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Foldesi v. State Respondent's Brief Dckt. 38120

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

MICHAEL F. FOLDESI)	
)	
Petitioner-Appellant,)	NO. 38120
)	
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

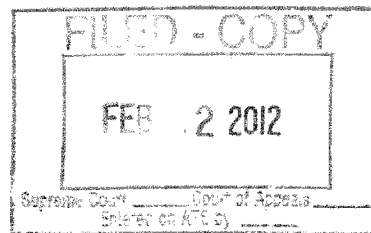
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STATEMENT OF THE CASE

Nature Of The Case

Michael Francis Foldesi appeals from the dismissal of his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

Foldesi filed a *pro se* petition for post-conviction relief following his conviction for delivery of a controlled substance. (R., pp.5-19.) Foldesi raised several claims in his petition including a claim designated "Ground Six" (hereafter "Claim 6"). (R., pp.7-17.) In this claim, Foldesi alleged he was denied his right to a fair trial, which was based on the assertion that "Detectives John Terry and Matt Bryngelson offered perjured testimony knowingly used by the prosecution to obtain a conviction." (R., p.13.)

In conjunction with his petition, Foldesi filed a motion asking the district court to take judicial notice of the clerk's record, the transcripts, the presentence report, and the exhibits from his "underlying criminal case," Ada County Case No. H0600762. (R., p.32.) Foldesi also filed a motion for the appointment of counsel, which the court granted. (R., pp.27-29, 35.)

The state filed an answer to Foldesi's *pro se* petition and a separate motion for summary dismissal with a supporting memorandum. (R., pp.42-46, 51-61.) The court conducted a hearing on the state's motion for summary dismissal on August 18, 2010. (See generally 8/18/2010 Tr.) At the outset of the hearing, Foldesi submitted two affidavits – one from Robi Foldesi and one from Dorothy Burke – but it does not appear either affidavit was filed on that date.

(8/18/2010 Tr., p.1, Ls.11-16; see R., p.3 (entry for 8/18/2010).) At the conclusion of the hearing, the court dismissed all of Foldesi's claims, but noted it would give Foldesi 20 days to submit additional evidence in support of Claim 6. (8/18/2010 Tr., p.14, L.9 – p.17, L.15.) The court entered a written order the following day that was consistent with its ruling from the bench. (R., p.62.) In its written order, the court advised Foldesi it would "conduct an evidentiary hearing" on Claim 6 if he submitted admissible evidence raising a genuine issue of material fact in relation to that claim. (R., pp.62-63.)

Approximately three weeks later, Foldesi submitted an affidavit from Robi.¹ (R., pp.66-67.) Robi's affidavit alleged he was a witness in Foldesi's criminal trial and "personally witnessed the following incident during the first day of the trial at approximately 1:30 p.m.:"

3. A longhaired male exited the courtroom and the Bailiff called Matt Bryngleson, who then got up and entered the courtroom.

4. The longhaired male that had just exited the courtroom then approached the other state witnesses and began [sic] to show and tell them with the aid of a note pad what he testified to as to where they were strategically placed during [Foldesi's] alleged criminal activities.

5. Specifically, [he] heard the other witnesses tell each other allegedly where they were strategically placed during [Foldesi's] alleged criminal activities in respects [sic] to the parking lot at the Kmart located on Fairview in Boise, ID.

6. It was obvious that this longhaired male officer that had just came out of the Courtroom was discussing [Foldesi's] case and

¹ The Affidavit of Robi Foldesi actually filed with the district court appears to be a revised version of the one submitted on the date of the hearing on the state's motion for summary dismissal, which was never filed. (See 8/18/2010 Tr., p.10, L.21 – p.13, L.23 (discussion of affidavit submitted at hearing and need for more information in the affidavit).)

was coaching the others on what to say during their upcoming testimony.

7. One of the witnesses noticed me sitting close by and listening to their conversation and immediately moved off to continue the conversation out of my range of hearing.

8. From what [he] observed and heard being said by these witnesses it was obvious to [him] that these individuals did not have independent knowledge of the facts and had to create their testimony so that it would match that of the longhaired individual that had exited the courtroom and Matt Bryngleson went in in order to prove the complaint regarding [Foldesi's] criminal charges.

(R., pp.66-67.)

On September 20, 2010, ten days after Foldesi filed Robi's affidavit, the court entered an order dismissing Claim 6, concluding Foldesi failed to raise a genuine issue of material fact entitling him to an evidentiary hearing on that claim. (R., pp.68-69.) Post-conviction counsel filed a notice of appeal on October 4, 2010 (R., pp.70-71), and Foldesi filed a *pro se* notice of appeal on October 15, 2010 (R., pp.73-76). However, on October 18, 2010, the court held a telephonic status conference at which it was agreed or determined that Foldesi could proceed to an evidentiary hearing on Claim 6. (R., p.4 (entry for status hearing on 10/18/2010); 2/11/2011 Tr., p.6, L.24 – p.10, L.4.) Consequently, on December 9, 2010, post-conviction counsel filed a notice withdrawing the notice of appeal he filed on behalf of Foldesi. (R., pp.88-89; 2/11/2011 Tr., p.7, L.25 – p.8, L.11.) The court conducted the evidentiary hearing on Claim 6 on April 1, 2011. (See generally 4/1/2011 Tr.)

At the evidentiary hearing, Foldesi called a single witness – Robi. (4/1/2011 Tr., pp.7-47.) After Robi testified, the stated “renew[ed]” its motion for

summary dismissal. (4/1/2011 Tr., p.47, Ls.3-5.) After the parties presented argument on the state's request, the court dismissed the petition. (4/11/2011 Tr., p.63, L.8.) The court thereafter entered a written order, which states, in part:

The matter having come before the Court for evidentiary hearing on April 1, 2011, and the Court having heard testimony and argument, the Court hereby orders the dismissal of claim #6 in the Petition for Post-conviction relief. . . .

The Court finds that Petitioner failed to present admissible evidence that would entitle Petitioner to relief. Petitioner claimed that the State's witnesses had spoke with each other about their testimony during the trial and offered perjured testimony. However, Petitioner failed to present testimony that would establish the State's witnesses were talking about their testimony during trial. Petitioner also failed to present any evidence that the State's witnesses had offered perjured testimony. The claim is dismissed because Petitioner has failed to present evidence establishing an essential element on which he bears the burden of proof.

(Order Dismissing Petition For Post-Conviction Relief, filed April 7, 2011 (augmentation).) Foldesi filed a timely notice of appeal. (Notice of Appeal, filed April 28, 2011 (augmentation).)

ISSUES

Foldesi states the issue on appeal as:

1. Did the district court err in summarily dismissing claim six of Mr. Foldesi's Petition for Post-Conviction Relief because the claim presents a genuine issue of material fact?
2. Did the district court err in failing to take judicial notice of the trial transcript from the underlying criminal case?

(Appellant's Brief, p.8.)

The state rephrases the issue as:

1. The district court dismissed Foldesi's Claim 6 after an evidentiary hearing. Does Foldesi's claim that he was entitled to an evidentiary hearing on Claim 6, therefore, fail?
2. Has Foldesi failed to establish reversible error in the district court's decision not to take judicial notice of the trial transcript at the evidentiary hearing given that he suffered no prejudice as a result of the court's failure to do so?

ARGUMENT

I.

Foldesi's Claim That The District Court Summarily Dismissed Claim 6 Is Belied By The Record

A. Introduction

Foldesi argues that Robi's testimony at the "summary dismissal hearing" raised a "factual issue" entitling him to an evidentiary hearing on Claim 6 of his petition. (Appellant's Brief, p.12.) Foldesi's claim fails because the hearing at which Robi testified was not a summary dismissal hearing, it was an evidentiary hearing. Since Foldesi received the very hearing he claims he was denied, his appellate claim of error is without merit.

B. Foldesi's Assertion That Claim 6 Was Summarily Dismissed Without An Evidentiary Hearing Is Belied By The Record

Foldesi's assertion that Claim 6 was summarily dismissed without an evidentiary hearing is belied by the record. The hearing on the state's motion for summary dismissal was held on August 18, 2010. The court, at that time, found Foldesi failed to support Claim 6 with admissible evidence that would raise a genuine issue of material fact. (R., p.62; 8/18/2010 Tr., p.15, Ls.12-19.) The court, however, gave Foldesi an additional 20 days to provide the necessary evidence. (R., pp.62-63.) The court even went so far as to give Foldesi guidance on how to improve the affidavit of Robi presented at the summary dismissal hearing in order to create a genuine issue of material fact. (8/18/2010 Tr., p.16, Ls.10-15.) The court also advised Foldesi that if he presented "admissible evidence," it would "conduct an evidentiary hearing." (R., p.63.) On

September 10, 2010, Foldesi submitted Robi's affidavit. (R., pp.66-67.) While the court entered a dismissal order ten days later, it is clear from the text of that order that it had not received Robi's affidavit. (R., p.68 ("Petitioner has failed to present the Court with any additional evidence, and therefore the Court finds that Petitioner's claim number six is unsupported by admissible evidence.")) That same day, for reasons that are not clear in the record, a telephonic status hearing was scheduled for October 18, 2010. (R., p.3 (9/20/2010 entry).)

The telephonic hearing conducted on October 18 is not transcribed, but the substance of what occurred at that hearing was summarized at a subsequent hearing held on February 11, 2011. Although the purpose of the February 11 hearing is not entirely clear, it appears the court was concerned that Foldesi's appeal would be dismissed as a result of the "Notice of Withdrawal of Notice of Appeal" filed by post-conviction counsel on December 9, 2010. (See generally 2/11/2011 Tr., p.4, L.10 – p.6, L.20.) In any event, it became clear during that hearing that the court was planning to conduct an evidentiary hearing on Foldesi's Claim 6 as discussed at the October 18 telephone hearing. What occurred between the October 18 hearing and the February 11 hearing can be ascertained from the following exchange:

[PROSECUTOR]: I think the only difficulty, Judge, is I don't think the dismissal of the UPC petition was final. I think we rescinded dismissal or allowed continued proceedings on allegation 6. And I think that happened in a telephonic status conference on October 19th [sic].

And then we set an evidentiary hearing for December 3rd of 2010. And shortly before that we got notice that the Court was unavailable and we cancelled our witnesses. And I think we just

assumed that we were still contemplating an evidentiary hearing on allegation No. 6.

...

THE COURT: Well, that's why I'm bringing you folks here, to bring the judge up to speed on this.

Is that your understanding as well, [counsel], that the –

[COUNSEL]: Yes. Yes, your Honor. As I understand it, there's only one issue pending in this court.

What happened is that you said you were going to dismiss all claims but I could get the one claim -- if I could get the one claim -- if I could get some information on the one claim, that you wouldn't dismiss that claim necessarily. I think I was a [sic] one-day late or something like that with the affidavit coming into your court.

I got it -- as soon as I got the affidavit, I gave it to the Court. But in the meantime the case gets dismissed. So I thought well, I better appeal.

So I appealed, and then we reopened it. So that's why I did the motion to withdraw the appeal because there's still a pending issue.

And I'm assuming that Mr. Foldesi's appeal -- I'm assuming that he would probably want to just withdraw that now and then appeal everything at one time if the Court finds against him.

THE COURT: All right. And, Mr. Foldesi, so you understand, I'm certainly willing to at this point, I think, probably enter an order staying the appeal, which gives you the full opportunity to appeal anything and everything, depending on this last issue. But we probably need to set that for hearing, then, and let's get this thing going along because I think obviously if the Court grants post-conviction relief after hearing the evidence and that that may -- there may not be a need for appeal. And if the Court doesn't grant that relief, then everything can go up on appeal.

(2/11/2011 Tr., p.6, L.22 – p.9, L.1.)

Following the foregoing exchange, the court asked the parties how long they anticipated the hearing would take. (2/11/2011 Tr., p.9, Ls.2-3.) Foldesi

indicated he was only planning to have Robi testify and the state advised it “actually had five witnesses subpoenaed last time.” (2/11/2011 Tr., p.9, Ls.4-14.) The court scheduled the hearing for three hours on April 1, 2011. (2/11/2011 Tr., p.9, Ls.18-24.)

Consistent with his prior representation, Foldesi called Robi as his only witness at the April 1 evidentiary hearing. (4/1/2011 Tr., pp.7-47.) After Robi testified, the state “renew[ed]” its motion for summary dismissal. (4/1/2011 Tr., p.47, Ls.3-4.) In presenting its argument in support of the motion, however, the state noted Robi’s affidavit created “some evidentiary issues, a question of fact that required the hearing today.” (4/1/2011 Tr., p.47, Ls.23-25.) The state then explained why it believed Foldesi had failed to present evidence entitling him to relief on Claim 6. (4/1/2011 Tr., pp.48-54.) While the state’s characterization of its motion as one for summary dismissal may not be technically correct, it is clear from the state’s argument that it was requesting dismissal of Foldesi’s Claim 6 because he failed to prove he was entitled to relief. Rule 41(b), I.R.C.P., specifically provides for such a motion when the “plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence” but has “shown no right to relief.” In such cases, the defendant may move for dismissal. *Id.*

Even if the state did not appreciate the distinction between summary dismissal and dismissal based on Foldesi’s failure to meet his burden of proof, any such misunderstanding does not somehow convert an evidentiary hearing into a summary dismissal hearing. Nor do any of the court’s comments

accepting the state's characterization of its motion as one for summary dismissal change the actual nature of the proceeding. Rather, it is clear from the record that the hearing held on April 1, 2011, which Foldesi calls the "summary dismissal hearing" (Appellant's Brief, p.12), was an evidentiary hearing.² The court's final order dismissing Claim 6 also supports the conclusion that the claim was dismissed after an evidentiary hearing. (Order Dismissing Petition for Post-Conviction Relief at p.1 ("The matter having come before the Court for evidentiary hearing on April 1, 2011, and the Court having heard testimony and argument, the Court hereby orders the dismissal of claim #6 in the Petition for Post-conviction relief.") (augmentation).)

Because the record belies Foldesi's claim that he did not receive an evidentiary hearing on Claim 6, he is failed to establish he is entitled to remand for this purpose.³

² Interestingly, although Foldesi refers to the April 1 hearing as the "summary dismissal hearing" in his Appellant's Brief, he referred to that same hearing as an evidentiary hearing in his "Motion to Augment the Record and Statement in Support Thereof" dated November 7, 2011, in which he requested augmentation with the "Exhibit List and Attached Respondent's Exhibit A, admitted at the April 1, 2011, Evidentiary Hearing."

³ Foldesi does not make any alternative argument that the court erred in denying relief on the merits of Claim 6. To the contrary, Foldesi acknowledges he "did not prove this claim by a preponderance of the evidence" at what he erroneously characterizes as the "summary dismissal hearing." (Appellant's Brief, p.12.)

II.
Foldesi Has Failed To Establish Reversible Error Based On The District Court's
Failure To Take Judicial Notice Of The Trial Transcript At The Evidentiary
Hearing

Foldesi argues the district court erred in failing to take judicial notice of the trial transcript from his underlying criminal case. (Appellant's Brief, pp.13-14.) In support of his argument, Foldesi relies on I.R.E. 201(d), which provides:

When a party makes an oral or written request that a court take judicial notice of records, exhibits or transcripts from the court file in the same or a separate case, the party shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all parties copies of such documents or items. A court shall take judicial notice if requested by a party and supplied with the necessary information.

Foldesi asked the district court to take judicial notice of specific items, including the trial transcript from his underlying criminal case. (R., p.32.) Although the state did not file a separate motion for judicial notice, it submitted the trial transcript from Foldesi's criminal case as an Exhibit to its Memorandum in Support of Motion for Summary Dismissal (Exhibit #1; 8/18/2010 Tr., p.4, Ls.17-18), and cited to portions of that transcript within its memorandum (R., pp.57, 59). Although the court did not enter a written order granting Foldesi's motion for judicial notice, arguably the court implicitly took judicial notice of the trial transcript in ruling on the state's motion for summary dismissal.

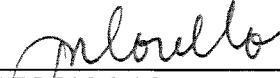
Even if this Court concludes the district court did not implicitly take notice of the documents identified in Foldesi's motion such that there was a technical violation of I.R.E. 201's requirement that the court take judicial notice when "requested by a party and supplied with the necessary information," Foldesi has failed to establish this is a basis for reversal. Foldesi's argument that the court

erred in failing to take judicial notice of the trial transcript seems to be predicated on the court's statement at the April 1 evidentiary hearing that it was declining to take judicial notice of the trial transcript. (Appellant's Brief, p.6.) This statement, however, appears to have been in response to the state's argument regarding Robi's trial testimony and the state's comment in support of its request for dismissal that it had "wanted the court to take judicial notice of the trial transcript" as indicated in its written motion for summary dismissal. (See 4/1/2011, p.52, L.24 – p.54, L.25.) It was certainly not in response to any request by Foldesi to take judicial notice at the April 1 hearing because no such request was made by Foldesi at that time. Rather, Foldesi's only request for judicial notice was made in conjunction with his petition in an effort to create a genuine issue of material fact in order to obtain an evidentiary hearing. Because the court conducted an evidentiary hearing on Claim 6, which is the only claim at issue on appeal, any failure by the court to take judicial notice for purposes of deciding whether to do so is harmless. Foldesi has failed to establish otherwise.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Foldesi's petition for post-conviction relief.

DATED this 22nd day of February, 2012.




JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of February, 2012, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

ELIZABETH ANN ALLRED
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.



JESSICA M. LORELLO
Deputy Attorney General