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Baxter v. State Appellant's Reply Brief Dckt. 36299

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IN THE SUPREME COURT OF THE STATE OF IDAHO

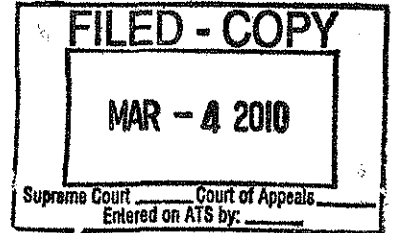
JOSEPH JACKSON BAXTER,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent-Respondent.)
 _____)

S. Ct. No. 36299

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Twin Falls

HONORABLE RANDY J. STOKER
District Judge



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II. ARGUMENT IN REPLY

In his Opening Brief, Mr. Baxter set forth and established that the district court erred in summarily dismissing his claim that Idaho Code § 18-7018 is unconstitutional. Additionally, Mr. Baxter explained how he received ineffective assistance of counsel because his trial counsel failed to argue the Twin Falls Criminal Justice Facility itself had not been injured by his conduct and because his appellate counsel failed to challenge the sufficiency of the evidence on direct appeal. In response, the State agrees the district court dismissed Mr. Baxter's constitutional challenge to Idaho Code § 18-7018 for reasons other than those for which Mr. Baxter was put on notice but nevertheless suggests the district court's error was harmless. Similarly, the State argues Mr. Baxter did not receive ineffective assistance of trial or appellate counsel. The State's arguments in this respect however are premised upon the flawed reasoning of the district court and its misunderstanding of Idaho's injuring jails statute.

A. The District Court Erred in Summarily Dismissing Mr. Baxter's Claim Alleging that Idaho Code § 18-7018 was Unconstitutional on Grounds Different from Those Previously Asserted by the State or Adopted by the District Court.

As explained in his Opening Brief, and as the State's concedes in its responsive briefing, Mr. Baxter's claim relating to the constitutionality of Idaho Code § 18-7018 was dismissed for reasons other than those contained in the notice of intent to dismiss. It is well settled that dismissing a petition for grounds not asserted in the twenty-day notice is reversible error. *See, e.g., DeRushe v. State*, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009). Still, the State argues "[a]ny error in the lack of notice is harmless, however, because Baxter's constitutionality claim ultimately fails as a matter of law, and no legal authority or evidence Baxter could have presented would have overcome summary dismissal of his claim." Brief of Respondent, p.7 (citations

omitted).

Interestingly, when confronted with similar circumstances on at least one prior occasion this Court has said such an “error by the district court cannot be held to be harmless, and the order summarily dismissing [the petitioner’s] application must be vacated.” *Downing v. State*, 132 Idaho 861, 864, 979 P.2d 1219, 1222 (Ct. App. 1999). In *Downing*, the district court’s notice of dismissal simply recited Idaho Code § 19-4906(b). *Id.* In response, Downing submitted additional affidavits even though the notice of intent to dismiss provided no guidance as to the district court’s rationale for dismissal. *Id.* The district court dismissed Downing’s application for post-conviction relief anyway. *Id.* Downing appealed the summary dismissal and this Court stated:

The opportunity for an applicant to adequately and appropriately respond to the district court's notice, in order to avoid summary dismissal and have the merits of his or her application considered at an evidentiary hearing, is a substantial right. When that right is affected by a defective notice of proposed dismissal, this Court cannot disregard the error.

Id.

Similarly, the district court’s error in this case should not be disregarded. Mr. Baxter was put on notice that the district court intended to dismiss his claim that Idaho Code § 18-7018 was unconstitutional “for the reasons set forth in the State’s brief.” Notice of Intent to Dismiss Post Conviction Petition, p.3. R. 90. The reasons set forth in the State’s brief were that “his allegations were conclusory.” Motion for Summary Disposition, p.8. R. 77. Mr. Baxter’s constitutional challenge was summarily dismissed though because the district court determined Mr. Baxter should have raised this claim in direct appeal. Order Dismissing Portion of Petition and Directing Hearing, p.2. R. 102.

To begin with, the district court’s conclusion that Mr. Baxter should have addressed the

constitutionality of Idaho Code § 18-7018 on direct appeal is wrong. Mr. Baxter could not have raised this issue on direct appeal because trial counsel failed to challenge the validity of the statute. *State v. Huntsman*, 146 Idaho 580, 585, 199 P.3d 155, 160 (Ct. App. 2008) (“It is well settled that in order for an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for assignment of error.”) (citations omitted).

Moreover, the State’s assertion that the district’s court error is harmless because there was no legal argument or evidence that Mr. Baxter could have proffered had he been given proper notice is incorrect. To the contrary, the injuring jails statute, which, as Mr. Baxter pointed out in his Opening Brief, was originally enacted by the Idaho territorial legislature in 1864, is ripe for a constitutional challenge.

It is a basic principle of due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 1, § 13 of the Idaho Constitution, that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *State v. Korsen*, 138 Idaho 706, 710, 69 P.2d 126, 132 (2003). Due process requires that all be informed as to what the state commands or forbids and that people of ordinary intelligence not be forced to guess at the meaning of a criminal law. *Korsen*, 138 Idaho at 711, 69 P.2d at 133.

In *Grayned*, the United States Supreme Court indicated:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-109.

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also Gonzales v. Carhart*, 550 U.S. 124, 148-49, 127 S.Ct. 1610, 1628 (2007); *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994). Due process requires that the statute in question inform citizens of what the state commands or forbids such that persons of common intelligence are not forced to guess at the meaning of the criminal law. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998). “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law.” *State v. Marek*, 112 Idaho 860, 866, 736 P.2d 1314, 1320 (1987).

Furthermore, “[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnote omitted).

A void for vagueness challenge is more favorably acknowledged and a more stringent vagueness test will be applied where a statute imposes a criminal penalty or if the law interferes with a substantial amount of conduct protected by the First Amendment. *State v. Cobb*, 132 Idaho 195, 199, 696 P.2d 244, 248 (1998); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). If the law does not regulate a significant

amount of constitutionally protected conduct, the court must determine (1) whether the law gives notice to those who are subject to it, and (2) whether the law contains guidelines and imposes sufficient discretion on those who must enforce it. *Cobb*, 132 Idaho at 198, 696 P.2d at 247.

A statute may be challenged as unconstitutionally vague on its face or as applied to a defendant's conduct. The statute at issue here reads:

Every person who wilfully and intentionally breaks down, pulls down or otherwise destroys or injures any public jail or other place of confinement, is punishable by fine not exceeding \$10,000, and by imprisonment in the state prison not exceeding five years.

I.C. § 18-7018. Mr. Baxter could have raised both a vague on its “face” challenge, because the statute requires those of ordinary intelligence to guess as to its meaning, as well as an “as applied” challenge, because the statute, as applied to Mr. Baxter’s conduct, failed to provide fair notice that his conduct was proscribed. *State v. Korsen*, 138 Idaho at 712, 69 P.3d at 132.

In sum, the district court’s error is not harmless. Had Mr. Baxter been provided proper notice he could have responded accordingly. As such, the order summarily dismissing Mr. Baxter’s claim that Idaho Code § 18-7018 is unconstitutional should be reversed and the matter remanded for further proceedings on those issues.

B. The District Court Erred in Finding that Trial Counsel Did not Provide Ineffective Assistance of Counsel by Failing to Argue that Mr. Baxter Did Not Injure the Jail.

Mr. Baxter explained in his Opening Brief how he received ineffective assistance of counsel when his trial counsel inexplicably failed to argue that Mr. Baxter did not violate Idaho Code § 18-7018 because he did not injure the jail and instead merely damaged a leased telephone. In response the State agrees with the district court’s conclusion that Mr. Baxter’s trial counsel was not deficient. In order to do so however the State relies upon the district court’s flawed interpretation and analysis of Idaho Code § 18-7018.

As discussed in Mr. Baxter's Opening Brief, contrary to the plain and ordinary reading of the statute, contrary to Idaho precedent, and contrary to persuasive authority from other jurisdictions, the district court reasoned that a person is guilty of violating Section 18-7018 even though the structure of the jail was not injured or damaged. To reach this conclusion the district court was forced to engage in judicial activism and expand the scope of the injuring jails statute to now include damage to any "property [that] is integral to the operation of the jail." Order Dismissing Post Conviction Petition, p.7. R. 111.

One of the flaws in this analysis is exposed in the State's argument. The State asserts "[t]he language of the statute itself does not include as an element ownership of injured or damaged property," therefore, as the district court held, trial counsel would have been precluded from arguing that Mr. Baxter did not damage the jail itself. Brief of Respondent, p.15. The State is correct in that ownership is not an element of the crime at issue here. The reason ownership is not an element becomes evident after some basic legal research. It not an element of the crime because the injuring jails statute only applies to injury or damage done to the jail structure itself and not the leased fixtures or furniture within the jail. See Opening Brief, pp.10-13. Yet Mr. Baxter's trial counsel failed to make this argument either in a motion to dismiss, a Rule 29 motion, or even to the jury, and in failing to do so trial counsel's performance fell below an objective standard or reasonableness as articulated in *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The State's, as well as the district court's, attempt to expand the scope of Idaho's injuring jails statute in order to sustain the conviction in this case and thereby somehow bootstrap trial counsel's competency above the constitutionally acceptable threshold has the unjust consequence of leaving Mr. Baxter convicted a crime he did not commit. Arguably Mr. Baxter's conduct

violated the malicious injury to property statute, Idaho Code § 18-7001, but he did not commit the crime of injuring jails.

Nevertheless, the district court's application of the law to the facts of this case are in error and subject to free review from this Court. Thus, this Court should reverse the district court's order denying Mr. Baxter's application for post-conviction relief, vacate the judgment of conviction, and remand this matter for a new trial with counsel.

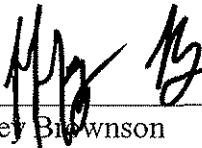
C. The District Court Erred when it Concluded Mr. Baxter did not Receive Ineffective Assistance of Counsel on Direct Appeal Because it was Objectively Unreasonable for Appellate Counsel to Not Challenge the Sufficiency of the Evidence.

Again, relying upon the rationale of the district court, the State simply argues Mr. Baxter was not prejudiced by appellate counsel's failure to challenge the sufficiency of evidence on appeal because "such an argument would have been unsuccessful under the [district] court's view that the phone destroyed by Baxter was a part of the jail sufficient to warrant a charge of injury to jails." Brief of Respondent, p.16. Without repeating them here but for the same reasons set forth above, as well as those explained in Mr. Baxter's Opening Brief, the district court's application of the law and conclusion are in error. Mr. Baxter's appellate counsel's performance was deficient and there is a reasonable probability that but for this deficiency the result of his appeal would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

III. CONCLUSION

For all the reasons set forth above and in Mr. Baxter's Opening Brief, this Court should reverse the district court's orders denying his petition for post-conviction relief and vacate the judgment of conviction and afford Mr. Baxter a new trial with counsel or alternatively remand for further post-conviction proceedings.

Respectfully submitted this 04 day of March, 2010.



Jeffrey Brownson
Attorney for Joseph Baxter

CERTIFICATE OF SERVICE

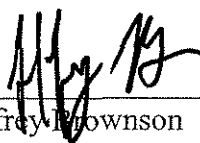
I CERTIFY that on March 04, 2010, I caused a true and correct copy of the foregoing document to be

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