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Ewell v. State Appellant's Brief Dckt. 38373

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERIC HAROLD EWELL,)
)
 Petitioner-Appellant,) NO. 38373
)
 v.)
)
 STATE OF IDAHO,) APPELLANT'S BRIEF
)
 Respondent.)
)
 _____)

BRIEF OF APPELLANT

COPY

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

HONORABLE CHERI C. COPSEY
District Judge

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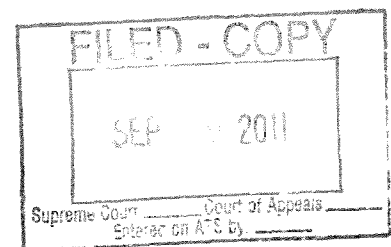


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STATEMENT OF THE CASE

Nature of the Case

Eric Harold Ewell appeals from the district court's order summarily dismissing his petition for post-conviction relief. He asserts that the district court erred by dismissing one of his claims because the court misperceived that claim and wrongfully concluded that it could have been raised on appeal and that it was not meritorious.

Statement of the Facts and Course of Proceedings

Mr. Ewell pleaded guilty to one count of possession of sexually exploitative material and admitted to an enhancement for being a repeat sexual offender. *State v. Ewell*, 147 Idaho 31 (Ct. App. 2009). He appealed, and his judgment of conviction was affirmed on appeal. *Id.*

In 2010, Mr. Ewell filed a petition for post-conviction relief. (R., p.3.) He alleged that his fifth, sixth, and fourteenth amendment rights were violated, that his plea was neither knowingly nor intelligently given, that he was not Mirandized prior to the psychosexual evaluation, and that he did not have the opportunity to review his Presentence Investigation Report (*hereinafter*, PSI). (R., p.4.) He asked that his sentence of twenty-five years, with fifteen years determine, be reduced to twenty years, with fifteen years determinate. (R., p.5.)

Specifically, Mr. Ewell alleged that he was not made aware that he could refuse to participate in the court-ordered psychosexual evaluation and by failing to be present during the examination. (R., pp.14-20.) He further alleged that his attorney as ineffective for failing to ensure that he was Mirandized prior to the PSI and by failing to

be present with him during the PSI interview. (R., pp.31-33.) He also asserted that he only had about 10 minutes to review the PSI. (R., p.31.) Mr. Ewell acknowledged that in *Stuart v. State*, 145 Idaho 467 (2008), the Idaho Court of Appeals held that it was not ineffective assistance of counsel to fail to provide advice prior to an individual undergoing a PSI because the PSI was not a critical stage. (R., p.32.) He requested that *Stuart* be overruled. (R., p.33.)

He further alleged that his attorney was ineffective for failing "preserve the primary issue for appeal." (R., p.74.) Mr. Ewell alleged that he had a letter from his attorney acknowledging that he was ineffective because he had not renewed a motion to dismiss after the State filed an amended information, and that this error was mentioned in the appellate court's decision. (R., p.74.)

The district court appointed counsel for Mr. Ewell. (R., p.95.) It then issued an order conditionally dismissing the petition. (R., p.104.) The district court took judicial notice of the entry of plea proceedings, and noted that Mr. Ewell was informed of the possible sentence he could receive, and noted that he was informed by the court that he would refuse to participate in the both the PSI and the psychosexual evaluation. (R., pp.107-08.) It also noted that Mr. Ewell represented that his attorney had explained that he had a constitutional right to remain silent during the examinations. (R., p.108.) The court also took judicial notice of the sentencing hearing, and noted that during that hearing, Mr. Ewell represented to the court that he had sufficient time to review the evaluations. (R., p.112.)

The district court concluded that Mr. Ewell was advised of his right to remain silent during the change of plea hearing, and therefore this claim was disproven by the

record. (R., pp.115-16.) Regarding the claim that counsel should have been present during these evaluations, the court held that he was not entitled to have counsel present, relying on *Hughes v. State*, 148 Idaho 448 (Ct. App. 2009), and *Stuart v. State*, 145 Idaho 147 (Ct. App. 2007). Regarding Mr. Ewell's mention that counsel should have hired an expert, the court noted that this was not supported by any evidence or facts which would have been produced. (R., p.116.) The court held that Mr. Ewell was informed of the possible penalties when he pleaded guilty. (R., p.117.)

Regarding the claim that counsel was ineffective for failing to renew the motion to dismiss following the amended information, the court held that such a claim could have been raised on appeal and would not have been successful as it does not violate a defendant's rights to consider prior convictions. (R., p.118.) The court gave Mr. Ewell twenty days to respond. (R., p.119.)

Mr. Ewell did not respond and the district court then dismissed the petition on the same grounds as set forth in the notice. (R., p.121.) Mr. Ewell appealed. (R., p.139.)

ISSUE

Did the district court err by dismissing one of Mr. Ewell's claims because it misperceived the nature of that claim?

ARGUMENT

The District Court Erred By Dismissing One Of Mr. Ewell's Claims Because It Misperceived The Nature Of That Claim

A. Introduction

Mr. Ewell asserts that, because the district court misperceived the nature of his claim regarding ineffectiveness of his appellate attorney, the district court improperly granted summary dismissal as to this claim.

B. The District Court Erred By Dismissing One Of Mr. Ewell's Claims Because It Misperceived The Nature Of That Claim

Mr. Ewell appeals the summary dismissal of his petition for post-conviction relief. An application for post-conviction relief is civil in nature. *Baldwin v. State*, 145 Idaho 148, 153 (2008) (citing *Gilpin-Grubb v. State*, 138 Idaho 76, 79-80 (2002)). An applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *Id.* The court may summarily dismiss a petition for relief when the court is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. *Id.* (citing I.C. § 19-4906(b)). However, disposition on the pleadings and record is not proper if there exists a material issue of fact. *Id.* If genuine issues of material fact exist that would entitle the applicant to relief, if resolved in the applicant's favor, summary disposition is improper and an evidentiary hearing must be conducted. *Id.* (citing *Berg v. State*, 131 Idaho 517, 518 (1998) (citations omitted)).

In his petition, Mr. Ewell alleged that his attorney was ineffective for failing "preserve the primary issue for appeal." (R., p.74.) Mr. Ewell alleged that he had a letter from his attorney acknowledging that he was ineffective because he not renewed

a motion to dismiss after the State filed an amended information, and that this error was mentioned in the appellate court's decision. (R., p.74.) Regarding this claim, the district court held that such a claim could have been raised on appeal and would not have been successful as it does not violate a defendant's rights to consider prior convictions. (R., p.118.) The court cited cases holding state recidivist statutes do not violate double jeopardy and that a court may consider prior convictions. (R., p.118.) The district court erred.

Mr. Ewell's claim is supported by the Court of Appeals' opinion on his direct appeal. See *State v. Ewell*, 147 Idaho 31 (Ct. App. 2009). In *Ewell*, the Court of Appeals stated that Mr. Ewell was charged with six counts of sexual exploitative material and with an enhancement for being a persistent violator. *Id.* at 33. The enhancement alleged that Mr. Ewell had been convicted of luring with a sexual motivation in the State of Washington. *Id.* Mr. Ewell filed a motion to dismiss the enhancement, asserting that the Washington conviction did not have a substantially equivalent Idaho counterpart and therefore could not be used to enhance his offenses. *Id.* The State then amended the information to include luring, luring with a sexual motivation, and communicating with a minor for immoral purposes. *Id.* Mr. Ewell then filed a new motion to dismiss on the grounds that the enhancement was unconstitutional and inapplicable to him. *Id.* After his motions were denied, Mr. Ewell pleaded guilty to one count of possession of sexually exploitative material and admitted to the enhancement, but he preserved the right to appeal. *Id.*

On appeal, the Court of Appeals concluded that it need not address the first issue of whether the enhancement should have been dismissed on the basis that there

was no substantially similar conviction in the State of Idaho. *Id.* at 34. The court held that it need not address this claim because, even assuming error, "it remains that the information was amended and, therefore, any deficiency in the original information is irrelevant." *Id.* The court specifically noted that Mr. Ewell did not challenge the relevant of the conviction for communication with a minor for immoral purposes in justifying the enhancement. *Id.*

Mr. Ewell specifically alleged that his attorney was ineffective for failing to renew the motion to dismiss and that this error was mentioned by the Court of Appeals. (R., p.74.) And Mr. Ewell is correct in that the Court of Appeals held that, because the motion was not renewed following the amendment of the information, it could affirm on this alternative, uncontested ground.

The district court erred in its analysis of this claim. First, the court wrongly perceived this is a claim that his attorney should have generally challenged the use of prior allegations against him as a double jeopardy violation. (R., p.135.) That was not Mr. Ewell's claim; his claim was that his attorney should have renewed the motion to dismiss challenging the applicability of the Washington offenses because they were not substantially similar to any Idaho offenses. (R., p.74.)

Second, the court erred by holding that this claim could have been raised on direct appeal. As the Court of Appeals' decision makes clear, it could not address any claim of error regarding the amended information because the motion to dismiss was not renewed following amendment of the information. *Ewell* 147 Idaho at 33-34. Because the motion was not renewed, the claim could not have pursued on appeal.


Finally, the court erred in its analysis regarding the success of any potential challenge. The court held that the use of prior convictions does not violate double jeopardy. (R., p.135.) Mr. Ewell does not take issue with this conclusion. However, this was not the nature of the claim being raised. Mr. Ewell specifically alleged that counsel was ineffective for failing to renew the challenge to the information after its amendment so that he could assert that the Washington offenses were not substantially similar to Idaho offenses. This claim was unaddressed on appeal because it was not properly preserved.

The district court misperceived the claim and improperly held that 1) it could have been raised on appeal; and 2) that a challenge would not be successful because the use of prior convictions does not violate double jeopardy. Therefore, this case must be remanded to the district court to properly address this claim.

CONCLUSION

Mr. Ewell requests that the district court's order summarily dismissing his petition be reversed and his case remanded for further proceedings.

DATED this 9th day of September, 2011.


JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of September, 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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