8-2-2012

Cavanaugh v. State Respondent's Brief Dckt. 37706

IN THE SUPREME COURT OF THE STATE OF IDAHO

PAUL JAMES CAVANAUGH,	)	
	)	
Petitioner-Appellant,	)	NO. 37706
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature Of The Case

Paul J. Cavanaugh appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The facts underlying Cavanaugh's convictions for vehicular manslaughter and leaving the scene of an injury accident are as follows:

> On March 10, 2005, Sara Jones was struck by the driver of a pickup truck while walking along a dirt road at approximately 6:30 in the evening. She later died from her injuries. Cavanaugh, who was the registered owner of the truck and who several minutes later emerged from the dark wooded area that the truck had swerved into after striking Jones, was charged with vehicular manslaughter and leaving the scene of an injury accident, Idaho Code sections 18-4006 and -8007, respectively. The district court entered a judgment of conviction on a jury verdict for both charges on December 16, 2005.

State v. Cavanaugh, Docket No. 33657, 2009 Unpublished Opinion No. 349, pp.1-2 (Idaho App. February 10, 2009). Cavanaugh was sentenced to fifteen years with eight years fixed for vehicular manslaughter and a concurrent five-year fixed term for leaving the scene of an injury accident. State v. Cavanaugh, Docket No. 37705, 2011 Unpublished Opinion No. 676, p.2 (Idaho App. October 26, 2011).

Cavanaugh did not appeal his conviction, but on June 12, 2006, he filed a pro se motion for a new trial under Idaho Criminal Rule 34, which was denied. Id. On appeal, the Idaho Court of Appeals affirmed the denial of Cavanaugh's motion for a new trial. Cavanaugh, Docket No. 33657.

On July 29, 2009, Cavanaugh filed a pro se post-conviction petition (R., Vol. 1, pp.4-102), presenting a variety of ineffective assistance of counsel claims, including a claim that his trial counsel failed to file a notice of appeal upon his timely request (R., Vol. 1, pp.55-56). The state filed an answer (R., Vol. 2, pp.223-243) and a motion for summary dismissal (R., Vol. 2, pp.251-270), and Cavanaugh filed a response to the state's motion (R., Vol. 2, pp.271-291). After a hearing (R., Vol. 2, p.323), the district court ruled that Cavanaugh's trial counsel had been ineffective for failing to file a direct appeal and entered an order allowing Cavanaugh a renewed period of time to do so (R., Vol. 2, pp.325-328).[1] The district court granted the state's motion for summary dismissal on all of Cavanaugh's remaining claims. (R., Vol. 2, pp.329-333.) Cavanaugh filed a timely notice of appeal. (R., Vol. 2, pp.334-337.)

[1] In his subsequently filed direct appeal, Cavanaugh raised two issues, prosecutorial misconduct and excessive sentence. Cavanaugh, Docket No. 37705. In an unpublished decision, the Idaho Court of Appeals affirmed Cavanaugh's convictions and sentences. Id.

ISSUE

Cavanaugh states the issue on appeal as:

> Did the district court err when it summarily dismissed Mr. Cavanaugh's post-conviction claim?

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Has Cavanaugh failed to establish that the district court erred when it summarily dismissed his claim that his counsel acted ineffectively when he did not exercise his final peremptory challenge in jury selection at trial?

ARGUMENT

Cavanaugh Has Failed To Establish That He Presented A Prima Facie Claim Of Ineffective Assistance Of Counsel

A. Introduction

Cavanaugh argues that the district court erred in dismissing his post-conviction relief claim "that he received ineffective assistance of counsel when his attorney failed to exercise his final peremptory challenge to exclude juror R.H." (Appellant's Brief, p.6.) He contends "the district court erred in finding, at the summary judgment stage, that failing to do so did not constitute deficient performance, and when it found that, assuming it was deficient, there was no prejudice shown." (Id.)

Contrary to Cavanaugh's arguments, the district court correctly ruled he failed to present evidence establishing a prima facie showing that his trial counsel's decision to not exercise a peremptory challenge against juror R.H. constituted deficient performance and that such performance was prejudicial to the outcome of his trial.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court freely reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221

(1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999); Edwards v. Conchemco Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Cavanaugh Has Failed To Show He Presented Admissible Evidence Constituting A Prima Facie Claim Of Ineffective Assistance Of Counsel

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906 (b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner's unrebutted allegations as true, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

To prove a claim of ineffective assistance of counsel, a post-conviction petitioner must satisfy the two prong test set forth by the United States Supreme Court in

Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must demonstrate: 1) counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88. A reviewing court evaluates counsel's performance at the time of the alleged error, not in hindsight, and presumes that "trial counsel was competent and that trial tactics were based on sound legal strategy." State v. Porter, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997). Counsel's strategic and tactical decisions will not be second-guessed on review or serve as a basis for post-conviction relief under a claim of ineffective counsel unless the UPCPA petitioner has shown that the decision resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review. Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Cunningham v. State, 117 Idaho 428, 430-31, 788 P.2d 243, 245-46 (Ct. App. 1990). "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992).

In order to demonstrate ineffective assistance by trial counsel for failing to either challenge a potential juror for cause or exercise a peremptory challenge against a potential juror, a petitioner must show that counsel's decision was not a legitimate strategic or tactical choice. See State v. Perry, 150 Idaho 209, 226 n.5, 245 P.3d 961, 978 n.5 (2010) ("where defense counsel did not try to exclude a juror for cause, nor use a peremptory challenge to remove her, the trial court's failure to remove that juror for cause sua sponte could not constitute fundamental error as the record failed to

demonstrate that the juror would be biased against the defendant, such that the failure to attempt to exclude that juror could not have been a strategic decision by the defense") (citing State v. Adams, 147 Idaho 857, 216 P.3d 146 (Ct. App. 2009)). Absent evidence of actual bias, counsel is not ineffective for failing to challenge a potential juror. Medrano v. State, 127 Idaho 639, 646, 903 P.2d 1336, 1343 (Ct. App. 1995). The "relevant test for determining whether a juror is biased is 'whether the juror' ... had such fixed opinions that [he] could not judge impartially the guilt of the defendant." United States v. Quintero-Barraza, 78 F.3d 1344, 1349-1350 (9th Cir. 1995) (citing Patton v. Yount, 467 U.S. 1025, 1035 (1984)); see I.C. § 19-2019(2) (Actual bias defined as "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which, in the exercise of a sound discretion on the part of the trier, leads to the inference that he will not act with entire impartiality.").

Cavanaugh had the opportunity in post-conviction proceedings to demonstrate actual bias, but failed to do so. See Smith v. Phillips, 455 U.S. 209, 215 (1981) ("[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). The record of the underlying criminal case supports the district court's conclusion that Cavanaugh had failed to make a prima facie showing that his trial counsel was ineffective for not excusing the juror through a peremptory challenge.

The jury selection hearing record reflects that the juror, R.H., had no actual bias against Cavanaugh. The record supports the district court's determination that "[t]he petition and other documents submitted by Mr. Cavanaugh, together with his argument at the hearing, failed to show that his trial counsel were ineffective" for failing to exercise

a peremptory challenge against juror R.H. (R., Vol. 2, p.332.) Shortly before juror R.H. was called to join the group of the "first 27" jurors, the district judge asked that group whether anyone had "any bias or prejudice either for or against Mr. Cavanaugh at this time?" and no one raised their hand. (Tr.,[2] p.54, L.25 – p.55, L.2.) The judge also asked the first 27 jurors whether they would be willing to follow the court's instructions on the law even if they believed the law should be different, and received only one negative response. (Tr., p.56, L.20 – p.58, L.1.) Just before juror R.H. was selected to join the first 27 jurors, the judge asked, "[a]re there are any of you if selected as a juror in this case who is [sic] unwilling or unable to render a fair and impartial verdict based upon the evidence presented in this courtroom and the law as instructed to you by the court?" and no one responded. (Tr., p.58, Ls.2-11.) After juror R.H. was chosen to join the first 27 jurors, he was asked if he would have answered "yes" to any of the questions previously asked, and answered "yes." (Tr., p.60, Ls.9-12.) The following dialogue ensued:

> THE COURT: And do you know something about this case or have you read something about this case?
>
> A. I did. Where I work is just a short distance on this particular road from the event. Yes. My daughter worked with Sara. I know one of the individuals they intend on calling as a witness. Do I think that I could judge fairly? Yes. But I don't know. I – what I've heard here by the prosecuting attorney and the defense attorney already today has changed my vision of what I believed happened so . . .
>
> THE COURT: Knowing – or having heard about this case, do you feel that you could set aside what you've heard about this case and decide the

[2] There are three transcripts included in the record on appeal. All "Tr." references in this brief are to the transcript prepared in relation to State v. Cavanaugh, Docket No. 33657.

case based solely upon the evidence that's presented during the course of this trial?

A. I believe that I could.

THE COURT: And with regard to the individuals that you know of who may be a witness in this case or witnesses, do you feel that you would give that person or persons greater weight than you would someone else? Or lesser weight? Either one.

A. I – it would – I would say greater weight. Yes. Probably.

THE COURT: Would this knowledge prevent you from acting with impartiality in this case?

A. I don't believe so. Like I said, I – what I – the knowledge that I had until today has already been changed by what I have seen here.

THE COURT: Any other questions that you would have responded yes to?

A. No.

THE COURT: Thank you very much.

A. Well, only that one question that I do – I do know personally one of the individuals that you intend on calling and my daughter worked with Sara at Stoneridge Resort. I did not know Sara. I work with people who did know her. All right. And this happened close to where I work.[3]

(Tr., p.60, L.8 – p.61, L.25.)

Despite knowing one of the witnesses and recognizing that he might give that witness's testimony greater weight, juror R.H. nonetheless stated he did not believe his knowledge of that witness would prevent him from acting impartially as a juror. (Id.) "Although not always dispositive, the court is entitled to rely on assurances from venire

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[3] It should be noted that juror R.H. did not say that the witness he knew was a prosecution witness. When defense counsel subsequently asked if any jurors "know anyone in law enforcement, work with law enforcement or [are] associated with law enforcement in any way" (Tr., p.88, Ls.11-13), R.H. did not respond (Tr., p.88, L.13 – p.92, L.17).

persons concerning partiality or bias." State v. Hairston, 133 Idaho 496, 506, 988 P.2d 1170, 1180 (1999). Having heard, first-hand, R.H.'s assurance that he could be an impartial juror, both the court and Cavanaugh's trial counsel had a valid basis to conclude likewise. It has often been stated:

> The trial court does not need to find jurors that are entirely ignorant of the facts and issues involved in the case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Hairston, 133 Idaho at 506, 988 P.2d at 1180 (quoting Murphy v. Florida, 421 U.S. 794, 800 (1975)); State v. Needs, 99 Idaho 883, 891, 591 P.2d 130, 138 (1979). Similarly, juror R.H. represented to the trial court, in essence, that he could lay aside any inclination he might have had to give more weight to the testimony of the witness he knew in order to serve as an impartial juror. In addition, the juror previously indicated (by stating there were no other questions he would have responded "yes" to) he was not biased against Cavanaugh, he would follow the trial court's instructions on the law, and he would render an impartial verdict based upon the evidence presented at trial. (Tr., p.54, L.25 – p.55, L.2; p.56, L.20 – p.58, L.11; p.61, Ls.16-18.)

Although Cavanaugh asserts he "presented unrebutted evidence that his attorney failed to strike a juror who admitted that he would be biased in favor of one of the witnesses" and was entitled to an evidentiary hearing on the issue (Appellant's Brief, p.10), he failed to present a genuine issue of material fact warranting such a hearing. Workman, 144 Idaho at 522, 164 P.3d at 802; Lovelace, 140 Idaho at 72, 90 P.3d at

297. After reciting the voir dire dialogue between juror R.H. and the trial judge,[4] Cavanaugh merely asserted in his verified petition:

> Mr. [R.H.] is obviously prejudice, he knows one of the witnesses, would give more weight to his testimony, his mind has been changed by what he has seen in the courtroom. Being that the verdict was guilty, Mr. [R.H.] made up his mind to the guilt of the Petitioner before the trial. Being a long time member of the community would give reason for Mr. [R.H.] to be prejudice against the Petitioner whom has not. Mr. [R.H.] stated he has already been changed by what he has seen here – in the court. What did he see, a courtroom full of friends, neighbors, and workmates. It is easy for him to be prejudice.

(R., Vol. 1, p.37 (verbatim except where indicated by brackets).) Cavanaugh's statement that juror R.H. had "made up his mind" about Cavanaugh's guilt is pure speculation, unsupported by any evidence. At the hearing on the state's motion for summary dismissal, Cavanaugh did not present any additional argument relative to his claim that his trial counsel was ineffective for failing to exercise a peremptory challenge to juror R.H. (See generally 4/21/10 Tr., pp.2-13.)

It is Cavanaugh's burden to demonstrate that he presented a genuine issue of material fact about whether his trial counsel was ineffective for failing to peremptorily strike juror R.H. However, he failed to present a prima facie case showing the juror could not render a fair and impartial verdict. See Workman, 144 Idaho at 522, 164 P.3d at 802; Lovelace, 140 Idaho at 72, 90 P.3d at 297. The district court correctly concluded that the "petition and other documents submitted by Mr. Cavanaugh, together with his argument at the hearing, failed to show that his trial counsel were ineffective before trial, during trial . . . and that there is a reasonable probability that but for the

[4] Cavanaugh also filed with the district court the trial transcript pertaining to the voir dire of juror R.H. (R., Vol. 1, pp.119-120.)

conduct of his counsel, the outcome of the trial would have been different. (R., Vol. 2, p.332.) See United States v. Miguel, 111 F.3d 666, 673 (9th Cir. 1997) (holding that, in a trial for abusive sexual contact, the trial court did not err in failing to excuse jurors for cause based upon statements that they had been the victims of child molestation or that they had relatives that had been victims of child molestation because the juror's indicated that they could render a fair and impartial verdict).

In sum, Cavanaugh's claim is nothing more than unsubstantiated speculation that, despite juror R.H.'s avowal that he could render a fair and impartial verdict, he was denied a fair trial. Such speculation is insufficient to carry Cavanaugh's burden. Without a showing of actual bias on the part of juror R.H., Cavanaugh has failed to establish a genuine issue of material fact that, under Strickland, his trial counsel performed deficiently by failing to exercise a peremptory challenge against the juror, and that absent such failure there is a reasonable probability the outcome of the proceedings would have been different. Accordingly, Cavanaugh has failed to establish any error in the district court's summary dismissal of his claim.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Cavanaugh's petition for post-conviction relief.

DATED this 2nd day of August, 2012

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 2nd day of August, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JOHN C. MCKINNEY
Deputy Attorney General

JCM/pm