

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. Ken-23-419

Aubrey Armstrong
Petitioner/Appellant

v.

State of Maine
Respondent/Appellee

On appeal from a denied Petition for Post-Conviction Review in the Kennebec
County Unified Criminal Court

REPLY BRIEF FOR APPELLANT

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ISSUES FOR REVIEW

- I. Whether Mr. Armstrong did not waive his equitable tolling argument because he had no meaningful opportunity to raise it and could not possibly do so without assistance of counsel?
- II. Whether the standard of review for post-conviction review cases is *de novo* and the state's assertion that the obvious error standard applies is based upon inapposite case law?

ARGUMENT

- I. **MR. ARMSTRONG DID NOT WAIVE HIS EQUITABLE TOLLING ARGUMENT BECAUSE HE HAD NO MEANINGFUL OPPORTUNITY TO RAISE IT AND COULD NOT POSSIBLY DO SO WITHOUT ASSISTANCE OF COUNSEL.**

The State claims in its brief that Mr. Armstrong failed to raise the issue of equitable tolling in the post-conviction court and consequently, he has waived that issue on appeal. [State's Br. at 8]. Because the post-conviction court summarily denied the petition prior to the State filing a response, there was no opportunity for Mr. Armstrong to raise the issue of equitable tolling. In addition, Mr. Armstrong could not possibly be expected to raise such a complex legal response when the post-conviction court refused to appoint counsel on his behalf.

On June 29, 2023, the Petitioner's, Aubrey Armstrong's, Petition for Post-Conviction Review, and his Motion for Appointment of Counsel was docketed in

the lower court. [R. 1]. The post-conviction court (Mallonee, J.) summarily denied the petition as untimely on September 29, 2023, prior to the State filing a response and without appointing counsel for Mr. Armstrong. [R. 1].¹ At that point, Mr. Armstrong availed himself of the only available legal remedy – an appeal.² On appeal, he has raised the issue of equitable tolling in response to the post-conviction court’s dismissal of his case, a defense that did not arise until after his case was dismissed. As this Court has made clear, “By way of guidance to the trial court, we note that summary dismissal of a post-conviction review petition without appointing counsel for the petitioner should be employed with caution.” *McEachern v. State*, 676 A.2d 488, 489 (Me. 1996) (“[U]nless the decision to summarily dismiss is absolutely clear, the trial court would be well-advised to appoint counsel and permit a response by the State to ensure adequate development of the basis for the petition prior to dismissal”). *See also Smith v. State*, 479 A.2d 1309, 1312 (Me. 1984) (where a PCR is unclear as to claims raised the petitioner should be appointed counsel because “Aided by the counseled amendment of petitioner’s pleading and by the

¹ Mr. Armstrong had twice previously requested appointment of counsel to assist him in amending a Petition for Post-Conviction Review, first when he filed a PCR Petition on April 10, 2023, [R. 3], and again within his Motion for Reconsideration of the dismissed PCR Petition filed June 1, 2023. [R. 33].

² Although Mr. Armstrong filed a Motion for Reconsideration of his first Petition for Post-Conviction Review after that one was also summarily dismissed prior to a response from the State and without appointment of counsel, the time delay in the Order on the Motion for Reconsideration cost Mr. Armstrong precious time in the judicial process and created great uncertainty with Mr. Armstrong as to the status of his case. [R. 36].

State’s response, the post-conviction court then will be in a better position to assure that a worthy claim is not lost merely through petitioner’s linguistic deficiencies.”).

Although generally, *pro se* litigants – even criminal defendants – are not “afforded any special consideration because of their *pro se* status, *Richards v. Bruce*, 1997 ME 61, ¶ 8, 691 A.2d 1223, 1225, and claims not raised in the lower court by a *pro se* defendant are waived, that rule seems limited to circumstances where a criminal defendant has elected to proceed to trial without counsel. *See State v. Dunn*, 480 A.2d 788, 790 (1984) (defendant elected to proceed *pro se* at trial and therefore not afforded any special considerations); *State v. Furrow*, 424 A.2d 694, 696 (Me. 1981) (defendant insisted on representing himself at trial and held to the same standard as represented litigants to follow procedural rules). Indeed, on petitions for post-conviction review filed by an indigent petitioner without aid of counsel, the general waiver rule has not applied. *See Brine v. State*, 232 A.2d 88, 89 (1967) (where the post-conviction court refused to appoint counsel for petitioner and summarily dismissed a PCR petition filed in 1963, petitioner did not waive claims raised in second petition filed in 1966, because without appointed counsel petitioner could not waive his claims).

Here, Mr. Armstrong did not have the opportunity to raise the issue of equitable tolling in the lower court because his case was dismissed prior to the State filing a response, which would have put Mr. Armstrong on notice as to the timing

issue. However, even if Mr. Armstrong had been on notice, the lower court's refusal to appoint counsel denied him the opportunity to address the timing issue as Mr. Armstrong could not possibly be held to the same legal standard as appointed counsel in raising such a complex legal issue as equitable tolling.

Therefore, Mr. Armstrong has not waived his defense of equitable tolling and this Court should consider it on appeal. *Brine*, 232 A.2d at 89.

II. THE STANDARD OF REVIEW FOR POST-CONVICTION REVIEW CASES IS *DE NOVO* AND THE STATE'S ASSERTION THAT THE OBVIOUS ERROR STANDARD APPLIES IS BASED UPON INAPPOSITE CASE LAW.

The State claims that the obvious error standard of review applies to the present case because Mr. Armstrong raised the issue of equitable tolling for the first time on appeal. [State's Br. at 9]. As previously argued, Mr. Armstrong could not raise the issue of equitable tolling in the lower court because he was denied appointed counsel to raise this complex legal issue and because the issue only became a live legal issue when his petition was dismissed for untimeliness. In making its argument, the State relies upon a series of cases that stand for the proposition that claims not raised in the lower court are reviewed under the obvious error standard. [State's Br. at 9]. Nevertheless, in each of those cases the procedural posture of the case is in stark contrast to the present case, as they were in the pre-trial or trial phase where the defendant was represented by counsel and

had the opportunity to raise an objection but declined or failed to do so. *See State v. Green*, 2024 ME 44, ¶ 19, 315 A.3d 755 (defendant did not properly renew a pretrial objection at trial and therefore the issue was unpreserved on appeal resulting in an obvious error standard of review); *State v. Ouellette*, 2024 ME 29, ¶¶13-14, 314 A.3d 253 (obvious error standard of review applied where an issue was unpreserved on appeal because it was not raised in the motion to suppress or litigated at the suppression hearing but was raised for the first time in a post-hearing brief); *State v. Reeves*, 2022 ME 10, ¶ 35, 268 A.3d 281 (issue not raised during the course of the defendant’s trial and thus unpreserved); *State v. Brown*, 2017 ME 59, ¶ 8 n.4 158 A.3d 501 (defense not raised at trial was not preserved and Law Court reviewed for obvious error).

Here, Mr. Armstrong’s Petition was summarily dismissed and he had no opportunity whatsoever to object to the dismissal, or to file a response to an argument made by the State because the State did not file an answer to his Petition prior to the dismissal. Further, in cases where a PCR has been dismissed as untimely, this Court has determined that the post-conviction court’s legal conclusion is reviewed *de novo*. *Roque v. State*, 2019 ME 99, ¶ 4, 210 A.3d 824, 825 (citing *Fortune v. State*, 2017 ME 61, ¶ 12, 158 A.3d 512) (the Law Court “will review a post-conviction court’s legal conclusions *de novo* and its factual findings for clear error”).

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision to summarily deny Mr. Armstrong's Petition for Post-Conviction Review and remand the case to allow Mr. Armstrong to amend his Petition for Post-Conviction Review with appointed counsel.

Date: July 30, 2024

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CERTIFICATE OF SERVICE

I, Michelle R. King, attorney for Aubrey Armstrong, hereby certify that on this date I made service of two copies of the foregoing Reply Brief, by email and First-class mail, to the following counsel:

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