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Foldesi v. State Appellant's Brief Dckt. 38120

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL FRANCIS FOLDESI,)
)
 Petitioner-Appellant,) NO. 38120
)
 v.)
)
 STATE OF IDAHO,) APPELLANT'S BRIEF
)
 Respondent.)
 _____)

COPY

BRIEF OF APPELLANT

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

HONORABLE MICHAEL R. MCLAUGHLIN
District Judge

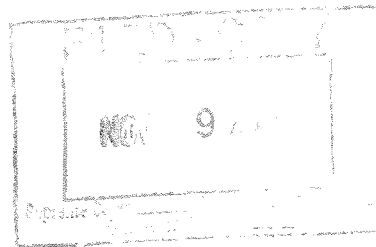
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STATEMENT OF THE CASE

Nature of the Case

Michael Francis Foldesi appeals from the district court's Order Dismissing Petition for Post-Conviction Relief. Mr. Foldesi asserts that the district court erred in summarily dismissing claim six in his post-conviction petition because he presented a genuine issue of material fact. Additionally, Mr. Foldesi asserts that the district court erred in failing to take judicial notice of trial transcripts from the underlying criminal case.

Statement of the Facts and Course of Proceedings

In 2007, Mr. Foldesi was convicted of delivery of a controlled substance and a persistent violator enhancement. (R., pp.5-6.) He appealed from the judgment of conviction for both charges. (R., p.6.) The Court of Appeals affirmed the convictions and a remittitur was issued in May of 2009. (R., p.6.)

In May of 2010, a Petition for Post-Conviction Relief was filed. (R., pp.5-18.) Mr. Foldesi asserted several post-conviction claims: 1) that his sentence was wrongfully enhanced and that the enhancement was a bill of attainder; 2) that the district court had failed to rule on his Motion to Strike the Information Part II, persistent violator enhancement, filed prior to trial, depriving him of due process and equal protection; 3) that Mr. Foldesi received ineffective assistance of counsel when counsel failed to argue the Motion to Strike; 4) that Mr. Foldesi received ineffective assistance of counsel when counsel failed to properly communicate with Mr. Foldesi about his civil forfeiture action; 5) that Mr. Foldesi received ineffective assistance of counsel when counsel failed to submit a true Notice of Intent to Offer Defense of Alibi, the notice submitted had an

incorrect address; 6) that Mr. Foldesi was denied a fair trial when officers offered “perjured testimony knowingly used by the prosecution to obtain a conviction.” Specifically, after his testimony, one officer left the courtroom and explained his testimony to fellow officers waiting to testify, who then presumably altered their testimony to match his testimony; 7) that Mr. Foldesi received ineffective assistance of counsel when counsel failed to object to the reading of a dynamite jury instruction. (R., pp.5-18.) Mr. Foldesi also filed a Motion and Affidavit in Support for Appointment of Counsel. (R., pp.27-29.) The motion was granted and counsel was appointed. (R., p.35.) Mr. Foldesi also filed a Motion to Take Judicial Notice of the Underlying Criminal Record Case No. H0600762. (R., pp.32-34.) Specifically, Mr. Foldesi requested that the district court take judicial notice of “the Record, Transcripts, PSI, and Exhibits.” (R., p.32.)

In July of 2010, the State filed an Answer asserting the following affirmative defenses: failure to state a ground upon which relief can be granted; to the extent that claims should have been raised on direct appeal, the claims are procedurally defaulted; the petition fails to raise an issue of material fact; and because the petition fails to state a claim upon which relief can be granted, even if the allegations are true, Mr. Foldesi is not entitled to any relief as a matter of law. (R., pp.42-45.) The State also filed a Motion for Summary Dismissal. (R., pp.51-52.) In the Memorandum in Support of Motion for Summary Dismissal, the State asserted that the first claim should be dismissed because Idaho courts have found that a persistent violator enhancement is not a bill of attainder and, therefore, the State is entitled to judgment as a matter of law. (R., pp.56-57.) The State also asserted that it was entitled to judgment as a matter of

law on claim two because the persistent violator enhancement is not a bill of attainder. (R., p.57.) On claim three, the State asserted that dismissal was necessary because Mr. Foldesi failed to show that counsel's performance was deficient, that he failed to show prejudice, and that a persistent violator enhancement is not a bill of attainder. (R., pp.57-59.) Claim four should be dismissed because it is not a "cognizable claim upon which relief can be granted pursuant to I.C. § 19-4901." (R., p.59.) The State asserted that claim five should be dismissed because Mr. Foldesi failed to "show that there was any resulting prejudice or that the result of the proceedings would have been different," because when the matter went to trial he was allowed to present the correct alibi address and defense. (R., pp.59-60.) On claim six, the State asserted that Mr. Foldesi failed to support the allegation with any admissible evidence. (R., p.60.) Finally, the State asserted that claim seven should be dismissed because the Court of Appeals addressed the claim and found that there was no dynamite instruction given. (R., pp.60-61.)

On August 18, 2010, a hearing on the motion to dismiss was held. (Tr.8/18/10, p.1, Ls.1-8.) The State presented argument consistent with their motion. (Tr.8/18/10, p.3, L.9 –p.10, L.3.) Mr. Foldesi submitted claims one through four and submitted claim five but noted that the issue "may have influenced the sentencing received." (Tr.8/18/10, p.10, Ls.6-20.) Counsel informed the district court that it would try to gather more evidence to support claim six and file that with the court at a later date. (Tr.8/18/10, p.10, L.21 – p.13, L.23.) Counsel also submitted on claim seven. (Tr.8/18/10, p.13, L.24 – p.14, L.3.)

The district court then found that:

The Court will dismiss 1 through 4. There's absolutely no basis for those. Again, you have to establish under the Strickland-type theory that there was – well, in this case, a persistent violator statute has been ruled to be constitutional. It's not a bill of attainder. There's case law on that. That's something that could have been brought up on the direct appeal. It wasn't.

And it wasn't because there was absolutely no basis for a licensed attorney to make such a presentation to the Appellate Court. Same is true with Claim 2 and 3, and so those are dismissed.

Claim 4, again, this is the forfeiture proceeding, civil asset forfeiture proceeding is not appropriate under the Uniform Post Conviction Procedure Act. That will be dismissed. Those are going to be dismissed with prejudice. So 1 through 4 are dismissed.

Claim 5. Again, first of all, the Court didn't rely upon an incorrect alibi address as a factor in sentencing. And the Court's sentence has been reviewed by the Court of Appeals along with the Rule 35, and so – there was absolutely nothing presented to the trier of fact, the jury, that there was some sort of an inaccurate alibi address that was used for impeachment purposes.

So again, back to that two-pronged test. First of all, it wasn't presented to the jury; and, secondly, because it wasn't presented to the jury, there's absolutely no prejudice. It's dismissed.

Claim 6. At this point the Court will dismiss Claim 6. . . . So as it stands now, even with the affidavit, Court will dismiss 6, but I'll allow you to refile in 20 days from the date of the Court's order.

...

Now, on the final claim, it has been ruled on by the Appellate Court. The Appellate Court, Court of Appeals said it was [sic] an error. So even if his counsel had objected, it was [sic] an error. It wasn't a dynamite instruction.

So the Court will dismiss Claim no. 7 with prejudice.

(Tr.8/18/10, p.14, L.9 – p.17, L.12.) Following the hearing on the motion for summary dismissal, the district court issued an Order Dismissing Petition for Post-Conviction Relief, dismissing all claims except for claim six, for which Mr. Foldesi was given 20

days to supplement the record with admissible evidence, for the reasons articulated on the record and because “there is no genuine issue of material fact as to those claims.” (R., pp.62-63.)

Thereafter, Mr. Foldesi submitted an Affidavit of Robi Foldesi. (R., pp.64-67.) The affidavit provided that Robi was sitting outside of the courtroom on the first day of his brother’s trial, when he saw a longhaired male that had just exited the courtroom go over and talk to other witnesses about where they were located in the parking lot at Kmart during the alleged illegal activities. (R., pp.66-67.) That the longhaired male was discussing Mr. Foldesi’s case and was coaching the other witnesses. (R., p.67.) And, that when the individuals noticed Robi they moved away to continue their conversation. (R., p.67.)

The district court then entered an Order Dismissing Petition for Post-Conviction Relief With Prejudice. (R., pp.68-69.) Appeals were filed. (R., pp.70-75.) However, the district court later acknowledged that it had not realized that the affidavit had been filed, rescinded the dismissal of claim six, and scheduled a hearing on claim six. (Tr.2/11/11, p.6, L.22 – p.9, L.1.)

Mr. Foldesi filed an Affidavit of Michael Foldesi summarizing the trial testimony of the relevant witnesses and illustrating that the testimony of the officers who were alleged to have discussed their testimony during trial matched while other witnesses testimony did not. (Augmentation: Affidavit of Michael Foldesi, March 23, 2011.)

At the hearing, Mr. Foldesi presented the testimony of his brother, Robi Foldesi. (Tr.4/1/11, p.6, Ls.4-20.) Robi testified that he was present at the courthouse for his brother’s trial and while he was in the hallway waiting to testify he saw some men in

suits, that he believed were police officers, talking to each other over a clip board and saying something about “over here” like he was “making a game plan . . . like he was doing a football play.” (Tr.4/1/11, p.7, L.1 – p.15, L.9.) Then the men noticed Robi and walked away. (Tr.4/1/11, p.15, Ls.14-25.)

The State argued that Robi could not say who the men were or if they even testified. (Tr.4/1/11, p.48, Ls.8-18.) The State also asked the district court to take judicial notice of the trial transcript. (Tr.4/1/11, p.53, Ls.1-2.) The State concluded that Mr. Foldesi had simply not met his burden and requested summary dismissal. (Tr.4/1/11, p.47, L.9 – p.54, L.25.) Mr. Foldesi argued that there is a genuine issue of material fact and the Robi Foldesi’s testimony was sufficient to survive summary dismissal. (Tr.4/1/11, p.55, L.7 - p.57, L.14.)

The district court acknowledged that it had been requested that it take judicial notice of the trial transcript, but declined to do so. (Tr.4/1/11, p.57, Ls.17-21.) The district court ultimately found that:

I’m left in a position where I have to speculate that, A, somebody came out of the courtroom; B, that they’ve discussed their testimony with perspective witnesses; and, C, that somehow that testimony was altered, changed or amended. And I have none of that before the court.

I recognize and respect the fact that that’s not an easy proposition to prove, but, nevertheless, there’s not sufficient evidence here for the court based upon giving – and giving the testimony every reasonable inference, I can’t find that there’s been a showing made that the witnesses’ testimony was altered or changed or that there was a violation of the court’s order to the witnesses not to discuss their testimony with other witnesses.

And, therefore, I can’t find that the outcome of this case has been altered or changed in any way.

(Tr.4/1/11, p.62, L.11 – p.63, L.5.)

The district court entered an Order Dismissing Petition for Post-Conviction Relief stating that:

The Court finds that Petitioner failed to present admissible evidence that would entitle Petitioner to relief. Petitioner claims that the State's witnesses had spoke [sic] 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.

This Order is based upon the Court's ruling in open court on April 2, 2011, and those findings of fact and conclusions of law are hereby incorporated into the Order as if set forth fully herein.

The Court hereby ORDERS that the Petition will be dismissed with prejudice.

(Augmentation: Order Dismissing Petition for Post-Conviction Relief.) Mr. Foldesi filed a Notice of Appeal timely from the district court's Order Dismissing Petition for Post-Conviction Relief. (Augmentation: Notice of Appeal.)

ISSUES

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?

ARGUMENT

I.

The District Court Erred By Summarily Dismissing Claim Six Of Mr. Foldesi's Petition For Post-Conviction Relief Because The Claim Presents A Genuine Issue Of Material Fact

A. Introduction

Mr. Foldesi asserts that claim six and the evidence offered in support presented a genuine issue of material fact. As such, the district court erred in summarily dismissing the claim.

B. Standard Of Review

In an appeal from post conviction proceedings, the appellate court will exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434 (Ct. App. 1992) (citations omitted). The review of "a district court's construction and application of a statute, the Uniform Post-Conviction Procedure Act (UPCPA), is a matter of free review." *Evensioski v. State*, 136 Idaho 189, 190 (2001) (citations omitted).

C. The District Court Erred By Summarily Dismissing Claim Six Of Mr. Foldesi's Petition For Post-Conviction Relief Because The Claim Presents A Genuine Issue Of Material Fact

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454, 456 (1991). It is a civil proceeding governed by the Uniform Post- Conviction Procedure Act (*hereinafter*, UPCPA) (I.C. §§ 19-4901 to 4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126

Idaho 813, 816 (Ct. App. 1995). However, the petition initiating post-conviction proceedings differs from the complaint initiating a civil action. A post-conviction petition is required to include more than “a short and plain statement of the claim”; it “must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached.” *Id.*; I.C. § 19-4903. “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c). In analyzing a post-conviction petition under this standard, the district court need not “accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Martinez*, 126 Idaho at 816-17. However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner’s allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only after the State controverts the petitioner’s allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612 (Ct. App. 1982). But in doing so, it must

still liberally construe the facts and draw reasonable inferences in favor of the petitioner. *Small*, 132 Idaho at 331.¹

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331. If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

In claim six, Mr. Foldesi asserted that he was denied a fair trial when officers offered "perjured testimony knowingly used by the prosecution to obtain a conviction." (R., pp.13-14.) Specifically, after his testimony, one officer left the courtroom and explained his testimony to fellow officers waiting to testify, who then presumably altered their testimony to match his testimony. (R., pp.13-14.)

In the State's Memorandum in Support of Motion for Summary Dismissal, the State asserted that Mr. Foldesi failed to support the allegation with any admissible evidence. (R., p.60.) Following a hearing on the motion for summary dismissal, the district court issued an Order Dismissing Petition for Post-Conviction Relief, dismissing all claims except for claim six, for which Mr. Foldesi was given 20 days to supplement the record with admissible evidence, for the reasons articulated on the record and because "there is no genuine issue of material fact as to those claims." (R., pp.62-63.)

Mr. Foldesi submitted the Affidavit of Robi Foldesi. (R., pp.64-67.) The affidavit provided that Robi was sitting outside of the courtroom on the first day of his brother's trial, when he saw a longhaired male that had just exited the courtroom go over and talk

¹ The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368 (Ct. App. 1996).

to other witnesses about where they were located in the parking lot at Kmart during the alleged illegal activities. (R., pp.66-67.) That the longhaired male was discussing Mr. Foldesi's case and was coaching the other witnesses. (R., p.67.) And, that when the individuals noticed Robi they moved away to continue their conversation. (R., p.67.)

Mr. Foldesi also filed an Affidavit of Michael Foldesi summarizing the trial testimony of the relevant witnesses, provided the order and opportunity for officers to have acted as he alleged, and illustrating that the testimony of the officers who where alleged to have discussed their testimony during trial matched while other witnesses testimony did not. (Augmentation: Affidavit of Michael Foldesi, March 23, 2011.)

At the summary dismissal hearing, Mr. Foldesi presented the testimony of his brother, Robi Foldesi. (Tr.4/1/11, p.6, Ls.4-20.) Robi testified that he was present at the courthouse for his brother's trial and while he was in the hallway waiting to testify he saw some men in suits, that he believed were police officers, talking to each other over a clip board and saying something about "over here" like he was "making a game plan . . . like he was doing a football play." (Tr.4/1/11, p.7, L.1 – p.15, L.9.) Then the men noticed Robi and walked away. (Tr.4/1/11, p.15, Ls.14-25.)

In this instance, a factual issue was raised as to whether officers who testified at Mr. Foldesi's trial discussed their testimony with another officer who had already testified in an attempt to present similar testimony at trial and a hearing should have been held on this issue. Certainly Mr. Foldesi did not prove this claim by a preponderance of the evidence at the summary dismissal hearing, but that is not a burden he is required to meet at the summary dismissal stage. Instead, he is only required to present an issue of material fact. In this case Mr. Foldesi supplied evidence

supporting his assertion; testimony and affidavits of Robi Foldesi who witnessed the unusual behavior outside of the courtroom in which Mr. Foldesi's trial was being held. Additionally, he attempted to provide the trial transcript to show the officer's had an opportunity to do what he alleged and to provide officer testimony showing that the officers who had opportunity to discuss testimony had similar testimony while the officer who did not have an opportunity to conspire with the other officers did not. Although the district court failed to take judicial notice of the transcript, Mr. Foldesi did provide an affidavit to show this same information to some extent. (Augmentation: Affidavit of Michael Foldesi, March 23, 2011.) This evidence is sufficient to present a question of material fact. As such, the proper course of action was for the district court to conduct an evidentiary hearing on the issue. Accordingly, the district court's order of summary dismissal should be reversed, claim six should be reinstated, and an evidentiary hearing held.

II.

The District Court Erred In Failing To Take Judicial Notice Of The Trial Transcript From The Underlying Criminal Case

In the case at hand, both Mr. Foldesi and the State requested that the district court take judicial notice of the trial transcript from the underlying criminal case. (R., pp.32-34; Tr.4/1/11, p.53, Ls.1-2.) The trial transcript was especially relevant in this case because it showed that the officers had an opportunity to discuss their testimony, as Mr. Foldesi alleged, and that the officers who had opportunity to discuss their testimony gave similar testimony, while the officer who did not have an opportunity, did not give similar testimony.

Idaho Rule of Evidence 201 governs judicial notice. Idaho Rule of Evidence

201(d) states:

(d) **When mandatory.** 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.

I.R.E. 201(d). As such, the district court was required to take judicial notice of the trial transcript as requested. The district court's failure to do so is error.

CONCLUSION

The district court erred in summarily dismissing claim six of Mr. Foldesi's Petition. Mr. Foldesi requests that this Court reverse the district court's order summarily dismissing this claim and remand for further proceedings.

DATED this 29th day of November, 2011.


ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

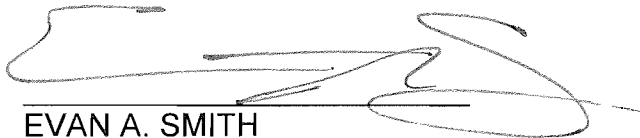
I HEREBY CERTIFY that on this 29th day of November, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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