

2015

**Cesar Daniel Lopez, Petitioner/ Appellant, vs. Ogden City,
Defendants/ Appellee.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CESAR DANIEL LOPEZ,	:	
Petitioner/Appellant,	:	
vs.	:	
OGDEN CITY,	:	
Defendants/Appellee.	:	Appellate Court No. 20150271

BRIEF OF APPELLANT

FILED
UTAH APPELLATE COURTS
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IN THE UTAH COURT OF APPEALS

CESAR DANIEL LOPEZ, :

Petitioner/Appellant, :

vs. :

OGDEN CITY, :

Defendants/Appellee. :

Appellate Court No. 20150271

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT AND NATURE OF PROCEEDINGS

This is an appeal from a final order and judgment entered by the Honorable Ernie W. Jones on March 9, 2015. This order dismissed Appellant's petition filed under the Post Conviction Remedies Act, after a motion to dismiss was filed by Ogden City, the Appellee in this case. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103 and Rule 65C(q) of the Utah Rules of Civil Procedure.

STATEMENT OF ISSUES ON APPEAL

POINT I

DID THE TRIAL COURT ERR WHEN IT GRANTED OGDEN CITY'S MOTION TO DISMISS CESAR'S CLAIM FOR POST CONVICTION RELIEF ON THE GROUND THAT CESAR FILED HIS CLAIMS AFTER THE EXPIRATION OF THE LIMITATIONS PERIOD AS SET FORTH IN UTAH CODE ANN § 78B-9-107(1) WITHOUT BEING PRESENTED ANY EVIDENCE OF WHETHER THE TOLLING PROVISIONS APPLY IN UTAH CODE ANN. § 78B-9-107(2)(e) or § 78B-9-107(3)?

POINT II

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT GRANTED OGDEN CITY'S MOTION TO DISMISS CESAR'S CLAIM FOR POST CONVICTION RELIEF ON THE GROUND THAT THE CESAR FILED HIS CLAIMS AFTER THE EXPIRATION OF THE LIMITATIONS PERIOD AS SET FORTH IN UTAH CODE ANN § 78B-9-107(1) BY RELYING ON DOCUMENTS OUTSIDE THE PLEADINGS?

STANDARD OF REVIEW

On appeal from a motion to dismiss, an appellate court “review(s) the facts only as they are alleged in the complaint. The Court is to accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to the plaintiff.” *Peck v. State*, 2008 UT 39, ¶ 2 191 P.3d 4 (Utah 2008) (quoting *Hall v. Department of Corrections*, 2001 UT 34, ¶ 2, 24 P.3d 958). Furthermore, an appellate court reviews an “appeal from an order dismissing or denying a petition for post-conviction relief for correctness without deference to the lower court's conclusions of law.” *Gardner v. State*, 2010 UT 46, ¶ 55, 234 P.3d 1115, *Taylor v. State*, 2007 UT 12, P 13, 156 P.3d 739 (Utah 2007) (quoting *Gardner v. Galetka*, 2004 UT 42, P 7, 94 P.3d 263 (Utah 2004)). When reviewing a dismissal based on rule 12(b)(6) of the Utah Rules of Civil Procedure, an appellate court must accept the material allegations in the petition as true, and we will affirm the dismissal only if the petitioner has failed to state a claim for which relief can be granted, i.e., if he “can prove no set of facts in support of his claim.” See *McNair v. State*, 2014 UT App 127, ¶ 6, 328 P.3d 874, 877 (Utah Ct. App. 2014) quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

PRESERVATION

These issues are preserved for appeal because they were appropriately raised in the trial court. “[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (Utah 2004) (alterations in original) (quoting *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 (Utah 2002)).

STATEMENT OF THE CASE

This case involves a petition for relief pursuant to the Post Conviction Remedies Act as outlined in U.C.A. § 78B-9-104 (the “Petition”) filed by the Appellant, Cesar Daniel Lopez. Cesar filed his the Petition on September 4, 2014 in the Ogden Second District Court. (See the Petition attached herewith as “Addendum A”.) The petition raises several challenges to Cesar’s conviction of retail theft on January 28, 2011 in the Ogden City Justice Court. Cesar alleged three primary issues in his Petition. First he alleged that his conviction was unconstitutional because he was not afforded his rights as outlined in Rule 11 of the Utah Rules of Criminal Procedure. As a corollary, because he was not informed of certain constitutional rights, his guilty plea was not entered knowingly and voluntarily. Second, Cesar alleged that he was not apprised of the effects this conviction would have on his immigration status, in violation of his due process rights under the U.S. Constitution, more fully outlined in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Third, Petitioner alleged that the aforementioned errors occurred because of ineffective assistance of his trial counsel.

The trial court issued a commencement order on 11/10/2014 ordering Ogden City to respond to the Petition. Ogden City moved to dismiss the petition on 12/10/2014 under two grounds: First that the petition was procedurally barred for failing to seek a trial de novo (i.e., an appeal) and second because the Petition was barred by the statute of limitations. (See Ogden City's moving papers attached as Addendum B.) The trial court granted Ogden City's motion to dismiss because it found that the Petition was barred by the limitations period outlined by Utah Code Ann. § 78B-9-107(2)(e). The Court specifically relied upon "docket entries" produced as attachments to the City's motion to dismiss to determine that Cesar "should have known of the facts (upon which his petition was based) through the exercise of reasonable diligence." Specifically, the trial court found that the "official docket entries represent instances where the Petitioner- through the exercise of diligent efforts- should have known of the potential impending immigration concerns that could accompany his guilty plea." (See Order Dismissing Case on page 3, attached herewith as Addendum C). Essentially, the trial court relied upon minute entry notes in the unverified docket pages attached Ogden City's motion to determine that Cesar knew, or should have known through the exercise of reasonable diligence that there would be negative immigration consequences of his guilty plea.

STATEMENT OF FACTS

As mentioned *supra*, on appeal from a motion to dismiss, the appellate court "review(s) the facts only as they are alleged in the complaint." *Peck v. State*, 2008 UT 39, ¶ 2. This court is to accept the factual allegations as true and draw all reasonable inferences from those facts in a light most favorable to the plaintiff." *Id.* (quoting *Hall v.*

Department of Corrections, 2001 UT 34, ¶ 2, 24 P.3d 958). The trial court did not hold any hearings, evidentiary or otherwise, in this case. Therefore, the facts as outlined in the petition for post conviction relief are as follows:

Cesar was convicted of Retail Theft, a Class B Misdemeanor on January 28, 2011 in the Ogden Justice Court in Weber County (See Justice Court Case No. 101803862). Cesar was charged by way of Information on 11/20/2010. He was arrested and taken to jail shortly after the alleged offense purportedly took place. Cesar was brought before the justice court judge via video court the next morning. The public defender entered as counsel and scheduled a pre-trial conference. On or about 12/02/2010 Cesar had a pre-trial conference and was transported from the jail to his court appearance. He was again transported to the justice court for a pre-trial conference on 12/09/2010. On or about 01/29/2011 Cesar was transported to the jail fully intending on have a trial on his theft charge. However, his public defender persuaded him to plead guilty to a retail theft charge. Another charge was dismissed. Cesar was not informed about the consequences this guilty plea would have on his immigration status. At the time of the entering of his plea, Cesar was not informed of his rights under Rule 11 of the Utah Rules of Criminal Procedure. Specifically, Cesar was not informed of his right to counsel, his right to a public trial, and his right to withdraw his guilty plea.

All of the aforementioned facts are take directly from Cesar's Petition for Post Conviction Relief. The Petition also states

The Statute of Limitations under U.C.A. §78B-9-107(e) is tolled because Petitioner first became aware of the evidentiary facts on which the petition is based within the past on year after reviewing his criminal proceedings

with his new counsel. He would have raised the issues sooner, if not for the ineffective assistance of his trial counsel. Petition at ¶ 11.

With these facts in mind, Cesar filed his Verified Petition for Relief Under the Post Conviction Remedies Act (the PCRA Petition) on September 5, 2014. The trial court issued a commencement order on 11/10/2014, pursuant to Rule 65C(i) of the Utah Rules of Civil Procedure, ordering Ogden City to respond to the Petition. Ogden City filed a Motion to Dismiss the Petition and accompanying memoranda on 12/10/2014. Cesar is essentially alleging three issues in his Petition. First he is alleging that he was not afforded his rights under Rule 11 of the Utah Rules of Criminal Procedure. Because he was not informed of certain constitutional rights his guilty plea was not entered knowingly and voluntarily. Second, Cesar is alleging that he was not apprised of the effects this conviction may have on his immigration status, in violation of his due process rights as outlined in the U.S. Supreme Court ruling in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Third, Cesar alleged that the aforementioned errors primarily occurred because of ineffective assistance of his trial counsel. Cesar alleges that he would have petitioned the court for post-conviction relief sooner, if not for ineffective assistance of his trial counsel. As mentioned *supra* the PCRA Petition alleges that the statute of limitations outlined in U.C.A. §78B-9-107(2)(e) is tolled because Cesar first became aware of the evidentiary facts on which the petition is based within the past one year after reviewing his criminal proceedings with his new counsel. Cesar would have raised the issues sooner, if not for the ineffective assistance of his trial counsel.

The trial court granted Ogden City's motion to dismiss.ⁱ After reviewing exhibits attached Ogden City's motion, the trial court found that the PCRA Petition was barred by the limitations period outlined by Utah Code Ann. § 78B-9-107(2)(e). The Court specifically relied upon unverified "docket entries" produced as attachments to the City's motion to dismiss to determine that Cesar "should have known of the facts through the exercise of reasonable diligence." Specifically, the trial court found that the "official docket entries represent instances where the Petitioner- through the exercise of diligent efforts- should have known of the potential impending immigration concerns that could accompany his guilty plea." (*See* Order Dismissing Case on page 3, attached herewith as Addendum C). Essentially, the trial court relied upon minute entry notes in the unverified docket sheets attached Ogden City's motion to determine that Cesar knew, or should have known through the exercise of reasonable diligence that there would be negative immigration consequences of his guilty plea.

SUMMARY OF ARGUMENT

The trial court erred when it dismissed Cesar's Petition filed pursuant to the Post Conviction Remedies Act ("PCRA"). Ogden City filed a motion, arguing that Cesar's PCRA petition as time-barred because Cesar filed the petition more than two years after his conviction. Ogden City attached a justice court minute entry sheet and referenced it in its motion. The trial court was persuaded by this document and held that Cesar's PCRA

ⁱ Ogden City alternatively argued that Cesar's petition was procedurally barred by U.C.A. § 78B-9-106(c), but the trial court did not address this issue in its ruling. Therefore, it is not an issue for appeal. Cesar's position was that he would have raised the issues addressed in his petition through a trial de novo in District Court or through an appeal, but for the ineffectiveness of his trial counsel. *See* U.C.A. § 78B-9-106(3).

petition was time-barred because he “should have known through reasonable diligence” the facts upon which the petition is based.

The trial court erred because it did not treat the factual allegations in the PCRA petition as true, with all reasonable inferences drawn from them in a light most favorable to Cesar. Cesar properly pleaded his PCRA petition pursuant to Rule 65 of the Utah Rule of Civil Procedure by alleging that he discovered, within a year of filing his PCRA petition, that his conviction caused him to suffer adverse immigration consequences. Instead of evaluating Ogden City’s motion in a light favorable to Cesar, the trial court relied on information a part from what was properly pleaded.

The trial court committed reversible error by granting Ogden City’s motion to dismiss by relying on documents produced outside of the pleadings. As mentioned, the trial court dismissed Cesar’s case because it reviewed information contained in what it referred to as an “official court docket sheet.” The trial court did not convert Ogden City’s motion to dismiss into a motion for summary judgment pursuant to Rule 12(b) of the Utah Rules of Civil Procedure. By failing to do so, the trial court did not provide Cesar meaningful notice of its intent to rely on outside documents and an opportunity to provide documents of his own to contradict the “official court docket sheet.”

ARGUMENT

- I. THE TRIAL COURT ERRED WHEN IT DISMISSED CESAR’S CLAIM FOR POST CONVICTION RELIEF ON THE GROUND THAT THE CESAR FILED HIS CLAIMS AFTER THE EXPIRATION OF THE LIMITATIONS PERIOD AS SET FORTH IN UTAH CODE ANN § 78B-9-107(1) BECAUSE BEING PRESENTED ANY EVIDENCE OF WHETHER THE TOLLING PROVISIONS APPLY IN UTAH CODE ANN. § 78B-9-107(2)(e) or § 78B-9-107(3).

The trial court erred by dismissing Cesar claims without hearing any evidence. When reviewing a motion to dismiss, the Court must treat “the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in a light most favorable to the plaintiff.” *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). The Court must then decide that, even if all of the facts contained in the complaint are true, that the Plaintiff is still not entitled to the relief it seeks. *Id.* While it is not stated as such, Ogden City’s Motion is essentially a motion filed pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure (Utah R. Civ. P.) Rule 12(b)(6) states that a respondent can move to dismiss a case for “ failure to state a claim upon which relief can be granted.” When reviewing a dismissal based on rule 12(b)(6) of the Utah Rules of Civil Procedure, the court “must accept the material allegations in the petition as true, and will affirm the dismissal only if the petitioner has failed to state a claim for which relief can be granted, i.e., if he ‘can prove no set of facts in support of his claim.’” *McNair v. State*, 2014 UT App 127, ¶ 6, 328 P.3d 874, 877 (Utah Ct. App. 2014) quoting *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

The trial court held that Cesar’s claims are time-barred because the petition was not filed within the statute of limitations period as outlined in U.C.A. § 78B-9-107(1). The statute states “a petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.” *Id.* U.C.A. § 78B-9-107(2) defines when a cause of action has “accrued”: For the purposes of this section, the cause of action accrues on the latest of the following dates:

- (a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
- (b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;
- (c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;
- (d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;
- (e) 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

Cesar alleged in his petition that he first became aware of the evidentiary facts upon which the petition was based within a year of filing his Petition, when he was haled in front of immigration court for removal proceedings. Cesar has alleged that only then did he discover that this conviction contained immigration consequences that were not disclosed to him by his trial counsel and that only then did he discover the irregularities of his conviction. Therefore based on the allegations of the Petition, the facts of which were personally verified by the Petitioner, the one-year statute of limitations has not expired, because Petitioner became aware of the evidentiary facts upon which his petition is based within a year of filing his Petition, as subsection (e) anticipates.

Because Petitioner filed his petition within a year after he became aware of the evidentiary facts upon which his petition is based, he is well within the statute of limitations as outlined in U.C.A. § 78B-9-107(2). As stated above, when reviewing a motion to dismiss, the Court must treat “the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff.” *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194,

196 (Utah 1991). The Court must then decide that, “even if all of the facts contained in the complaint are true, that the Plaintiff is still not entitled to the relief it seeks.” *Id.*

It is clear from the “Ruling and Order on Respondent’s Motion to Dismiss Petitioner’s Petition for Post Conviction Relief” that the trial court did not treat Cesar’s petition as if it was true and draw all reasonable inferences in his favor. The trial court held that Cesar’s petition was time-barred because, after reviewing a court minute entry sheet, attached to Ogden City’s moving papers, held that Cesar “should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based” before he pleaded guilty to the retail theft charge. (*See* Page 3 of the Order) The trial court surmised this after reviewing the court minute entry sheet because the minute entry sheet indicated that his “parents had retained an immigration attorney on his behalf.” *Id.* The trial court based its entire decision on the notation entries of the justice court clerk into the court docket.

The minute entry sheets presented by Ogden City, and relied upon by the trial court, is belied by the allegations contained in Cesar’s petition. Despite the notations in the minute entry sheet relied upon by the trial court, Cesar claims that he was not advised of the impact this guilty plea would have on his immigration status. Cesar claims that his trial counsel did not advise him properly and that he was haled into immigration court for removal proceedings because of the misadvice. The United States Supreme Court held:

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U.S. 698, 740, 13 S. Ct. 1016, 37 L. Ed. 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984), deportation is

nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 360-364, 176 L. Ed. 2d, at 290-293. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38, 222 U.S. App. D.C. 313 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U.S., at 322, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”). *Padilla v. Kentucky*, 559 U.S. 356, 365-366, 130 S. Ct. 1473, 1481-1482 (U.S. 2010).

The Supreme Court ultimately concluded that, “because the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203. Pp. 369-374, 176 L. Ed. 2d, at 296-299. The severity of deportation—‘the equivalent of banishment or exile,’ *Delgadillo v. Carmichael*, 332 U.S. 388, 390-391, 68 S. Ct. 10, 92 L. Ed. 17 (1947) --only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.”

Whether or not Cesar was properly advised by his trial counsel is an issue of disputed fact in this case. The trial court relied on information contained in a minute entry sheet, presumably prepared by a justice court clerk, without hearing Cesar’s side of the story. The trial court improperly dismissed Cesar’s petition without first hearing evidence, or at least allowing the parties to participate in discovery to determine what Cesar knew, or didn’t know (or should have known) when he entered his guilty plea. Cesar alleged that he was not advised about the immigration consequences of his guilty

plea by his trial counsel. If this allegation is true, it is *per se* ineffective assistance of counsel under *Padilla's* incorporation of the test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Cesar's Petition was plead in accordance with Rule 65C of the Utah R. Civ. P., which governs proceedings in all petitions for post-conviction relief. Rule 65C requires that a petition contain, "in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief." *Id.* R. 65C(d)(3). This is a somewhat higher standard than the general pleading standard found in rule 8(a). See *Id.* Rule 8(a)(1) (requiring that pleadings contain "a short and plain . . . statement of the claim showing that the party is entitled to relief"). See *McNair v. State*, 2014 UT App 127 at ¶9. While Rule 65C now mentions the possibility of a motion to dismiss as a responsive pleading (See Rule 65C(k)), it does not outline the appropriate standard of review for such a motion. Therefore, the only way to evaluate Ogden City's motion is in the context of Rule 12(b)(6). This court held in *McNair* "Since rule 12(b)(6) does not conflict with rule 65C, we assume all facts and reasonable inferences contained in the petition, as clarified in the response to the State's motion to dismiss, in the light most favorable to McNair." *McNair v. State*, 2014 UT App 127 at ¶ 17 (Utah Ct. App. 2014).

To grant a motion to dismiss, the court must treat "must accept the material allegations in the petition as true, and will affirm the dismissal only if the petitioner has failed to state a claim for which relief can be granted, i.e., if he 'can prove no set of facts in support of his claim.'" *McNair* 2014 UT App 127 at ¶ 6. Cesar has sufficiently laid out a factual basis for his PCRA Petition and he should be afforded his opportunity to

prosecute his case.

II. THE TRIAL COURT ERRED WHEN IT DISMISSED PETITIONER'S CLAIM FOR POST CONVICTION RELIEF ON THE GROUND THAT THE CESAR FILED HIS CLAIMS AFTER THE EXPIRATION OF THE LIMITATIONS PERIOD AS SET FORTH IN UTAH CODE ANN § 78B-9-107(1) BY RELYING ON DOCUMENTS OUTSIDE THE MOTION.

The trial court erred when it dismissed Cesar's PCRA petition by relying on documents outside of the motion to dismiss. As argued *supra* the trial court heavily relied upon documents attached to Ogden City's motion to dismiss. Ogden City attached, what the trial court refers to as an "official docket sheet." This sheet was presented as an attachment to Ogden City's motion without any explanation as to where it came from, who prepared it, or who entered the information it contained. The trial court relied upon the information contained Ogden City's attachment to its moving papers. Such reliance was improper and is reversible error, because the trial court failed to convert Ogden City's motion into one for summary judgment. "If a court does not exclude material outside the pleadings and fails to convert a rule 12(b)(6) motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents." *Tuttle v. Olds*, 2007 UT App 10, P6, 155 P.3d 893, (Utah Ct. App. 2007) quoting *Oakwood Vill., L.L.C. v. Albertsons*, , 2004 UT 101, P12, 104 P.3d 1226 (Utah 2004). Rule 12(b) states:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

The trial court did not put Cesar on notice that it intended to treat Ogden City's motion as a motion for summary judgment. Therefore, the motion was not properly converted to a Rule 56 motion for summary judgment and Cesar was not given a meaningful chance to rebut the information contained in the docket sheet.

Tuttle v. Olds, 2007 UT App 10, 155 P.3d 893, (Utah Ct. App. 2007) is a case on point and is instructive here. *Tuttle* involves a water rights dispute between a landowner (the Plaintiff) and the Utah State Engineer and Utah Department of Natural Resources (the Defendants). The case involved a controversy from Defendants' discovery that Plaintiffs were irrigating land with more water than their certified water rights permitted. Defendants created a groundwater management plan after a federal study revealed a significant overdraft of water in the Valley. The groundwater management plan called for Defendants to conduct a survey comparing the actual irrigated acreage in the Valley with the acreage that should be irrigated based on the water rights of the Valley's farmers, including Plaintiffs. Defendants sought to discover and stop any illegal watering in order to restore the Valley's groundwater to expected levels. The management plan included procedures for notifying landowners of illegal watering by letters warning recipients to stop the illegal usage. This plaintiff did not receive a letter and did not think that their watering practices were illegal. Plaintiff's later entered into a contract to sell the property to a buyer. After purchasing the property, the buyer was informed that he did not have rights to access the water to his land. The buyer sued the plaintiff in federal court. The buyers sought damages for the decrease in the Property's value as a result of the inability to legally irrigate the Property to the extent represented by Plaintiffs. The buyers

eventually won a federal judgment against Plaintiffs for approximately \$ 1,400,000.

Plaintiff then sued the defendant here (the state engineer). Without filing an answer to the complaint, Defendants filed a motion to dismiss Plaintiffs' claims pursuant to rule 12(b)(6) of the Utah Rules of Civil Procedure. The trial court granted the motion to dismiss, relying heavily on the federal judgment obtained against the plaintiff in their federal lawsuit with the buyer of their land. The court of appeals reversed the trial court's decision because it relied on documents outside the pleadings when rendering judgment.

The rule 12(b) conversion procedure consists of “giving the parties reasonable notice and opportunity to submit all pertinent summary judgment materials for the court's consideration.” *Id.* at ¶ 8 See also *Hebertson v. Willowcreek Plaza*, 923 P.2d 1389, 1391 (Utah 1996); *Strand v. Associated Students of Univ. of Utah*, 561 P.2d 191, 193 (Utah 1977). “The notice and opportunity to submit requirements are especially important with respect to the party against whom judgment is entered.” See *Strand*, 561 P.2d at 193 (stating that the opportunity for the non-moving party to submit rule 56 material is particularly important). The Utah Rules of Civil Procedure provide that complaints and answers constitute pleadings. See Utah R. Civ. P. 7(a) (including replies to counterclaims and answers to cross-claims, as well as third-party complaints and answers, within the definition of pleadings). A matter outside the pleadings “include[s] any written or oral evidence . . . which . . . substantiat[es] . . . and does not merely reiterate what is said in the pleadings.” *Oakwood Vill.*, 2004 UT 101 at ¶ 12.

The trial court here did not give Cesar an adequate opportunity to present information outside of the pleadings to respond to the minute entry sheet produced by

Ogden City. The minute entry sheet did not simply reiterate what was said in any pleading before the trial court. Granting of the motion, based on the information in this document, was improper and the matter should be reversed.

Nevertheless, even if the trial court had converted Ogden City's motion to a motion for summary judgment, the document would still be problematic and likely inadmissible. The document would not be sufficient as a supportive document for a motion for summary judgment under Utah R. Civ. P. Rule 56. Rule 56(f) would require such a document supplied by Ogden City to:

be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

The minute entry sheet was not verified by any person nor was it certified by a court clerk, or any other court employee entrusted with verifying court papers. Therefore, even if presented- it would not be admissible for a summary judgment motion.

The trial court relied heavily on the minute entry sheet that it referred to as an "official docket sheet" in its ruling. Because it relied on information presented outside of the pleadings, the trial court's decision to dismiss Cesar's case should be overturned and remanded so that Cesar be afforded his day in court.

CONCLUSION


The trial court erred by granting Ogden City's motion to dismiss. The trial court did not "accept the material allegations in the petition as true." The trial court was

required to accept the allegations at face value, and only dismiss the claim if the allegations could prove no set of facts in support of his claim. Cesar has sufficiently laid out a factual basis for his PCRA Petition to survive a motion to dismiss. This court should examine the dismissal in the same framework as any motion filed pursuant to Rule 12(b)(6), because it does not contradict Rule 65C. When viewed in a light most favorable to the petition, the trial court should not have dismissed the petition.

Furthermore, the trial court committed reversible error by relying on documents outside the pleadings when rendering a decision. The trial court failed to convert Ogden City's motion to a summary judgment motion as required by Rule 12(b). The trial court relied heavily on the minute entry sheet produced by Ogden City and by failing to provide Cesar proper notice and a meaningful opportunity to offer evidence to contradict the statements in the minute entry sheet, the trial court committed reversible error.

DATED this 21st day of July 2015.

RICHARDS LAW GROUP, P.C.



Jason B. Richards
Attorney for Appellant

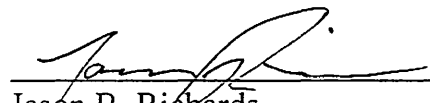
CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 5,288 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because: G this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point roman style.

DATED this 21st day of July 2015.

RICHARDS LAW GROUP, P.C.


Jason B. Richards
Attorney for Appellant

PROOF OF SERVICE

I certify that on 07/21/2015 I served a true and correct copy of the foregoing BRIEF OF APPELLANT to:

Utah Court of Appeals
PO Box 140230
Salt Lake City, UT 84114-0230
(Via First Class Mail)

Wm. Gregory Burdett
310 26th Street
Ogden, UT 84401
(Via First Class Mail)



Kimberly Freebairn

ADDENDA

Addendum One: Petition for Post Conviction Relief

Addendum Two: Motion to Dismiss and supporting Memorandum

Addendum Three: Ruling and Order on Respondent's Motion to Dismiss Petitioner's
Petition for Post Conviction Relief.

ADDENDUM A

Jason B. Richards #13341
RICHARDS LAW GROUP, P.C.
2568 Washington Blvd. Suite 102
Ogden, Utah 84401
Telephone: (801) 781-2026
Facsimile: (801) 334-9662
Email: jason@jbrlawyers.com

Attorneys for Petitioner

**IN THE SECOND DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH**

CESAR DANIEL LOPEZ)	VERIFIED PETITION FOR
)	RELIEF UNDER THE POST
Petitioner,)	CONVICTION REMEDIES ACT
vs.)	
OGDEN CITY)	Case No.
Respondent.)	Judge:

Cesar Daniel Lopez ("Petitioner" or "Cesar"), by and through counsel undersigned, and pursuant to Utah Code Ann. §§ 78B-9-104, 78B-9-107(3) and 78B-9-401, hereby petitions this court for an order granting relief under the Post Conviction Remedies Act.

NATURE OF THE CASE

1. This Petition seeks to vacate the conviction entered by the Ogden Justice Court on 01/21/2011.
2. Petitioner maintains that his conviction was entered in violation of his rights under the United States and Utah Constitution.

PARTIES, JURISDICTION, AND VENUE

3. The Petitioner was convicted of Retail Theft, a Class B Misdemeanor on January 28, 2011 in the Ogden Justice Court in Weber County (See Case No. 101803862).
4. At the time of the conviction, Petitioner was a resident of Weber County, Utah.
5. The Respondent, Ogden City, initiated and prosecuted the criminal charge at issue against the Petitioner, by filing a citation with the Ogden City Justice Court in Weber County, State of Utah.
6. The Petitioner is not presently incarcerated, his judgment was not reviewed on appeal, and the legality of his conviction or sentence was not adjudicated previously in either a civil or post-conviction proceeding.
7. Petitioner did not directly appeal his judgment, conviction and sentence previously because he alleges that he first became aware of the evidentiary facts on which the petition is based on within the last one year of this Petition. Therefore, this was well after the time limits for those methods of relief had expired.
8. Cesar would have petitioned the court for post-conviction relief sooner, if not for ineffective assistance of his trial counsel.
9. This Court has jurisdiction over this Petition for Post-Conviction Relief pursuant to U.C.A. §78B-9-104(1).
10. Venue is proper in this Court pursuant to U.C.A. §78B-3-307.
11. The Statute of Limitations under U.C.A. §78B-9-107(e) is tolled because Petitioner first became aware of the evidentiary facts on which the petition is based within the past on

year after reviewing his criminal proceedings with his new counsel. He would have raised the issues sooner, if not for the ineffective assistance of his trial counsel.

FACTUAL BACKGROUND

12. Cesar was charged by way of Information on 11/20/2010. He was arrested and taken to jail shortly after the alleged offense purportedly took place.
13. Cesar was brought before the justice court judge via video court the next morning. The public defender entered as counsel and scheduled a pre-trial conference.
14. On or about 12/02/2010 Cesar had a pre-trial conference and was transported from the jail to his court appearance.
15. He was again transported to the justice court for a pre-trial conference on 12/09/2010.
16. On or about 01/29/2011 Cesar was transported to the jail fully intending on have a trial on his theft charge. However, his public defender persuaded him to plead guilty to a retail theft charge. Another charge was dismissed.
17. Cesar was not informed about the consequences this guilty plea would have on his immigration status.
18. At the time of the entering of his plea, Jorge was not informed of his rights under Rule 11 of the Utah Rules of Criminal Procedure.
19. Specifically, Cesar was not informed of his right to counsel, his right to a public trial, and his right to withdraw his guilty plea.

GROUND FOR RELIEF

CONSTITUTIONAL CLAIMS

20. Cesar repeats and incorporates by reference allegations 1-18 of this Verified Petition.

21. The failure of Cesar's public defender to apprise him of the possible immigration consequences of his guilty was a violation of Cesar's constitutional rights.
22. The failure of his public defender or the Justice Court to apprise Cesar of his constitutional rights to counsel, a trial, and other rights listed under Rule 11 constitutes a violation of the Fifth, Sixth, and 14th Amendments to the United States Constitution.
23. Furthermore, the failure of the Justice Court to apprise Cesar of his constitutional rights as outlined above constitute a violation of Article I, Sections 7 and 12 of the Utah Constitution.

WHEREFORE, Petitioner Cesar Lopez, petitions this Court to vacate the conviction entered by the Ogden Justice Court in the aforementioned case and dismiss the charges against him.

DATED this 4th day of September 2014.

RICHARDS LAW GROUP, P.C.

/s/ Jason B. Richards
JASON B. RICHARDS
Attorney for Petitioner

VERIFICATION

CESARY DANIEL LOPEZ, being first duly sworn deposes and states that he is the Petitioner in the above entitled action; that he read the foregoing Verified Petition, that he understands its contents; and that the facts set forth in this pleading are true and correct to his own personal knowledge, or belief where indicated.

DATED this 5 day of September 2014

/s/ Cesar Daniel Lopez
CESAR DANIEL LOPEZ
Petitioner

SWORN AND SUBSCRIBED to before me this 5 day of September 2014.

/s/ Ashley Allen
Ashley Allen
Notary Public-State of Utah
Commission No. 604117
Comm. Exp. 12-16-2014

ADDENDUM B

Michael S. Junk, #5095
Wm. Gregory Burdett, #7825
Ogden City Prosecutor's Office
310 – 26th Street
Ogden, UT 84401
Tel: (801) 629-8595

IN THE SECOND DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

CESAR DANIEL LOPEZ,

Petitioner,

v.

OGDEN CITY,

Respondent.

MEMORANDUM SUPPORTING
MOTION TO DISMISS PETITION
FOR POST-CONVICTION RELIEF

Case No. 140905670

Judge Ernie W. Jones

Ogden City, by and through the undersigned attorney, submits this Memorandum
Supporting Motion to Dismiss Petition for Post-Conviction Relief.

FACTS

1. This case was initiated on November 22, 2010, charging Cesar Daniel Lopez (hereinafter referred to as the "Petitioner") with two misdemeanor counts: Unlawful Possession or Consumption of Alcohol by Minor, a class B misdemeanor, and Retail Theft, a class B misdemeanor. See Ogden City Justice Court Docket for Case # 101803862 hereto as Exhibit A.

2. On November 22, 2010, Petitioner was arraigned upon the aforementioned charges. The court appointed the public defender for the Petitioner. A Pretrial Conference was scheduled for December 2, 2010. See Exhibit A.

3. On December 2, 2010, defense counsel moved to continue the pretrial conference to another day. The case was continued to December 9, 2010, for an additional pretrial conference. See Exhibit A.

4. On December 9, 2010, a bench trial was scheduled for January 28, 2011. See Exhibit A.

5. On January 28, 2011, Petitioner, being represented by counsel, entered into a plea negotiation in which he pled guilty to the class B misdemeanor, Retail Theft, and the remaining charge was dismissed. See Exhibit A.

6. The Petitioner was sentenced to a term of 60 days or he could pay \$500 fine. The court ordered that his sentence could run concurrent with any other time the defendant is serving and that the Petitioner could be released to Immigration. See Exhibit A.

7. Petitioner failed to file a Notice of Appeal with the Ogden City Justice Court. No entry of such a filing is listed on the court docket. See Exhibit A.

8. Petitioner through his counsel filed a petition for Post-Conviction Relief on or about September 5, 2014.

ARGUMENT

I. PETITIONER'S PETITION FOR POST-CONVICTION RELIEF IS PROCEDURALLY BARRED BECAUSE PETITIONER FAILED TO SEEK A TRIAL DE NOVO.

The Post-Conviction Remedies Act contains two provisions that significantly limit a petitioner's right to seek post-conviction relief. First section 78B-9-106 precludes a petitioner from receiving relief if the ground for relief could have been but was not raised at trial or on

appeal. Utah Code Ann. § 78B-9-106 (2008). Second to be eligible for post-conviction relief, the petitioner must have “exhausted all other legal remedies, including a direct appeal.” *Id.* § 78B-9-102. A petition for post-conviction relief is a collateral attack on a conviction and sentence and is not a substitute for direct appellate review. *Rudolph v. Galetka*, 2002 UT 7, ¶ 5, 43 P.3d 467. To be eligible for post-conviction relief, petitioners have consistently been required to appeal errors through regular and prescribed procedures in order to prevent extraordinary relief from being used as a substitute for normal appellate procedures. *Lucero v. Kennard*, 2005 UT 79, ¶ 36, 125 P.3d 917. The regular and prescribed method for appealing a justice court conviction is to seek a trial de novo in the district court. *Id.* ¶ 38 and Utah Code Ann. § 78A-7-118.

Thus, the critical inquiry to determine whether a justice court defendant must seek a de novo trial in order to meet the exhaustion requirement and be eligible for post-conviction relief is this: could a trial de novo provide the justice court defendant with a plain, speedy, and adequate remedy for the alleged constitutional violation? *Lucero*, 2005 UT 79, at ¶ 38. In other words, where an appropriate remedy for a constitutional violation would be a new trial, a justice court defendant must undergo a trial de novo to meet the exhaustion requirement. *Id.* Furthermore, to obtain post-conviction relief if a justice court defendant has not sought a trial de novo, the defendant must establish that the constitutional violation was the kind that would demand relief beyond a new trial. *Id.*

In our case, petitioner failed to seek a trial de novo. He was convicted and sentenced on August 31, 2012. He was informed by the court that he had 30 days to appeal any sentence given. He did not file a notice to appeal within the 30 days of sentencing. Therefore, petitioner

pursuant to Section 78B-9-106 of the Utah Code Annotated is procedurally barred from seeking post-conviction relief because he did not exhaust his legal remedies.

II. PETITIONER'S PETITION FOR POST-CONVICTION RELIEF IS PROCEDURALLY BARRED BECAUSE PETITIONER FAILED TO FILE WITHIN THE STATUTE OF LIMITATIONS.

Utah's Post-Conviction Remedies Act (PCRA) contains a one year statute of limitations. Under the PCRA, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. §78B-9-107(1). For purposes of the PCRA, a cause of action accrues on the latest of the following dates:

- (a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

- (e) 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;

Utah Code Ann. §78B-9-107(2).¹

Petitioner did not file any direct appeal. Therefore, his cause of action accrued on "the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken." Utah Code Ann. §78B-9-107(2) (a). Petitioner was sentenced on January 28, 2011. After a criminal conviction in a justice court, a notice of appeal "must be filed within 30 days of the entry of that order or judgment." Utah Rules of Criminal Procedure 38(b) (1). Petitioner therefore had until February 28, 2011, in which to file a notice of appeal. Since he did not file

¹ A cause of action may also accrue on the date of entry of the decision of the appellate court, the last day for filing a certiorari petition, or entry of denial of certiorari or entry of the decision on certiorari review, or the date on

any appeal, his post-conviction cause of action accrued on that date and he had one year in which to file a post-conviction petition. In other words, a timely post-conviction petition had to be filed on or before February 28, 2012. Petitioner did not file his post-conviction petition until September 5, 2014. His petition is over two years too late.

The PCRA one year "limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3)." Utah Code Ann. § 78B-9-107(3). Petitioner has not asserted that he is entitled to tolling under this provision.

Because respondent has asserted that petitioner's claims are time-barred, petitioner has the burden to disprove that his petition is time-barred. "The respondent has the burden of pleading any ground of preclusion . . . but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence." Utah Code Ann. § 78B-9-105.

CONCLUSION

Petitioner is both time and procedurally barred from seeking post-conviction relief because he failed to exhaust his legal remedy by not filing a notice of appeal with the court for a trial de novo and by not filing his petition for post-conviction relief before the one year statute of limitations. Based on the facts, the law, and the arguments set forth above, respondent

which a new rule as described in subsection 78B-9-104(1)(f) is established. None of these dates apply to Petitioner

respectfully request that this Court to deny and dismiss the petition for post-conviction relief filed by Petitioner.

Dated this 10 day of December, 2014.



Ogden City Prosecutor

CERTIFICATE OF MAILING

I hereby certify that on the 10 day of December, 2014, I served a true and correct copy of the foregoing MEMORANDUM SUPPORTING MOTION TO DISMISS PETITION FOR POST-CONVICTION RELIEF, on the following individuals by filing the document with the court through electronic filing:

Jason B. Richards
Attorney for Petitioner



because he did not appeal and no new rule is applicable.

EXHIBIT A

OGDEN CITY JUSTICE COURT
WEBER COUNTY, STATE OF UTAH

OGDEN CITY vs. CESAR DANIEL LOPEZ

CASE NUMBER 101803862 Other Misdemeanor

CHARGES

Charge 1 - 32A-12-209 - UNLAWFUL POSSESSION OR CONSUMPTION OF
ALCOHOL BY MINOR Class B Misdemeanor

Offense Date: November 21, 2010

Plea: November 22, 2010 Not Guilty

Disposition: January 28, 2011 Dismissed (w/o prej)

Charge 2 - 76-6-602 - RETAIL THEFT (SHOPLIFTING) Class B
Misdemeanor

Offense Date: November 21, 2010

Plea: January 28, 2011 Guilty

Disposition: January 28, 2011 {Guilty}

CURRENT ASSIGNED JUDGE
NORMAN L ASHTON

PARTIES

Defendant - CESAR DANIEL LOPEZ

Represented by: CITY PDA

Plaintiff - OGDEN CITY

DEFENDANT INFORMATION

Defendant Name: CESAR DANIEL LOPEZ

Offense tracking number: 15111404

Date of Birth: January 07, 1991

Law Enforcement Agency: OGDEN CITY POLICE

Prosecuting Agency: OGDEN CITY

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	5.50
	Amount Paid:	5.50
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: CERTIFIED COPIES

Amount Due:	0.50
Amount Paid:	0.50

Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due: 1.00
Amount Paid: 1.00
Amount Credit: 0.00
Balance: 0.00

REVENUE DETAIL - TYPE: CERTIFICATION

Amount Due: 4.00
Amount Paid: 4.00
Amount Credit: 0.00
Balance: 0.00

PROCEEDINGS

11-22-10 Case filed
11-22-10 Filed: From an Information
11-22-10 Judge ANDREA LOCKWOOD assigned.
11-22-10 Filed: Information
11-22-10 Judge NORMAN L ASHTON assigned.
11-22-10 Minute Entry - Minutes for Appointment of Counsel
Judge: NORMAN L ASHTON
PRESENT
Clerk: Ildiad
Prosecutor: WEISKOPF, DAVID E
Defendant
Defendant's Attorney(s): VALLEJO, IAN R

Video

ARRAIGNMENT

Defendant waives reading of Information.
Advised of rights and penalties.
The defendant is advised of right to counsel.
Defendant is arraigned.
This is the time set for video arraignment. PDA enters as counsel.
Defendant enters pleas of not guilty to the charges as filed.
Pre-Trial set for 12/02/10. \$1146 bail stands. Defendant has ICE hold.

APPOINTMENT OF COUNSEL

Court finds the defendant indigent and appoints CITY PDA to represent the defendant.

Appointed Counsel:

Name: CITY PDA
Address:
City: OGDEN UT 84401
Phone:

PRE-TRIAL CONFERENCE is scheduled.

Date: 12/02/2010

Time: 10:00 a.m.

Location: Norman L. Ashton
310 - 26th Street

Ogden, UT 84401

Before Judge: NORMAN L ASHTON

11-22-10 PRE-TRIAL CONFERENCE scheduled on December 02, 2010 at 10:00 AM
in Norman L. Ashton with Judge ASHTON.

11-22-10 Charge 1 Plea is Not Guilty

11-22-10 Charge 2 Plea is Not Guilty

12-02-10 Minute Entry - Pretrial Conference continued

Judge: NORMAN L ASHTON

PRESENT

Clerk: tiannam

Prosecutor: BURDETT, W GREGORY

Defendant

Defendant's Attorney(s): STUDEBAKER, MICHAEL P

CONTINUANCE

Whose Motion:

The Defendant's counsel CITY PDA.

Reason for continuance:

Defendant's parents have retained an immigration attorney.

Case continued to 12/9/10 at 10:30 a.m.

The motion is granted.

PRE-TRIAL CONFERENCE is scheduled.

Date: 12/09/2010

Time: 10:30 a.m.

Location: Norman L. Ashton
310 - 26th Street

Ogden, UT 84401

Before Judge: NORMAN L ASHTON

12-02-10 PRE-TRIAL CONFERENCE Continued.

12-02-10 PRE-TRIAL CONFERENCE scheduled on December 09, 2010 at 10:30 AM
in Norman L. Ashton with Judge ASHTON.

12-09-10 Minute Entry - Minutes for PRE-TRIAL CONFERENCE

Judge: NORMAN L ASHTON

PRESENT

Clerk: pamr
Prosecutor: BURDETT, W GREGORY
Defendant
Defendant's Attorney(s): STUDEBAKER, MICHAEL P

HEARING

This is the time set for pre-trial conference. Defendant is present in custody of Weber County Jail with PDA as counsel. Negotiations have not been reached. Bench trial is set 1/28/11 at 10:30 a.m. Bail remains set at \$1146. Defendant also has bice hold. BENCH TRIAL is scheduled.

Date: 01/28/2011
Time: 10:30 a.m.
Location: Norman L. Ashton
310 - 26th Street

Ogden, UT 84401

Before Judge: NORMAN L ASHTON

12-09-10 BENCH TRIAL scheduled on January 28, 2011 at 10:30 AM in Norman L. Ashton with Judge ASHTON.

01-28-11 Minute Entry - Minutes for BENCH TRIAL

Judge: NORMAN L ASHTON

PRESENT

Clerk: pamr
Prosecutor: BURDETT, W GREGORY
Defendant
Defendant pro se
Defendant's Attorney(s): NEBEKER, MATTHEW L
Interpreter: Angelica Shaefer (Spanish)

Language: Spanish

HEARING

This is the time set for bench trial. Defendant is present, in custody of Weber County Jail, with PDA as counsel. Trial is not held as negotiations have been reached.

Defendant enters plea of guilty to MB-retail theft. City moves to dismiss remaining charges.

Court accepts and proceeds with sentencing.

SENTENCE JAIL

Based on the defendant's conviction of RETAIL THEFT (SHOPLIFTING) a Class B Misdemeanor, the defendant is sentenced to a term of 60 day(s). The total time suspended for this charge is 60 day(s).

SENTENCE JAIL SERVICE NOTE

Court imposes a pay/stay sentence of \$500 cash or 60 days jail.

Sentence may run concurrent with any other time the defendant is serving. Defendant may be released to Immigrations.

SENTENCE FINE

Charge # 2 Fine: \$500.00

Suspended: \$0.00

Surcharge: \$257.89

Due: \$500.00

Total Fine: \$500.00

Total Suspended: \$0

Total Surcharge: \$257.89

Total Principal Due: \$500.00

Plus Interest

01-28-11 Charge 1 Disposition is Dismissed

01-28-11 Charge 2 Disposition is {Guilty}

01-28-11 Case Closed

Disposition Judge is NORMAN L ASHTON

01-31-11 Filed order: Sentence, Judgment, Commitment

Judge NORMAN L ASHTON

Signed January 31, 2011

03-29-11 Fee Account created Total Due: 0.50

03-29-11 Fee Account created Total Due: 1.00

03-29-11 Fee Account created Total Due: 4.00

03-29-11 CERTIFIED COPIES Payment Received: 0.50

Note: 10.50 cash tendered. 5.00 change given.

03-29-11 COPY FEE Payment Received: 1.00

03-29-11 CERTIFICATION Payment Received: 4.00

ADDENDUM C

FILED

MAR 09 2015

SECOND
DISTRICT COURT

**IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH**

CESAR DANIEL LOPEZ,

Petitioner,

vs.

OGDEN CITY,

Respondent.

**RULING AND ORDER
ON RESPONDENT'S
MOTION TO DISMISS
PETITIONER'S
PETITION FOR POST-
CONVICTION RELIEF**

Case No. 140905670
Judge Ernie W. Jones

This matter is before the Court on Respondent's Motion to Dismiss Petitioner's Petition for Relief Under the Post Conviction Remedies Act. The Court, subsequent to initial review, previously forwarded a copy of the Petitioner's Verified Petition to Respondent for response. The Court has received Respondent's Motion to Dismiss the Petition and supporting memorandum as well as Petitioner's memorandum opposing that dismissal motion. Having reviewed the now complete briefing on this matter, the Court is prepared to make the following ruling.

On January 28, 2011, Petitioner pled guilty to a single count of Class B Misdemeanor Retail Theft in the Ogden City Justice Court. At some point

in 2014, Petitioner was haled before an immigration court for removal proceedings that were instigated as a result of his previous guilty plea.

Central to Petitioner argument for post-conviction relief is the argument that he was unaware of the adverse consequences that his guilty plea could have on his immigration status. Petitioner maintains that his appointed public defender offered ineffective assistance in failing to inform the Petitioner of these possible consequences. Related to this argument, Petitioner also offers that the Ogden City Justice Court neglected to inform him of his right to a public trial and his right to withdraw his guilty plea in addition to the possibility of adverse immigration consequences as a result of his guilty plea.

While Petitioner's claims are grounded in an appropriate basis pursuant to Utah Code §78B-9-104 and are not subject to preclusion under Utah Code §78B-9-106, the Court determines here that Petitioner has brought his claims long after the expiration of the limitations period established in Utah Code §78B-9-107. Specifically, the Court determines that the limitations period outlined in Utah Code §78B-9-107(2)(e) began to run during Petitioner's misdemeanor proceedings before the Ogden City Justice Court or, at the latest, immediately following his sentencing and not within the last year when Petitioner began contending removal proceedings.

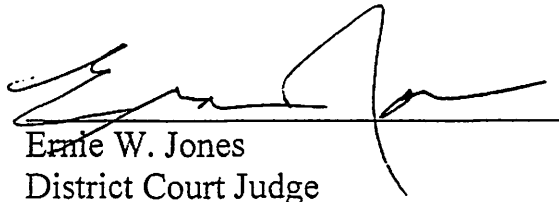
Utah Code §78B-9-107(2)(e) sets forth that a Petitioner must file his petition within one year after “the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.” The Court notes here that the limitations period *does not* begin to run as soon as Petitioner affirmatively knows of the evidentiary facts forming the basis of his petition, but rather when the Petitioner “should have known” of those facts through the exercise of “reasonable diligence.” Pursuant to the Ogden City Justice Court Docket regarding Petitioner’s misdemeanor proceedings, Petitioner was granted a continuance on December 2, 2010 due to the fact that his Parents retained an immigration attorney on his behalf. Resp’t Br. Ex. A at 3. Furthermore, the Justice Court informed the Petitioner at his sentencing that he might be released to immigration. Resp’t Br. Ex. A at 5.

The Court determines that these official docket entries represent instances where the Petitioner—through the exercise of diligent efforts—should have known of the potential of impending immigration concerns that could accompany his guilty plea. As he stood to know of these potential consequences, it follows that the exercise of reasonable diligence would have alerted him at that time of the procedural mechanisms to appeal his sentence to the District Court through a trial de novo. As such, the Court

determines that the time for an appropriate filing of a Post-Conviction Petition has long since passed since the cause of action began to accrue soon after the imposition of Petitioner's sentence. The filing of this petition in 2014, nearly two years after the limitations period expired, is therefore untimely and the Court cannot grant the requested relief.

The Court therefore GRANTS Respondent's Motion to Dismiss the Petition for Post-Conviction Relief. In accordance with the aforementioned ruling, Petitioner's Petition for Post-Conviction Relief is DISMISSED. This represents the final order of the Court. Not further order is required pursuant to Rule 7(f) of the Utah Rules of Civil Procedure.

Dated this 9 day of March 2015.



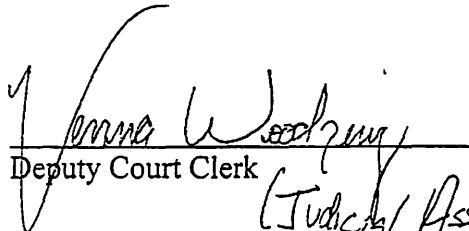
Ernie W. Jones
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 9 day of March, 2015, I sent a true and correct copy of the foregoing ruling and order to Petitioner and Respondent as follows:

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