment that Avila had the right to appeal his conviction, and that he had the right to withdraw his statement of guilt. (R. 100-104). After sentencing, Avila neither filed a motion to withdraw his guilty plea, nor appealed his conviction or sentence. (R. 93-98). On December 8, 2015, over seven years later, Avila brought a petition for post-conviction relief in the Third District Court, Salt Lake Department, petitioning the district court to allow withdrawal of his plea made back in February of 2007. (R. 1-7). The basis for Avila's petition was an allegation that the justice court in which he pled and was convicted failed to strictly comply with Rule 11(e), thereby alleging his plea was unknowing and involuntary. (R. 5).

The City filed a Motion for Summary Judgment on February 12, 2016 on the basis that the one-year statute of limitations in which to file a petition for post-conviction relief had long-ago expired, or in the alternative, that the petition was meritless. (R. 84-91). Avila filed his response to the motion on March 14, 2016. (R. 116-124). The district court heard argument on the motion on May 27, 2016. (R. 155-156). On June 22, 2016, the district court ruled in favor of the City in an order granting summary judgment, denying and dismissing Avila's petition on grounds that Avila had not satisfied the statute of limitations requirement pursuant to Utah Code Ann. § 78B-9-107. (R. 171-172). Avila then appealed the district court's decision on the motion for summary judgment to this Court.

SUMMARY OF ARGUMENT

The PCRA allows a petitioner to seek relief only if the petition is filed within a one-year statute of limitations. The two events that could trigger that year in the instant case are: (1) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken, or (2) the date on which the petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

Regarding the first possible instance, Avila did not appeal his conviction or sentence, and the last day for filing an appeal was a date over seven years prior to the filing of his petition under the PCRA. The statute of limitations had therefore expired several years prior to his filing.

Addressing the second possible instance, Avila bases his petition on an allegation that the justice court that took his plea did not strictly comply with Rule 11(e) of the Utah Rules of Criminal Procedure, alleging consequently that his plea was not knowing and voluntary. However, he provides no new material evidentiary facts that have come forth since his time to appeal lapsed. Instead he mistakenly labels his later recognition of the legal significance of long-known/available facts as new “facts”. As the underlying facts to his Rule 11(e) allegation were known or available to Avila years prior to him filing his petition, the one-year limitation had long expired by the time he filed his petition.

In both instances, the statute of limitations expired years prior to Avila filing his petition. Avila's petition was therefore barred by the statute limitations of the PCRA. Avila attempts to show genuine dispute of material facts by asserting unrelated facts as "material" to the time-bar issue. He also misunderstands the difference between a dispute over legal significance of a fact and a dispute over the fact itself, mislabeling the former as the latter. Taking into account his misguided labels, there are no material facts in genuine dispute with regard to the issue of the time-bar on Avila's petition. With no genuine dispute over actual material facts, and Avila having exceeded the one-year time limitation, summary judgment is appropriate. This Court should therefore affirm the district court's decision granting summary judgment and denying/dismissing Avila's petition based on failure to satisfy the statute of limitations of the PCRA.

ARGUMENT

I. THE CORRECTNESS OF SUMMARY JUDGMENT IN THIS CASE TURNS ON TWO KEY DISTINCTIONS MISUNDERSTOOD BY AVILA:

A. DISTINCTION #1: THE DIFFERENCE BETWEEN ACTUAL NEW FACTS THAT COME TO A PETITIONER'S KNOWLEDGE, AS OPPOSED TO THE REALIZATION OF THE LEGAL SIGNIFICANCE OF FACTS ALREADY PRESENT.

The PCRA allows a petitioner to seek post-conviction relief only if the petition is filed within a one-year statute of limitations. *See* Utah Code Ann. § 78B-9-107(1). The one-year period accrues on the latest date corresponding to a "cause of action"

event. *Id.* The two such events relevant to the instant inquiry include: (1) the last day for filing an appeal from the entry of a final judgment of conviction, if no appeal is taken, and (2) the date on which the petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which his petition is based. *Id.* at § 78B-9-107(2)(a, e).

With regard to the last date for filing an appeal, there is no confusion. Avila did not file an appeal after conviction and sentencing on the charge of Driving Under the Influence of Alcohol/Drugs, and the last day for filing an appeal was a date over seven years prior to the filing of his petition under the PCRA. The statute of limitations in this instance had therefore expired several years prior to Avila filing his petition in 2015.

The date on which Avila knew or should have known of evidentiary facts on which his petition is based is the matter regarding which Avila misunderstands. In this instance, “the time for filing begins to run when the petitioner knows or, in the exercise of reasonable diligence, should have known the evidentiary facts and *not when the petitioner recognizes their legal significance.*” *Brown v. State*, 2015 UT App. 254, ¶ 10, 361 P.3d 124 (ellipses, citation, and internal quotation marks omitted, emphasis added). In *Brown*, the basis of the defendant's claims were his trial counsel's statements, the trial counsel's alleged conflict of interest, and the defendant's use of prescription medication at the time of his plea. *Id.* at ¶ 11. The

defendant in *Brown* did not claim he was unaware of those facts when he pled guilty, only that he did not understand their significance at the time. *Id.* But “. . . coming to a better or more complete understanding of the practical import of his plea, is different from coming to know new evidentiary facts.” *Id.* at ¶ 13.

Avila misunderstands this differentiation. He claims that his realization that Rule 11(e) was not followed constitutes a new evidentiary fact he did not know at the time of his conviction. This is a new legal conclusion he has come to, not a new evidentiary fact. No new evidentiary facts have been alleged by Avila that would not have been available at the time in which to appeal lapsed. Only the *legal significance* of facts already present has been newly discovered by Avila. As those facts, and any other facts of which he may he may have recognized legal or practical significance, were evident years prior to him filing his petition, the one-year limitation in this instance expired concurrent with the limitation that began accruing on the date his time to appeal had lapsed. Avila merely misunderstands the difference between actual, new evidentiary facts as opposed to the realization of the legal significance of facts already evident.

B. DISTINCTION #2: THERE IS NO GENUINE DISPUTE OF MATERIAL FACT – AVILA MERELY MISUNDERSTANDS THE DIFFERENCE BETWEEN A MATERIAL FACT, AS OPPOSED TO A FACT THAT HAS NO SIGNIFICANCE IN DECIDING ON THE RELIEF REQUESTED, OR THAT IS NOT EVEN AN ACTUAL “FACT”.

Where there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law, summary judgment is an appropriate remedy. Utah R. Civ. P., Rule 56(a). Summary judgment, however, is not precluded “simply whenever some fact remains in dispute, but only when a *material* fact is genuinely controverted.” *Heglar Ranch Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980) (emphasis added). The fact in dispute must be “material to [the] resolution of the underlying legal issue.” *See Wilberg v. Hyatt*, 2012 UT App 233, ¶ 16, 285 P.3d 1249. The time-bar to Avila’s petition is the underlying legal issue on which the district court granted summary judgment. Only facts necessary for the resolution of that issue, the time-bar, are therefore “material” to the summary judgment inquiry.

The facts material to the resolution of the legal time-bar issue are dictated by the determinative elements set forth in the PCRA’s statute of limitations provision: (1) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken, and (2) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based. *See Utah Code Ann. § 78B-9-107(2)*. A final judgment of conviction was entered against Avila on February 27, 2007, and Avila was sentenced that same day. (R. 95). No appeal was taken by Avila. (R. 95-98). The facts underlying Avila’s Rule 11(e) allegation were evident when the time for Avila’s appeal lapsed. There is no genuine dispute of these material facts.

Avila alleges to the contrary, however each of the several “facts” he sets forth as in dispute is either immaterial to the time-bar issue (i.e. his affidavit, which would, if anything, be related to the merits of the petition), or is actually a conclusion about the legal significance of a fact, not a genuine dispute of the fact itself.

Avila’s circular, and rather dizzying arguments about disputed facts stem not from a genuine dispute of what actually took place on certain dates, rather from a failure to distinguish material facts from their legal significance. There is no dispute that Avila’s guilty plea, conviction, and sentencing occurred on February 7, 2007. What Avila disputes, and mistakenly labels as fact, is his legal conclusion regarding their validity. There is also no genuine dispute that the 30 days in which to appeal expired on March 9, 2007. What Avila disputes, and again mistakenly labels as fact, is his legal conclusion about the triggering of the time to appeal, not the facts of the events themselves. Finally, there has been no genuine dispute raised over the actual presence or knowledge of the facts that much later gave rise to Avila’s Rule 11(e) allegation in his petition. What Avila admits is that he only much later realized the legal significance of those facts. Whereas no actual material facts are in dispute, rather a legal conclusion or significance, summary judgment is appropriate and the district court’s decision should be affirmed.

II. SUMMARY JUDGMENT IS APPROPRIATE AS A MATTER OF LAW BECAUSE AVILA FILED HIS PETITION OVER SEVEN YEARS AFTER THE STATUTE OF LIMITATIONS EXPIRED.

Having separated fact from legal significance, the subsequent conclusion of law is clear. Avila's time to appeal expired on March 9, 2007, and the facts underlying Avila's petition were evident at or by that same date. The one-year statute of limitations therefore began to run on that date, and itself expired on March 9, 2008. Avila filed his petition on December 8, 2015, well over seven years after the statutory time to do so. Avila's petition is therefore time-barred, as decided by the district court, and summary dismissal is appropriate.

CONCLUSION

Having no genuine dispute of material fact, and where Avila missed the statute of limitations by over seven years, this Court should affirm the district court's decision to grant the City's motion for summary judgment, denying and dismissing Avila's petition for post-conviction relief.

Respectfully submitted this 18th day of March, 2017.

/s/ Stephen K. Aina
Attorney for Respondent/Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with Rule 24(f)(1), Utah R. App. P., this brief contains 2,284 words, excluding the table of contents, and table of authorities. I further certify that in compliance with Rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

*/s/ Stephen K. Aina
Attorney for Respondent/Appellee*

CERTIFICATE OF SERVICE

I certify that on March 18, 2017, in accordance with Utah Supreme Court Standing Order No. 11, an electronic copy of this brief was filed/served via email to:

1. The Utah Court of Appeals, at: courtofappeals@utcourts.gov, and

2. Alexander J. Helfer, attorney for Petitioner/Appellant, Gaspar Avila, at:

alex@newtonandhelferlaw.com.

Paper copies will be delivered within 7 days, as per the Order, by March 25, 2017.

Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (PDF) will be filed and served within 14 days.

/s/ Stephen K. Aina