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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1886**

Charles M. Zencius, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 23, 2008
Affirmed
Collins, Judge***

Benton County District Court
File No. K5-02-848

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert J. Raupp, Benton County Attorney, Courts Facility, 615 Highway 23, P.O. Box 189, Foley, MN 56329 (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges the district court's denial of his postconviction petition. Because the district court did not abuse its discretion by denying the petition, we affirm.

FACTS

As the result of an altercation that occurred in Sauk Rapids on June 8, 2002, Charles M. Zencius, Jr. was charged with one count of attempted second-degree murder and one count of first-degree assault. In October 2003, a jury found Zencius guilty of first-degree assault but not guilty of attempted second-degree murder, and, in November 2003, Zencius was sentenced to 134 months' imprisonment. Zencius did not file a direct appeal.

In July 2007, Zencius sought the assistance of the State Public Defender's office, and a petition for postconviction relief was filed on July 30, 2007. In lieu of facts, grounds, and prayer for relief, the petition contained the following statement:

Petitioner recently contacted the Office of the State Public Defender requesting assistance in challenging the 2003 judgment and conviction in this matter. Because the time for direct appeal has expired, the only means by which he can challenge his conviction is by filing a petition for post-conviction relief. Under the [2005] amendment to the post-conviction statute, the petition in this case must be filed before August 1, 2007. Because of the circumstances, counsel has not had the opportunity to obtain a transcript of the trial and proceedings in this case or to investigate the case. For these reasons, counsel cannot, at this time, reasonably set forth the facts, the grounds upon which the petition is based, and the relief requested.

Counsel will obtain the necessary transcripts, investigate petitioner's claims, and then provide an amended petition for post-conviction relief specifically setting forth the facts of this case, the grounds upon which the petition is based, and the relief requested.

The petition also requested "an evidentiary hearing after a determination of the facts, grounds, and relief is made [by Zencius's counsel]."

On August 6, 2007, the district court denied Zencius's petition, concluding that it "does not meet any of the minimum requirements for an allegation of facts and grounds upon which post-conviction relief could be granted" and sets forth "no allegations that the County Attorney could respond to." This appeal followed.

DECISION

Zencius contends that the district court improperly denied his postconviction petition. This court reviews a postconviction proceeding only to determine whether there is sufficient evidence to sustain the postconviction court's findings, and a postconviction court's decision will not be disturbed absent an abuse of discretion. *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992).

Postconviction petitions are governed by the Postconviction Remedy Act, Minn. Stat. §§ 590.01-.10 (2006).¹ A postconviction petition must include "a statement of the facts and grounds upon which the petition is based and the relief desired. All grounds for

¹ In 2005, the legislature amended the Postconviction Remedy Act. That amendment required any person whose conviction became final before August 1, 2005, to petition for postconviction relief by August 1, 2007. 2005 Minn. Laws. ch. 136, art. 14, § 13, at 1097-98.

relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein.” Minn. Stat. § 590.02 (2006).

Zencius concedes that his petition did not set forth the facts, grounds, and request for relief. But he argues that his petition “did, consistent with [the Postconviction Remedy Act], explain why the facts, grounds, and relief ‘could not be reasonably set forth’ at that time.” We view Zencius’s argument as unpersuasive for several reasons.

First, although Zencius explained why his petition contained no facts of the case, grounds upon which the petition is based, or the relief requested, he did not state why he waited as long as he did, until the eve of the expiration of the limitation period, to avail himself of legal counsel. Second, Zencius cites no authority to support the proposition that his failure to contact an attorney until only a few days before his time for filing a postconviction petition expired is a “reasonable” excuse that, in effect, would serve to enlarge the limitation period. And even if Zencius’s circumstances could support the conclusion that the facts could “not be reasonably set forth,” he cites no authority in support of his claim that it is an abuse of the district court’s discretion to deny such a petition under these circumstances. Finally, the effect of the practice proposed by Zencius would permit convicted defendants to file “placeholder” petitions devoid of allegations, allow the petitioner’s attorney to investigate if there was a valid basis for the petition, and only then amend the petition if an alleged error was discovered. We decline to endorse such practice. *See Morrissey v. State*, 286 Minn. 14, 16, 174 N.W.2d 131, 133-34 (1970) (“A [postconviction] petitioner may not subject the judicial process to an

exploratory investigation in the hope that some fortuitous reason may be discovered for expunging a conviction from the record.”).

Citing *Morrissey*, Zencius argues that before a district court can deny a postconviction petition, “the petitioner must be allowed an opportunity to present allegations sufficient to warrant relief or a hearing, even if his first attempt falls short” of the Postconviction Remedy Act’s requirements. But *Morrissey* establishes no such rule. There, the district court dismissed Morrissey’s petition because his sentence had already expired by the time that he had filed the petition. *Id.* at 15, 174 N.W.2d at 133. Noting that “consequent disabilities flowing from the stigma of conviction remain,” the supreme court reversed and remanded “so that [Morrissey] may have an opportunity to present a petition setting forth allegations of sufficient substance to justify the granting of a full evidentiary hearing.” *Id.* at 16, 174 N.W.2d at 133. Zencius’s assertion that *Morrissey* establishes a categorical rule prohibiting the denial of a deficient postconviction petition is, therefore, without merit.

Zencius also seizes upon caselaw in which the supreme court has ordained the general principle that a convicted defendant is entitled to at least one right of review by an appellate or postconviction court. *See, e.g., Deegan v. State*, 711 N.W.2d 89, 93 (Minn. 2006); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). We also take note of *Stutelberg v. State*, wherein the supreme court recently repeated earlier suggestions that “a [post conviction] petition cannot be barred as untimely where the petitioner has not been heard on appeal.” 741 N.W.2d 867, 874 (Minn. 2007). However, the district court did not deny Zencius’s petition because it was not timely. Rather, the

petition was denied because Zencius failed to assert, much less establish, any basis whatsoever upon which he would be entitled to relief. And Zencius offered no explanation for why, nearly four years after his conviction, his postconviction petition contained no facts, grounds, or request for relief. Moreover, Zencius's opportunity for review of the merits of his case is not absolutely extinguished. As the district court concluded, "[Section] 590.01, [s]ubd. 4 provides an opportunity for [Zencius] to seek post-conviction relief, even if the application is not timely, upon meeting one of the standards set forth in [s]ubd. 4(b). At this time, none of those standards [has] been alleged in the Petition."

Under the circumstances presented here, we cannot conclude that the district court abused its discretion by applying the law and denying Zencius's patently deficient petition.

Affirmed.