

IN THE UTAH COURT OF APPEALS

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Patrick C. Bush,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Petitioner and Appellant,)		
)	Case No. 20050638-CA	
v.)		
)		
City of Murray,)	F I L E D	
)	(October 6, 2005)	
)		
Respondent and Appellee.)	<table border="1"><tr><td>2005 UT App 428</td></tr></table>	2005 UT App 428
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Third District, Salt Lake Department, 040915600
The Honorable Stephen L. Henriod

Attorneys: Patrick C. Bush, Taft, California, Appellant Pro Se
 Brian E. Brower, Murray, for Appellee

Before Judges Bench, Greenwood, and Thorne.

PER CURIAM:

Patrick C. Bush appeals the district court's denial of his petition for postconviction relief. This case is before the court on a sua sponte motion for summary disposition. We affirm.

In 1998, Bush pleaded no contest to a class B misdemeanor. Based on this plea, Bush was sentenced to a jail term of 180 days and a fine, each of which were suspended. Upon payment of a restitution award, probation was terminated.

Nearly six years after entry of his plea, Bush filed his petition for postconviction relief. Bush alleged that he was not appointed counsel when he entered his plea, that he was not made aware of his right to counsel, and that the judgment predicated upon that plea should be vacated for these reasons.

The district court denied the petition, concluding that, while Bush should have been provided an attorney in the underlying case, "(1) [Bush] has no effective remedy, (2) this claim could have been raised on appeal, and (3) a judgment not

appealed has a presumption of regularity." Bush contends that the district court erred because no counsel was provided at the original plea hearing and he did not waive his right to counsel. It is uncontested that counsel was not provided to Bush at the plea hearing. However, the underlying case file was destroyed, and there is no evidence of record regarding the issue of waiver other than Bush's own self-serving affidavit.

Pursuant to the Post-Conviction Remedies Act (the Act), see Utah Code Ann. §§ 78-35a-101 to -110 (2002 & Supp. 2004), Bush's petition was time barred. Under the Act, a defendant must file a petition within one year after the cause of action has accrued. See id. § 78-35a-107(1) (Supp. 2004). When no appeal is filed, a cause of action typically accrues under this section "the last day for filing an appeal from the entry of the final judgment of conviction." Id. § 78-35a-107(1)(a). Clearly, Bush's petition was filed long after this date. However, a cause of action may accrue under this section on "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." Id. § 78-35a-107(1)(e). Bush filed his petition almost six years after entry of his plea and termination of his sentence and probation. Although Bush alleges in his memorandum in response to the motion for summary disposition that he only became aware that his constitutional rights were violated on July 22, 2003, there is no factual support of record for this assertion.

Furthermore, even if we could reach the issue of whether Bush waived the right to counsel, Bush has not provided this court with any evidence or transcripts that would support his position. The Utah Supreme Court has held:

When a defendant predicates error to this court, he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record.

Rudolph v. Galetka, 2002 UT 7, ¶8, 43 P.3d 467 (citations omitted); see also Utah Code Ann. § 78-35a-105 (2002) ("The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."). Because Bush provides no evidence

supporting his allegation regarding waiver of counsel, we agree that dismissal of his petition was appropriate.

Accordingly, we affirm the order of the district court.

Russell W. Bench,
Associate Presiding Judge

Pamela T. Greenwood, Judge

William A. Thorne Jr., Judge