

IN THE UTAH COURT OF APPEALS

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Kenneth Ray Underwood,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellant,)	
)	Case No. 20100092-CA
v.)	
)	F I L E D
State of Utah,)	(May 13, 2010)
)	
Defendant and Appellee.)	2010 UT App 129

Second District, Ogden Department, 090907430
The Honorable Michael D. DiReda

Attorneys: Kenneth Ray Underwood, Gunnison, Appellant Pro Se

Before Judges Orme, Thorne, and Roth.

PER CURIAM:

Kenneth Ray Underwood appeals the district court's dismissal of his petition for post-conviction relief as frivolous. This matter is before the court on its sua sponte motion for summary disposition on the basis that the grounds for review are so insubstantial as not to merit further proceedings and consideration by this court.

Underwood filed a petition for post-conviction relief on October 14, 2009. The district court dismissed the petition because it determined that both of Underwood's claims were previously adjudicated in a prior proceeding or were frivolous on their face.

A petition is frivolous on its face when "the facts alleged do not support a claim for relief as a matter of law." Utah R. Civ. P. 65C(g)(2)(A). The Post-Conviction Remedies Act provides that a person is not eligible for relief under the Act if the ground "could have been but was not raised at trial or on appeal." Utah Code Ann. § 78B-9-106(1)(c) (2008); see also Kell v. State, 2008 UT 62, ¶¶ 21-23, 196 P.3d 913.

Underwood raised two claims in his petition for post-conviction relief: (1) the State illegally seized certain coins related to charges filed against him from the office of Aric

Cramer, and (2) his right to confront the witnesses against him was violated when the State subpoenaed Mr. Cramer but failed to compel his attendance at trial. Underwood did not raise these issues in his direct appeal. See State v. Underwood, 2009 UT App 49U (mem.).

Underwood raised issues in his direct appeal relating to the evidence obtained from this witness and the chain of custody concerning that evidence. Thus, Underwood was fully aware of the facts supporting the legal theories he raises in his post-conviction petition. However, Underwood made no attempt in his petition, nor does he here, to explain why he failed to raise these related issues in his direct appeal. Further, Underwood did not characterize his claims as being based upon ineffective assistance of appellate counsel. See Utah Code Ann. § 78B-9-106(3) ("Notwithstanding Subsection 1(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel."). Therefore, because the grounds raised by Underwood could have been brought in his direct appeal and Underwood has not alleged that failure to raise such claims was the result of ineffective assistance of counsel, such claims are barred by the Post-Conviction Remedies Act. See Kell, 2008 UT 62, ¶¶ 21-23. The district court properly dismissed the petition as frivolous because Underwood could not prevail as a matter of law.¹

Affirmed.

Gregory K. Orme, Judge

William A. Thorne Jr., Judge

Stephen L. Roth, Judge

¹The court also denies Underwood's motion to quash the sua sponte motion for summary disposition.