

IN THE UTAH COURT OF APPEALS

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Michael William Kissell,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner and Appellant,)	
)	Case No. 20081065-CA
v.)	
)	F I L E D
State of Utah,)	(May 13, 2010)
)	
Respondent and Appellee.)	2010 UT App 123

Seventh District, Moab Department, 060700140
The Honorable Lyle R. Anderson

Attorneys: Keith Andrew Fitzgerald, Moab, for Appellant
Mark L. Shurtleff and Ryan D. Tenney, Salt Lake City,
for Appellee

Before Judges Orme, Thorne, and Roth.

ROTH, Judge:

Michael William Kissell appeals the dismissal of his petition for postconviction relief. The State urges us to uphold the dismissal because Kissell has not challenged the bases of the trial court's decision. We affirm.

The trial court dismissed Kissell's petition for postconviction relief because the Post-Conviction Remedies Act (the PCRA) precludes petitions based on issues that could have been, but were not, raised on direct appeal. See Utah Code Ann. § 78-35a-106(1)(c) (2006) (current version as amended at Utah Code Ann. § 78B-9-106(1)(c) (2008)).¹

In both the trial court and on appeal, Kissell did not dispute that his petition was untimely or that it was

¹The State contends that the trial court also determined that the petition was time-barred because it was not filed within the one-year statute of limitations imposed by the PCRA, see Utah Code Ann. § 78-35a-107(1) (Supp. 2006) (current version as amended at Utah Code Ann. § 78B-9-107 (2008)). We read the trial court's order differently and conclude that the trial court did not reach that issue because its determination that the petition was procedurally barred was dispositive.

procedurally barred. Instead, Kissell argued to the trial court that two applicable exceptions excused him from the consequences of the PCRA's time and procedural bars. First, the act itself provides that a petition filed outside the one-year statute of limitations may be allowed "[i]f the court finds that the interests of justice require." Id. § 78-35a-107(3) (Supp. 2006) (current version as amended at Utah Code Ann. § 78B-9-107 (2008)).² Second, although the PCRA's exhaustion requirements, with one exception not relevant here, appear absolute, see id. § 78-35a-106, the common law permits a postconviction court to excuse the petitioner's failure to file a direct appeal when unusual circumstances exist, see Peterson v. Kennard, 2008 UT 90, ¶¶ 16-18, 201 P.3d 956.³ The trial court here found no unusual circumstances warranting an exception to the procedural bar. Having determined that the petition was procedurally barred, the court did not go on to analyze the application of the interests of justice exception to the time bar.

On appeal, Kissell argues the underlying merits relevant to our consideration of the applicability of both exceptions. See generally id. ¶ 18 ("Unusual circumstances are those that confront us with an obvious injustice or a substantial and prejudicial denial of a constitutional right." (internal quotation marks omitted)); Adams v. State, 2005 UT 62, ¶ 16, 123 P.3d 400 ("An analysis of what constitutes an exception in the 'interests of justice' should involve examination of both the meritoriousness of the petitioner's claim and the reason for an untimely filing."). He has failed, however, to persuade us that the trial court erred in declining to apply either of those exceptions to excuse his late filing and his failure to file a direct appeal. See generally Allen v. Friel, 2008 UT 56, ¶ 5, 194 P.3d 903 (reviewing the trial court's legal conclusions in

²Section 78-35a-107 was renumbered and amended in 2008, resulting in the removal of the language providing for an interests of justice exception. See Utah Code Ann. § 78B-9-107 amend. notes (2008). Kissell's petition for postconviction relief was filed in 2006. We therefore cite to the version then in effect.

³The 2008 amendment to and recodification of the PCRA appears to have extinguished our authority to apply the unusual circumstances exception. See id. § 78B-9-102(1) (amending the PCRA to become "the sole remedy" for any person challenging a sentence following exhaustion of all other legal remedies); see also Peterson v. Kennard, 2008 UT 90, ¶ 16 n.8, 201 P.3d 956. But, "[b]ecause [Kissell] sought post-conviction relief prior to the implementation of the 2008 amendment, relief through our common law writ authority is still available to him." See Peterson, 2008 UT 90, ¶ 16 n.8.

dismissing a petition for postconviction relief for correctness). We therefore affirm the dismissal of the petition for postconviction relief on the basis stated in the trial court's order, i.e., that it was procedurally barred.⁴ We do not further address the time bar because the procedural bar is dispositive.

Stephen L. Roth, Judge

WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne Jr., Judge

⁴Although we do not reach the merits of Kissell's claim, we note that the portion of the record available to us on appeal appears to support the trial court's actions. The judge's statements that Kissell identified as problematic initially raise some concern but in their broader context appear to be relevant to the sentencing decision and do not appear to indicate bias. When read in context, those statements seem to be more of a commentary on how behaviors, such as those Kissell admitted, serve to reinforce societal stereotypes, rather than an expression of the sentencing judge's personal opinions. Further, the statement regarding the actual and the potential effects of Kissell's actions on the victim appears to be founded upon the presentence report and the statements of the victim's parents as well as the impact these kinds of behaviors can have on victims generally. In one of its postconviction orders, the court also clarified its decision to sentence Kissell consecutively as a method of providing the parole board discretion "to ensure that [Kissell] will not be released without any effort at rehabilitation." The court emphasized that it gave the parole board discretion purely for rehabilitative purposes and that the consecutive sentencing was not intended to influence the length of Kissell's sentence if he cooperated with rehabilitative efforts. The gravity and circumstances of the offenses and the rehabilitative needs of the offender are precisely the type of factors a sentencing court must consider when deciding whether sentences for multiple offenses should run consecutively or concurrently. See Utah Code Ann. § 76-3-401 (2008).