12-22-2009

Hoskins v. State Respondent's Brief Dckt. 36337

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRY HOSKINS,	)	
	)	
Petitioner-Appellant,	)	NO. 36337
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM

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STATEMENT OF THE CASE

Nature of the Case

Terry Hoskins appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

Hoskins pled guilty to possession of a controlled substance on October 29, 2007. (R., p.3.) He received a unified sentence of four years with three years fixed. (R., p.5.) Hoskins did not file a direct appeal. (See generally, R.)

Hoskins did file a timely *pro se* petition for post-conviction relief (R., pp.3-9) and a request for counsel (R., pp.10-15). Hoskins' petition made a claim of ineffective assistance of counsel based on his trial counsel's failure to file a motion to suppress. (See R., pp.3-9.) The district court appointed counsel (R., p.20) and granted Hoskin's motion to extend time to file a supplemental or amended petition (R., pp.22-27). Hoskins filed a *pro se* affidavit in support of his petition, again claiming the search of his vehicle incident to his arrest was illegal. (R., pp.28-30.) The state filed a motion for summary disposition. (R., pp.31-33.) Hoskins, with appointed counsel, filed another affidavit in support of his petition, making the same ineffective assistance of counsel claim. (R., pp.34-36.)

The district court held a hearing on the state's motion. (See generally, 3/2/09 Tr.) At the conclusion of the hearing, the district court granted the state's motion for summary dismissal and denied Hoskins' petition for post-conviction relief, reasoning that any motion to suppress would have been denied. (R., pp.37-40; Tr., p.8, L.1 – p.13, L.15.) Hoskins timely appealed. (R., pp.42-45.)

ISSUE

Hoskins states the issue on appeal as:

> *Did the district court err in summarily dismissing Mr. Hoskins' petition for post-conviction relief?*

(Appellant's brief, p.6.)

The state rephrases the issue on appeal as:

Has Hoskins failed to establish he raised a genuine issue of material fact in relation to his ineffective assistance of counsel claim such that the court should have conducted an evidentiary hearing rather than summarily dismissing his claim?

ARGUMENT

Hoskins Has Failed To Establish The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

Hoskins contends the district court erred in summarily dismissing his claim that trial counsel was ineffective because counsel did not file a motion to suppress. (Appellant's brief, pp.23-27.) According to Hoskins, he provided sufficient evidence in support of this claim to raise a genuine issue of material fact entitling him to an evidentiary hearing. (Appellant's brief, pp.15-22.) Hoskins' claim fails. A review of the record and the applicable law reveals the district court correctly concluded Hoskins was not entitled to an evidentiary hearing or post-conviction relief.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Hoskins Has Failed To Establish The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Hassett v. State, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). A court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. Summary dismissal is akin to summary judgment. Hassett, 127 Idaho at 315, 900 P.2d at 223 (referencing I.R.C.P. 56). A claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); see also Roman, 125 Idaho at 647, 873 P.2d at 901.

Dismissal is proper where the evidence fails to establish an essential element of the applicant's claim or does not support relief as a matter of law. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975); Wilson v.

State, 133 Idaho 874, 878, 993 P.2d 1205, 1209 (Ct. App. 2000). However, if an applicant presents a material factual issue, an evidentiary hearing must be conducted. Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991). Thus, to withstand the state's motion, Hoskins had the burden of presenting admissible evidence to establish a prima facie case of ineffective assistance of counsel.

In order to establish a prima facie case of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989).

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). A reviewing court evaluates counsel's performance at the time of the alleged error, not in hindsight, and presumes that "trial counsel was competent and that trial tactics were based on sound legal strategy." State v. Porter, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997). Trial counsel's strategic and

tactical decisions will not be second-guessed on review or serve as a basis for post-conviction relief under a claim of ineffective counsel unless the UPCPA petitioner has shown that the decision resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review. Giles v. State, 125 Idaho 921, 924, 877 P.2d 365, 368 (1994); Cunningham v. State, 117 Idaho 428, 430-31, 788 P.2d 243, 245-46 (Ct. App. 1990).

According to Hoskins' allegations, in March of 2007 law enforcement officers arrested him on two misdemeanor warrants while Hoskins was inside his vehicle. (R., p.34.) The officers allowed Hoskins to finish a cigarette and tell his girlfriend good-bye before they handcuffed Hoskins and placed him in a patrol vehicle. (R., p.34.) Upon a search incident to Hoskins' arrest, officers found a spoon with a white substance on it that field tested positive for methamphetamine. (R., pp.34-35.) Hoskins bases his ineffective assistance of counsel claim on his trial counsel's failure to file a motion to suppress that evidence. (R., pp.3-9, 28-30, 34-36.)

When a post-conviction petitioner claims that his counsel was ineffective for failing to file a motion in his underlying criminal case, the court "may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance." Sanchez v. State, 127 Idaho 709, 713, 905 P.2d 642, 646 (Ct. App. 1995) (citing Huck v. State, 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct. App. 1993)). "[A] conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the [Strickland] test." Id. Thus, "[i]f the motion

lacked merit and would have likely been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of his pursuit." Id.

The Fourth Amendment prohibits unreasonable searches and seizures. "A warrantless search is presumptively unreasonable unless it falls within certain special and well-delineated exceptions to the warrant requirement." State v. Kerley, 134 Idaho 870, 874, 11 P.3d 489, 493 (Ct. App. 2000) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971); State v. Ferreira, 133 Idaho 474, 479, 988 P.2d 700, 705 (Ct. App. 1999)). A search incident to arrest is a well established exception to the warrant requirement and, as such, does not violate the Fourth Amendment. Chimel v. California, 395 U.S. 752, 762-63 (1969); Kerley, 134 Idaho at 874, 11 P.3d at 493. Furthermore, prior to Arizona v. Gant, 129 S.Ct. 1710 (2009), it was well settled that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." New York v. Belton, 453 U.S. 454, 460 (1981), quoted in State v. Bromgard, 139 Idaho 375, 379, 79 P.3d 734, 738 (Ct. App. 2003).[1]

The United States Supreme Court revisited the Belton rule, however, in Gant. Gant "was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, [and] police officers searched his car and

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[1] In State v. Charpentier, the Idaho Supreme Court adopted the rule established by the United States Supreme Court in Belton "as the proper interpretation of Article I, § 17 of the Idaho Constitution." 131 Idaho 649, 652, 962 P.2d 1033, 1037 (1998).

discovered cocaine in the pocket of a jacket on the backseat." 129 S.Ct. 1710, 1714. The Arizona Supreme Court held that the Belton rule did not "justify the search in [Gant's] case" because "Gant could not have accessed his car to retrieve weapons or evidence at the time of the search." Id. The United States Supreme Court affirmed the Arizona Supreme Court and held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contained evidence of the offense of arrest." Id., 129 S.Ct. 1710, 1724. Gant was decided about two years after the entry of judgment against Hoskins, and about a month after the dismissal of his post-conviction petition.

Hoskins admits that had trial counsel filed a motion to suppress he "would have requested relief that appeared to be unavailable *under existing Idaho precedent*." (Appellant's brief, p.23 (emphasis in original).) Hoskins, however, argues that due to differing interpretations of Belton and Thorton over the years (Appellant's brief, pp.23-27), "competent counsel would have challenged the search in Mr. Hoskins' case as having exceeded that which was permitted under the 'search incident to arrest' exception to the warrant requirement. And . . . Idaho precedent notwithstanding, that motion should have been successful." (Appellant's brief, p.27).

The search, at the time of Hoskins' arrest, was legally conducted as a search incident to arrest under existing Idaho and U.S. law.[2] At the hearing on the motion for summary disposition, the district court heard argument on, and considered the probability of, the success of the suppression motion Hoskins claims his trial counsel should have filed. The district court found that whether Hoskins was inside his vehicle or "had been removed, based on the current status of Idaho law, that search could have taken place and was, therefore, a proper warrrantless search of that vehicle pursuant to Idaho law." (Tr., p.12, Ls.8-11.) The district court went on to explain that it would not have granted a motion to suppress by Hoskins' trial counsel and did "not see any basis of why any other court would [have] suppressed that evidence." (Tr., p.12, Ls.19-21.)

Hoskins failed to raise any genuine issues of material fact to demonstrate deficient performance on the part of trial counsel for failing to file a motion to suppress. Given the state of the law in both Idaho and the U.S. at the time of Hoskins' arrest, a motion to suppress in this case would have been denied and Hoskins' counsel was not deficient for failing to pursue it. Sanchez, 127 Idaho at 713, 905 P.2d at 646 (internal citation omitted). As a result, Hoskins could not have been prejudiced by his attorney's decision not to file the motion. Id. Hoskins, then, has failed to establish the district court erred when it summarily dismissed Hoskins' petition for post-conviction relief.

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[2] The state notes that Hoskins has failed to articulate how he would have prevailed on his suppression motion even in light of Gant. He merely assumes he would have. (Appellant's brief, p.27.)

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

DATED this 22nd day of December 2009.

JENNIFER E. BIRKEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of December 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK R. LEHTINEN
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.

JENNIFER E. BIRKEN
Deputy Attorney General

JEB/pm