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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JIMMY THOMAS GLASS)	
)	
Petitioner-Appellant,)	NO. 38079
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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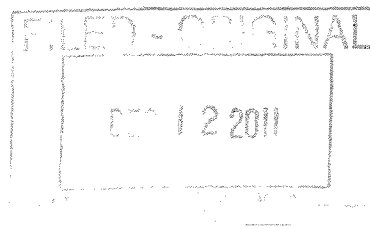


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STATEMENT OF THE CASE

Nature Of The Case

Jimmy Thomas Glass appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The facts of the underlying criminal case and first petition for post-conviction relief are set forth in Glass v. State, Docket No. 36203, 2010 Unpublished Opinion No. 354 (Idaho App., February 18, 2010):

The facts of this case are provided in detail by this Court's opinion in Glass's direct appeal. See *State v. Glass*, 146 Idaho 77, 190 P3d 896 (Ct. App. 2008). Glass solicited an undercover police officer over the internet, believing the officer was a fifteen-year-old girl. Glass identified himself online under the username "letsgetkinky831" and the undercover officer identified himself under the username "Lisa200215ncal." During the course of the conversation, Glass invited the undercover officer to view a sexually-explicit image of himself and proposed a sexual rendezvous. The officer gave the address to a vacant apartment building being used as part of a sting operation. Glass agreed to meet "Lisa" at the apartment right away because he had to work later that day. He indicated that his name was Tom and he would be driving a black, two-door car. Shortly thereafter, the car drove into the complex parking lot, and Glass approached the apartment door and was arrested by police officers.

Glass was found guilty by a jury of enticing a child over the internet. I.C. § 18-1509(A). The district court sentenced Glass to a unified term of fifteen years, with a minimum period of confinement of three years. Following Glass's I.C.R. 35 motion, the district court reduced his sentenced to a unified term of fifteen years, with a minimum period of confinement of two years. This Court affirmed Glass's judgment of conviction in *Glass*, 146 Idaho 77, 190 P.3d 896.

Glass filed a pro se application for post-application relief alleging seven claims: (1) the state failed to disclose exculpatory evidence; (2) the state failed to disclose an expert witness; (3) the

prosecutor used perjured testimony; (4) prosecutorial misconduct; (5) ineffective assistance of trial counsel for failing to investigate a potential defense; (6) he was not adequately advised of his rights pertaining to the psychosexual evaluation as required by *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006); and (7) ineffective assistance of appellate counsel. Counsel was appointed to represent Glass during the post-conviction proceedings. The state moved for summary dismissal of the first five claims on the basis that Glass had failed to state a claim upon which relief may be granted. Specifically, the state argued that the first four claims could have been raised on direct appeal and that Glass could not show deficient performance on his fifth claim. After a hearing on the state's motion, the district court dismissed the first five claims. The state conceded the validity of Glass's claim concerning a violation of *Estrada*, and the district court granted a new sentencing hearing. Glass conceded that his seventh claim was without merit and did not object to its summary dismissal.

Id., at 1-2. Glass appealed. Id. On appeal he asserted that "the district court erred by summarily dismissing his claim that the state committed a *Brady*¹ violation by failing to disclose the seizure of his laptop computer from work as well as the results of any testing conducted on it." Id. at 2 (internal footnote omitted). He also asserted that "the district court erred by summarily dismissing his claim of prosecutorial misconduct as it related to the alleged *Brady* violation concerning his work computer." Id. at 2-3. The Court of Appeals affirmed the district court's order. As to Glass's Brady claim, it held: "[T]he seizure of Glass's work computer was the subject of extensive testimony offered at Glass's preliminary hearing which was subject to cross-examination by Glass's counsel.... Glass's own filings belie his claim that the computer itself was not disclosed by the state." Id. at 4. It further found that the state did not commit a Brady violation by failing to disclose the results of testing done on Glass's

¹Brady v. Maryland, 373 U.S. 83 (1963).

computer. Id. at 5. It noted that at the preliminary hearing the state's witness testified that a superficial examination of the hard drive revealed the existence of the phrase "letsgetkinky831" but that the examiner explained that testing had not been completed. Id. At trial, the state did not use any test results. Id. The court noted that Glass inferred that, because the state did not use the test results, the results must have been exculpatory. Id. It then explained, "in this case, Glass's application provided even less than conclusory allegations. It provided only implicit inferences and speculation that the results of forensic testing done on his work computer must have been exculpatory because the state did not present them at trial." Id. The Court of Appeals held that Glass failed to establish a genuine issue of material fact that the state failed to disclose material exculpatory information. Id.

Glass thereafter filed his successive petition for post-conviction relief and affidavit in support, which is the subject of this appeal. (R., pp. 3-31.) In his successive petition, Glass made seven claims (R., pp. 3-25), which were summarized by the district court:

1. Prosecution failed to disclose exculpatory evidence in the form of computer forensic results and the Micron Laptop would indicate Glass was not the person chatting with the undercover officer in the internet sting operation.
2. Prosecution made misleading statements to the court, i.e. 1) regarding the custody and whereabouts of exculpatory evidence which is now lost; 2) allowing perjured testimony by a witness without correcting the jury record or addressing the false statements; 3) falsely claiming the Micron Laptop was still in custody, when it was not or failed to preserve the Micron Laptop.
3. Prosecution failed to disclose the Yahoo! Terms of Service Agreement and Yahoo! Registration Page. Undercover

agent violated the terms of service by portraying himself as a minor. This misconduct was hidden from Petitioner, denying him a valid entrapment defense.

4. Trial counsel was ineffective by failing to have a forensic examiner review the computer's contents.

5. Prosecution represented at a hearing on June 5, 2008 that the laptop was in law enforcement custody. In January 2009, petitioner was informed that the Laptop was no longer in custody and had been released. Petitioner claims he should have been notified of this.

6. Following Petitioner's pro se motion to preserve the Micron Laptop, petitioner was advised at the hearing on November 19, 2009, that the laptop had been released to Mr. Ken Grover in 2006 and that prosecution did not have a copy of the hard drive. Because his first post conviction attorney did not take possession of any evidence from the State regarding the laptop, his attorney was ineffective in failing to present evidence at this first petition.

7. In response to the State's motion for summary disposition, Glass alleges there was no connection between him and the chat log transcript and cites to *United States v. Tank*, 200 F.3d 630-31 (9th Cir. 2000).

(R., pp. 248-49). The state filed a motion for summary dismissal and supporting brief. (R., pp. 225-37.) Glass filed a response to the state's motion. (R., pp. 238-43.) The district court thereafter summarily dismissed Glass's successive petition. (R., pp. 247-53.) Glass timely appealed. (R., pp. 255-58.)

ISSUES

Glass states the issues on appeal as:

1. Did the district court abuse its discretion when it incorrectly concluded Mr. Glass's Brady claim was adequately raised in his first petition?
2. Did the District Court abuse its discretion when it erroneously found Mr. Glass's claim of ineffective assistance showed no basis that trial counsel failed to investigate and prepare for trial?
3. Did the District Court abuse its discretion when it erroneously rejected Mr. Glass's claim that prosecution withheld exculpatory evidence, made misstatements of facts, and violated a court order by destroying evidence?
4. Did the District Court abuse its discretion when it misconstrued that the newly discovered evidence, the Yahoo! TOS agreement, established a prima facie case of outrageous government misconduct which would have enabled Mr. Glass to either strategically present an entrapment defense or offer an entrapment jury instruction at trial?

(Appellant's brief, p. 9.)

The state rephrases the issue as:

Has Glass failed to show error in the summary dismissal of his successive petition for post-conviction relief?

ARGUMENT

Glass Has Failed To Establish That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

Glass challenges the summary dismissal of his successive post-conviction petition. On appeal, he raises four issues – a Brady claim, an ineffective assistance of trial counsel claim, a prosecutorial misconduct claim, and a newly discovered evidence claim. (Appellant's brief, p. 9.) Glass contends that the first three issues were inadequately raised by his first post-conviction counsel. (See Appellant's brief, pp. 10, 21, 25.) In addition, he asserts that the district court erred in dismissing his newly discovered evidence claim because, he contends, the newly discovered evidence would have allowed him to assert an entrapment defense at trial. (Appellant's brief, pp. 28-35.) Application of the law to the facts supports the district court's determination that Glass failed to establish a valid post-conviction claim. Glass has therefore failed to show error.

B. Standard Of Review

On review of a dismissal of a post-conviction application, the appellate court will review the entire record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require that relief be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The Court freely reviews the district court's application of the law. Id.

C. Glass Has Failed To Show That The District Court Erred In Summarily Dismissing His Successive Petition For Post-Conviction Relief

Idaho Code § 19-4908 governs the filing of successive petitions and provides:

Waiver of or failure to assert claims. – All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

(Bold in original.) The plain language of this statute makes clear that successive petitions for post-conviction relief are generally not permissible. Summary dismissal of a successive petition is therefore appropriate “if the grounds for relief were finally adjudicated or waived in the previous post-conviction proceeding.” Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (citation omitted). Only in cases where the petitioner can show “sufficient reason” why claims were “inadequately presented in the original case,” may he have the opportunity to re-litigate them. Id.; see also I.C. § 19-4908. Thus, “to prevent his second application from being dismissed, [Glass] had the burden of providing the district court with factual reasons upon which the court could conclude there was a ‘sufficient reason’ why the grounds for relief asserted in his second petition ... ‘were inadequately raised’” in his original petition. Hooper v. State, 127 Idaho 945, 948, 908 P.2d 1252, 1255 (Ct. App. 1995) (quoting I.C. § 19-4908).

Idaho courts have long held that deficient representation by counsel in an initial post-conviction proceeding, that causes a claim to be inadequately presented to the court, constitutes a “sufficient reason” to allow assertion of the same claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908. See, e.g., Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008); Baker v. State, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Where, as here, a petitioner alleges ineffective assistance of post-conviction counsel as a basis for bringing a successive petition, the relevant inquiry is “whether the second application has raised not merely a question of counsel’s performance but substantive grounds for relief from the conviction and sentence.” Nguyen v. State, 126 Idaho 494, 496, 887 P.2d 39, 41 (Ct. App. 1994) (quoting Wolfe v. State, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct. App. 1987)). Thus, to overcome summary dismissal, Glass was required to allege facts which, if true, showed both (1) that the claims alleged in his successive petition were either not raised or were inadequately asserted in his original post-conviction action due to the ineffective assistance of his original post-conviction attorney, and (2) a valid underlying claim of post-conviction relief. Id.

Glass raised four issues in his successive post-conviction petition – a Brady claim, an ineffective assistance of counsel claim, a prosecutorial misconduct claim, and a newly discovered evidence claim. There is no question that Glass raised the first three issues in his first post-conviction petition. (See R., p. 177-186 (Decision And Order Granting State’s Motion For Summary Dismissal And Notice Of Intent To Dismiss Ground Seven).) See also Glass v. State,

Docket No. 36203, 2010 Unpublished Opinion No. 354 (Idaho App., February 18, 2010) (affirming the denial of Glass's Brady and prosecutorial misconduct claims on appeal).

Glass contends that his first three claims (his Brady claim, prosecutorial misconduct claim, and ineffective assistance of counsel claim) were inadequately raised below because his first post-conviction counsel failed to present admissible evidence in support of the claims. (See Appellant's brief, pp. 10, 21, 22-26.) Contrary to Glass's assertions, a review of the record and applicable law support the district court's dismissal of these claims. He has failed to show either that his post-conviction counsel was ineffective or the existence of a valid underlying claim. In addition, Glass has failed to show that the district court erred in dismissing his claim of newly discovered evidence.

1. Brady Claim

In his successive petition, Glass alleged that the "prosecution failed to disclose exculpatory evidence in the form of computer forensic results and the Micron Laptop. This evidence would indicate that the Petitioner was not the person chatting with the undercover officer in their 'internet sting' operation." (R., p. 6.) He asserted that his post-conviction attorney was ineffective for failing to have the hard drive of the computer examined because of his attorney's personal belief that there would be no incriminating information on the hard drive, and this failure to examine the hard drive resulted in his first Brady claim being summarily dismissed by the court. (R., pp. 15-17.) The district court dismissed this claim

on the grounds that the claim was “adequately raised in the first petition.” (R., p. 251.) Glass has failed to show error.

This issue was addressed in Glass’s first petition for post-conviction relief and was the primary issue raised in his first post-conviction appeal. (See, R., pp. 180-182.) See also Glass v. State, Docket No. 36203, 2010 Unpublished Opinion No. 354 (Idaho App., Feb. 18, 2010). Glass has failed to show that his first post-conviction attorney was ineffective for failing to examine the hard drive of the computer. Glass has still failed to have the hard drive of the computer examined and has still failed to present evidence that any results of forensic testing would be exculpatory. In the proceedings on his first petition, the court of appeals upheld dismissal of this claim because, in part, Glass’s first application “provided only implicit inferences and speculation that the results of forensic testing done on his work computer must have been exculpatory because the state did not present them at trial.” Glass, 2010 Unpublished Opinion No. 354 at 5. Glass’s successive petition still “provide[s] only implicit inferences and speculation” that the results of testing would be exculpatory. Because Glass failed to present any admissible evidence that his first post-conviction attorney was ineffective for failing to examine the hard drive, which could constitute a “sufficient reason” to allow assertion of the same claim in a subsequent post-conviction petition pursuant to I.C. § 19-4908, he has failed to show that the district court erred in dismissing his claim.

2. Prosecutorial Misconduct Claim

Likewise, Glass's prosecutorial misconduct claim was properly dismissed by the district court. In his successive petition, Glass asserted that the prosecution committed misconduct by 1) making misleading statements to the court concerning the custody and whereabouts of exculpatory evidence which is now lost; 2) allowing perjured testimony by a witness without correcting the jury record or addressing the false statements; and 3) committing perjury for falsely claiming the Micron Laptop was still in custody or violating the court order to preserve the Micron Laptop evidence. (R., p. 6.) The district court summarily dismissed these claims, ruling:

Glass' first petition was not dismissed until February, 2009. Glass raised these issues in his first petition, and or fails to explain why he did not raise these issues in his first petition. Glass states a bare allegation that the laptop would have exculpatory evidence. This claim is dismissed.

(R., pp. 251-52.) Glass has failed to show error.

These three claims were raised and denied in Glass's first post-conviction proceeding. (See, R., p. 183 ("prosecution did not disclose 'Brady' evidence, prosecution misled the court and defense with misstatements of facts, prosecution did not disclose an expert witness, and prosecution knowingly used perjured testimony".)) Because these claims were addressed in Glass's first petition, the district court did not err in denying his successive petition on this ground. Further, to the extent that these prosecutorial misconduct claims may be slightly different than the ones alleged in his first petition, Glass has failed to explain why these issues were not raised in his first petition or on direct appeal.

Further, these underlying facts are the same facts underlying his Brady claim. Because Glass is unable to establish a Brady violation, he is unable to establish a prosecutorial misconduct claim in relation to his Brady claim. See Glass, 2010 Unpublished Opinion No. 354 at 5 (“Because we conclude Glass’s application failed to raise a genuine issue of material fact concerning a *Brady* violation, we need not address Glass’s remaining claim that the *Brady* violation related to the disclosure of his work computer and its contents amounted to prosecutorial misconduct.”).

3. Ineffective Assistance Of Trial Counsel Claim

Glass also asserts that the district court erred in summarily dismissing his ineffective assistance of trial counsel claim. (Appellant’s brief, pp. 17-21.) In his successive petition, Glass claimed that his trial counsel was ineffective for

not obtaining, consulting and presenting computer expert testimony in conjunction with computer forensic evidence; and corroboration testimony of Kathy Grover, who told trial counsel’s own investigator that the Petitioner was using his Micron Laptop during the time frame of the alleged crime. Moreover, trial counsel failed to properly perform a pre-trial investigation, which is supported by the study conducted by the National Legal Aid and Defender Association, which found that Ada County Public Defenders Office was constitutionally inadequate spending an average of 2.18 hours per felony case.

(R., p. 7.) The district court dismissed this claim, holding:

Glass claims he is the owner of the computer. He claims his trial counsel should have had the computer analyzed, presumably to determine if it was used in the internet “chat” session. The state at trial never claimed this computer was used for the chat. The court fails to see how a forensic analysis would make a difference in this case. Glass provides no basis for believing it would, other than to say it could have exculpatory evidence on it.

(R., p. 252.) Glass has failed to show that the district court erred.

This claim was dismissed in Glass's first petition because Glass failed to present any admissible evidence in support of his claim. (R., pp. 184-85 ("Glass has provided no other evidence from witnesses that could change the outcome of the case.")) Although in his successive petition he asserted that his first post-conviction attorney was ineffective and failed to adequately present this claim (R., pp. 18-19), Glass continued to fail to present anything more than speculation and conjecture as to the testimony of a computer expert witness or Kathy Grover. Thus, the district court properly dismissed this claim.

4. Newly Discovered Evidence Claim

In his successive petition, Glass asserted that the prosecution failed to disclose the Yahoo! Terms of Service Agreement and Yahoo! Registration Page. (R., pp. 20-25.) Glass asserted that the investigator violated the Terms of Service agreement by posing as a fifteen-year-old girl online. (R., pp. 21-22.) Glass contends that because the prosecutor failed to disclose this agreement, he was deprived of the opportunity to cross-examine the investigator about this purported violation of the agreement. (R., p. 22.) Glass alleged, "If trial counsel had access to this information at trial, counsel would have impeached the prosecution's key witness and presented a valid entrapment defense." (R., p. 22.) In dismissing this claim, the district court ruled:

Due process requires all material exculpatory evidence known to the state or in its possession be disclosed to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Glass has not shown that this is evidence the prosecution had before his trial. This claim is dismissed. Furthermore, if there was a violation of an

agreement, that would be an issue between Yahoo and the state's agents who allegedly violated a user agreement. Glass was not a party to that agreement. A violation of the agreement in and of itself would not give Glass an entrapment defense. Glass would also have to admit to the offense to claim entrapment which he has not done. See *Suits v. State*, 143 Idaho 160, 139 P.3d 762 (Ct. App. 2006).

(R., p. 252)

On appeal, Glass asserts that the district court erred in finding the Yahoo! Terms of Service Agreement (TOS) agreement not material and argues, "had the state disclosed the TOS, trial counsel could have made a strategic decision for an entrapment defense or formulated a jury instruction for entrapment at the trial." (Appellant's brief, p. 28.) According to Glass, the TOS supports his entrapment defense because the investigator violated the TOS when he created his online profile. (Id.) Glass has failed to show error.

A post-conviction petitioner may be entitled to relief if he demonstrates the existence of "evidence of material facts, not previously presented and heard, that requires vacation of the ... sentence in the interests of justice." I.C. § 19-4901(4). The four-part test a defendant must satisfy in order to be entitled to a relief based upon a claim of newly discovered evidence is that the alleged evidence: (1) is newly discovered and was unknown to the defendant at the time of trial; (2) is material, not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *Whiteley v. State*, 131 Idaho 323, 326, 955 P.2d 1102, 1105 (1998); *State v. Drapeau*, 97 Idaho 685, 691, 551 P.2d 972, 978 (1976).

Even assuming that the TOS was newly discovered, Glass cannot show that it is material and “not merely cumulative or impeaching.” Nor can Glass show that the agreement “will probably produce an acquittal.” Even if Glass could show a violation of the TOS agreement, it could only be used to impeach the investigator; it would not support an entrapment defense:

Entrapment occurs when an otherwise innocent person, not inclined to commit a criminal offense, is induced to do so by a state agent who, desiring grounds for prosecution, originates the criminal design and implants in the mind of the innocent person the disposition to commit the alleged offense. There is a distinction however, between originating the idea to commit the crime and merely furnishing the opportunity to commit it.

Suits v. State, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006) (internal citations omitted). Glass has not even alleged what evidence purportedly supports an entrapment defense, let alone shown the possibility of a valid entrapment defense. Moreover, the evidence of Glass’s guilt is overwhelming. The court of appeals held in Glass’s direct appeal:

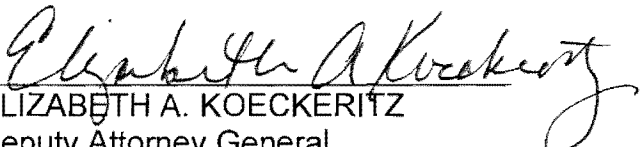
[T]he online interaction between “lisa200215ncal” and “letsgetkinky831” was a private conversation to which only those two were a party. “Lisa200215ncal” provided “letsgetkinky831” with the address of a vacant apartment complex near Fairview Avenue. “Letsgetkinky831” responded by saying his name was “Tom” and that he would be coming from the north side of Boise. He also indicated that he would be arriving in a small, black two-door car and that he was leaving his residence immediately to come to the apartment because he needed to go to work later. Twenty-three minutes later, the detectives witnessed a black two-door car driving into the apartment complex parking lot. While the detectives did lose sight of the car, shortly thereafter Glass arrived and knocked on the door where the detectives had set up the sting. Given this evidence, we conclude there was substantial evidence upon which a reasonable jury could have concluded that Glass was the person behind the “letsgetkinky831” screen name.

Glass, 146 Idaho at 85, 190 P.3d at 904. Given the strength of this evidence, it is highly unlikely that a violation of the TOS agreement would have led to an acquittal. Further, the district court correctly noted that a violation of that agreement would be an issue between Yahoo! and the detective. Finally, as explained by the district court, in order to prevail on an entrapment defense, the defendant must acknowledge that he committed the crime. See Suits, 143 Idaho at 164, 139 P.3d at 766. Glass continues to deny that he was “letsgetkinky 831.” (Appellant’s brief, p. 29 (“Glass maintains that he was not letsgetkinky831 and that he did not chat with Detective.”).) For these reasons, Glass cannot show error in the district court’s dismissal of this claim for relief.

CONCLUSION

The state respectfully requests that this Court affirm the district court’s order summarily dismissing Jimmy Thomas Glass’s successive petition for post-conviction relief.


DATED this 12th day of December 2011.


ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of December 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JIMMY THOMAS GLASS
IDOC #67308
ICC
G-102-A
P.O. Box 70010
Boise, Idaho 83707


ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm