

11-10-2011

Gerardo v. State Appellant's Brief Dckt. 38592

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Gerardo v. State Appellant's Brief Dckt. 38592" (2011). *Not Reported*. 214.
https://digitalcommons.law.uidaho.edu/not_reported/214

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL	4
ARGUMENT	4
I. The District Court Erred When It Dismissed Mr. Gerardo's Petition For Post-Conviction Relief	4
A. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his trial counsel	5
B. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his appellate counsel.....	7
C. Mr. Gerardo maintained and provided evidence of a factual claim of innocence, thereby demonstrating prejudice.....	8
CONCLUSION.....	9
CERTIFICATE OF MAILING	10

I. TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 687 (1984) 4, 9

STATE CASES

McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999) 4

Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App.1990) 4

Young v. State, 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App.1988) 4

Hassett v. State, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995) 5, 9

Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988) 5

Suits v. State, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006) 5

I. STATEMENT OF THE CASE

A. Nature of the Case

Frank Gerardo appeals from the district court's order dated March 8, 2011; in which the district court denied his petition for post-conviction relief, after hearing. Mr. Gerardo asserts that the district court erred by denying his petition for post-conviction relief.

B. Statement of the Facts & Course of Proceedings

On August 18, 2009, Mr. Gerardo filed a petition for post-conviction relief along with a supporting affidavit, alleging ineffective assistance of counsel regarding the performance of both his trial level and appellate level attorneys. (R., pp.16 and 25). due to ineffective assistance of counsel. (R., p. 128, also, *Affidavit of Frank Gerardo*, R., p. 145-146).

Mr. Gerardo's position in his Amended Verified Petition for Post Conviction Relief was that his trial attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

- a. failed to request a limiting instruction with regards to the address of Mr. Gerardo and Mr. Johnny Gonzalez at 21st. Avenue South in Nampa, Idaho after the district court denied a motion in limine to exclude such statements as hearsay;
- b. failed to fully investigate the facts of Mr. Gerardo's case by failing to interview prior to trial and call during trial, despite Mr. Gerardo's request, Ms. Christina Delgado who would have testified that Mr. Gerardo and Mr. Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charge;

c. failed to introduce evidence that contradicted the State's evidence that Mr. Gerardo and co-defendant Mr. Johnny Gonzalez shared the same address. (R., 45.). (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Gerardo's position in his Amended Verified Petition for Post-conviction Relief was that his appellate attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

a. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion to sever;

b. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion for mistrial. (R., 45-46.); (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Gerardo supplied evidence via his Amended Verified Petition for Post Conviction Relief a factual claim of innocence, stating: that his charges alleged events alleged to have occurred on or about the night of January 24, 2006; that he was arrested on or about January 25, 2006 and on or about that same day placed in the custody of the Canyon County Jail in the same holding cell with Keith Alan Ogburn, co-defendant; and that prior to January 15, 2006 when he was placed into custody, he had never met Keith Alan Ogburn. (R., 46.). Further, the record before the trial court reflected the Affidavit of Keith Alan Ogburn, in which Mr. Ogburn testified that he had never met Mr. Gerardo prior to being placed into the same holding cell with Mr. Gerardo on or about January 25, 2006, corresponding to Mr. Gerardo's testimony. (R., 50.), (See also Affidavit of Frank Gerardo, R. 53 - 56.).

An evidentiary hearing was conducted on February 25, 2011. (Tr. p. 5). The testimony of Keith Alan Ogburn and Mr. Gerardo was elicited on behalf of Mr. Gerardo. (Tr. pp. 9 - 28). No witnesses appeared for the State.

Mr. Gerardo supplied evidence via his Amended Verified Petition for Post Conviction Relief a factual claim of innocence, stating: that his charges alleged events alleged to have occurred on or about the night of January 24, 2006; that he was arrested on or about January 25, 2006 and on or about that same day placed in the custody of the Canyon County Jail in the same holding cell with Keith Alan Ogburn, co-defendant; and that prior to January 15, 2006 when he was placed into custody, he had never met Keith Alan Ogburn. (R., 46.). Further, the record before the trial court reflected the Affidavit of Keith Alan Ogburn, in which Mr. Ogburn testified that he had never met Mr. Gerardo prior to being placed into the same holding cell with Mr. Gerardo on or about January 25, 2006, corresponding to Mr. Gerardo's affidavit. (R., 50.), (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Keith Ogburn testified at the February 25, 2011 hearing on post conviction to the same facts, namely that he had never met Mr. Gerardo before the two of them were arrested and placed into the same holding cell on or about January 25, 2006. (Tr., p. 9, Line 12 - p. 12. Line 10.). In fact, Mr. Ogburn testified in response to the State's cross examination, "I just don't know Mr. Gerardo." (Tr., p. 12, Line 10.).

Mr. Gerardo also testified on his own behalf. His testimony matched the sworn facts stated in his verified amended petition and his affidavit in support, both referenced above. (Tr., p. 14, Line 12 - p. 12. Line 10.).

The district court by Order denied Mr. Gerardo's petition for post-conviction relief. (R., 91-92.).

Mr. Gerardo timely filed his appeal. (R., 93-95.).

II. ISSUES PRESENTED ON APPEAL

- A. Did the district court err when it dismissed Mr. Gerardo's Petition for Post-Conviction Relief concerning his trial counsel?
- B. Did the district court err when it dismissed Mr. Gerardo's Petition for Post-Conviction Relief concerning his appellate counsel?

III. ARGUMENT

I.

The District Court Erred When It Dismissed Mr. Gerardo's Petition For Post-Conviction Relief

Upon review of a district court's denial of a petition for post-conviction relief when an evidentiary hearing has occurred, Idaho appellate courts will not disturb the district court's factual findings unless they are clearly erroneous. *McKinney v. State*, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999), *citing* I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App.1990). When reviewing mixed questions of law and fact, the appellate court defers to the district court's factual findings supported by substantial evidence, but freely reviews the application of the relevant law to those facts. *Id.*, *citing* *Young v. State*, 115 Idaho 52, 54, 764 P.2d 129, 131 (Ct. App.1988).

To prevail on an ineffective assistance of counsel claim in a post-conviction action, one must show that his or her attorney's performance was deficient, and that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984);

Hassett v. State, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Suits v. State*, 143 Idaho 160, 162, 139 P.3d 762, 764 (Ct. App. 2006). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.*

A. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his trial counsel.

Mr. Gerardo's position in his Amended Verified Petition for Post Conviction Relief was that his trial attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

a. failed to request a limiting instruction with regards to the address of Mr. Gerardo and a Mr. Johnny Gonzalez at 21st. Avenue South in Nampa, Idaho after the district court denied a motion in limine to exclude such statements as hearsay;

b. failed to fully investigate the facts of Mr. Gerardo's case by failing to interview prior to trial and call during trial, despite Mr. Gerardo's request, Ms. Christina Delgado who would have testified that Mr. Gerardo and Mr. Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charge;

c. failed to introduce evidence that contradicted the State's evidence that Mr. Gerardo and co-defendant Mr. Johnny Gonzalez shared the same address. (R., 45.). (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Gerardo presented evidence in the form of his verified petition, his affidavit, and the testimony of co-defendant Keith Ogburn and himself. His verified petition and affidavit provide evidence of the above claims. (R., 45, 53-56.).

Moreover, he testified to those facts at hearing. He testified that he had asked his attorney a limiting instruction with regards to the address of Mr. Gerardo and a Mr. Johnny Gonzalez at 21st. Avenue South in Nampa, Idaho. (Tr., p. 19, line 19 – p. 20, line 2.). This was important because the admission of testimony that Mr. Gerardo shared housing with co-defendant Mr. Gonzalez was not supposed to come in, and undercut Mr. Gerardo's position that he did not know the co-defendants, nor was he involved in a crime with them.

Further, Mr. Gonzalez's affidavit makes clear that Mr. Gonzalez did not share that same address, and that the first time he met Mr. Gerardo was when he was placed in the same holding tank as Mr. Gerardo. (See Affidavit of Johnny Gonzalez, R., 15 – 16.).

Additionally, Mr. Gerardo testified about his attorney's failure to investigate and introduce the testimony of Ms. Christina Delgado who would have testified that Mr. Gerardo and Mr. Gonzalez had separate residences and did not know each other prior to being arrested on the underlying charge. (Tr., p. 15, Line 5 – p. 16, Line 11; p. 17, Line 10 – p. 18, Line 6.). This failure is important as it supports Mr. Gerardo's statements that he had not met the co-defendants in this case, and therefore he could not be guilty. Mr. Gerardo's live testimony, affidavits and verified petition amply demonstrate a reasonable probability that the outcome of his trial would have been different had his attorney not failed to take the necessary steps requested.

Therefore, it is Mr. Gerardo's position that the district court erred by denying his claim of ineffective assistance of counsel and thereby his claim for post-conviction relief.

B. The District Court erred when it dismissed Mr. Gerardo's claim of ineffective assistance of counsel with regard to his appellate counsel.

Mr. Gerardo's position in his Amended Verified Petition for Post-conviction Relief was that his appellate attorney was ineffective such that he received ineffective assistance of counsel because his attorney:

a. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion to sever;

b. failed to raise on appeal the issue of the district court's denial of Mr. Gerardo's motion for mistrial. (R., 45-46.); (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Gerardo provided evidence via his verified petition and his sworn affidavit regarding the above claims. (R., 45-46.); (See also Affidavit of Frank Gerardo, R. 53 - 56.). Further, he testified at his hearing on his petition for post-conviction relief that he asked his attorney to raise the issue of severance, and the denial of his motion for mistrial, but that his attorney did not raise them. (Tr., p. 18, Line 21 – p. 20, Line 2.).

The district court incorrectly reasoned in its order denying relief that the issues related to mistrial and severance were direct appeal issues and therefore could not be subject of post-conviction relief. (R., 93.).

Mr. Gerardo's position is that his appellate attorney failed to raise the requested issues and was therefore ineffective. Evidence of those omissions was provided to the district court in the form of a verified amended petition, an affidavit, and testimony.

Mr. Gerardo's contention that failure to raise these issues on appeal constitutes ineffective assistance on the part of his appellate attorney is not barred by the fact that the issues could have been raised on appeal.

The district court in a very conclusory fashion ruled that appellate counsel's representation was competent and that the failure to present the issues amounted to strategy. Such a conclusion is in error. Mr. Gerardo wanted those issues raised, and so made the request of his attorney. His attorney did not do so. Mr. Gerardo argues that such a failure amounts to ineffective assistance by falling below the objective standards of reasonableness.

C. Mr. Gerardo maintained and provided evidence of a factual claim of innocence, thereby demonstrating prejudice.

Mr. Gerardo supplied evidence via his Amended Verified Petition for Post Conviction Relief a factual claim of innocence, stating: that his charges alleged events alleged to have occurred on or about the night of January 24, 2006; that he was arrested on or about January 25, 2006 and on or about that same day placed in the custody of the Canyon County Jail in the same holding cell with Keith Alan Ogburn, co-defendant; and that prior to January 15, 2006 when he was placed into custody, he had never met Keith Alan Ogburn. (R., 46.). Further, the record before the trial court reflected the Affidavit of Keith Alan Ogburn, in which Mr. Ogburn testified that he had never met Mr. Gerardo prior to being placed into the same holding cell with Mr. Gerardo on or about January 25, 2006, corresponding to Mr. Gerardo's affidavit. (R., 50.), (See also Affidavit of Frank Gerardo, R. 53 - 56.).

Mr. Keith Ogburn testified at the February 25, 2011 hearing on post conviction to the same facts, namely that he had never met Mr. Gerardo before the two of them were arrested and placed into the same holding cell on or about January 25, 2006. (Tr., p. 9, Line 12 - p. 12. Line 10.). In fact, Mr. Ogburn testified in response to the State's cross examination, "I just don't know Mr. Gerardo." (Tr., p. 12, Line 10.).


Mr. Gerardo also testified on his own behalf. His testimony matched the sworn facts stated in his verified amended petition and his affidavit in support, both referenced above. (Tr., p. 14, Line 12 - p. 12. Line 10.).

Therefore, Mr. Gerardo demonstrated a claim of factual innocence, and thereby demonstrated prejudice caused by the failings of his attorneys. It is Mr. Gerardo's position that if his attorneys had performed the requests made by their client, there is a reasonable probability that the outcome of the trial, and subsequently the appeal, would have been different. It is therefore his position that he demonstrated that his attorneys' performance was deficient, and that he was prejudiced by the deficiencies. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995).

IV. CONCLUSION

Based on the above, Mr. Gerardo respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.

DATED this 9 day of November, 2011.


STEPHEN D. THOMPSON
Conflict Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of November, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

Kenneth K. Jorgensen
Deputy Attorney General
Criminal Division
Post Office Box 83720
Boise, Idaho 83720-0010

A handwritten signature in black ink, appearing to read 'S. D. Thompson', written over a horizontal line.

STEPHEN D. THOMPSON
Conflict Appellate Public Defender