

3-12-2012

Turney v. State Respondent's Brief Dckt. 38669

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

Recommended Citation

"Turney v. State Respondent's Brief Dckt. 38669" (2012). *Not Reported*. 258.
https://digitalcommons.law.uidaho.edu/not_reported/258

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.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PHILIP A. TURNEY)	
)	
Petitioner-Appellant,)	NO. 38669
)	
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

HONORABLE CHERI C. COPSEY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PHILIP A. TURNEY
IDOC #24289
ICC G-116 A
PO Box 70010
Boise, Idaho 83707

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

FILED - COPY
MAR 12 2012
Supreme Court _____ Court of Appeals _____
Entered on A/S by _____

ATTORNEYS FOR
RESPONDENT

PRO SE
PETITIONER-APPELLANT

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 The Proceedings	1
ISSUES.....	3
ARGUMENT	4
Turney's Claims For Post-Conviction Relief Were Properly Found To Be Frivolous.....	4
A. Introduction.....	4
B. Standard Of Review	4
C. Counsel Was Properly Denied Because Turney's Claims Are Frivolous	5
1. Turney's Claim That The Prosecution Presented False Testimony By Officer White Is Frivolous As A Matter Of Law.....	5
2. Turney's Claim That His Counsel Was Ineffective For Failing To Call Anderson As A Witness Is Frivolous Because There Is Absolutely No Admissible Evidence To Support It.....	7
CONCLUSION.....	11
CERTIFICATE OF MAILING.....	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Aragon v. State</u> , 114 Idaho 758, 760 P.2d 1174 (1988)	8
<u>Charboneau v. State</u> , 140 Idaho 789, 102 P.3d 1108 (2004)	4, 5
<u>Gonzales v. State</u> , 151 Idaho 168, 254 P.3d 69 (Ct. App. 2011).....	4, 5
<u>Grube v. State</u> , 134 Idaho 24, 995 P.2d 794 (2000).....	6
<u>Howard v. State</u> , 126 Idaho 231, 880 P.2d 261 (1994)	8
<u>Ivey v. State</u> , 123 Idaho 77, 844 P.2d 706 (1992)	8
<u>LaBelle v. State</u> , 130 Idaho 115, 937 P.2d 427 (Ct. App. 1997).....	8
<u>Newman v. State</u> , 140 Idaho 491, 95 P.3d 642 (Ct. App. 2004).....	5
<u>Plant v. State</u> , 143 Idaho 758, 152 P.3d 629 (Ct. App. 2007).....	4
<u>Russell v. State</u> , 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990)	8
<u>State v. Beorchia</u> , 135 Idaho 875, 26 P.3d 603 (Ct. App. 2001).....	9
<u>State v. Chapman</u> , 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991)	8
<u>State v. Dopp</u> , 129 Idaho 597, 930 P.2d 1039 (Ct. App. 1996)	6
<u>State v. Drapeau</u> , 97 Idaho 685, 551 P.2d 972 (1976).....	6
<u>State v. Payne</u> , 146 Idaho 548, 199 P.3d 123 (2008)	9
<u>State v. Turney</u> , 147 Idaho 690, 214 P.3d 1169 (Ct. App. 2009).....	1
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	8
<u>Swader v. State</u> , 143 Idaho 651, 152 P.3d 12 (2007)	5
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	5
 <u>STATUTES</u>	
I.C. § 19-4904	4

STATEMENT OF THE CASE

Nature Of The Case

Philip A. Turney appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Turney crashed his vehicle into two stopped police patrol cars, seriously injuring two police officers. State v. Turney, 147 Idaho 690, 691, 214 P.3d 1169, 1170 (Ct. App. 2009). A jury convicted him of two counts of aggravated DUI and a persistent violator sentencing enhancement. Id. The Idaho Court of Appeals affirmed the judgment over claims that the two convictions for aggravated DUI violated double jeopardy protections and that the sentence was excessive. Id. at 691-93, 214 P.3d at 1170-72.

Turney thereafter filed a petition for post-conviction relief, alleging claims of “prosecutorial error,” “ineffective assistance of trial counsel,” and “ineffective assistance of appellate counsel.” (R., pp. 4-13.) The petition was verified (R., p. 14), and a copy of an affidavit apparently filed in a different case was also submitted (R., pp. 16-19). Turney later filed a “supplement” to the petition in which he made a further allegation of ineffective assistance of trial counsel. (R., pp. 42-44.)

The state moved to dismiss the petition. (R., pp. 49-64.) Thereafter Turney moved for appointment of counsel. (R., pp. 65-66.) The district court denied this motion on the basis that Turney had supported none of his claims with admissible evidence and that the claims were frivolous. (R., pp. 68-80.)

Three weeks later the court entered an order conditionally dismissing the petition, giving Turney 20 days to respond. (R., pp. 90-102.) Turney filed a “bifurcated response” and an affidavit with exhibits. (R., pp. 123-368.) The court thereafter dismissed the petition. (R., pp. 394-406, 408.) Turney timely appealed. (R., pp. 410-12.)

ISSUES

Turney states the issues on appeal as:

1. Did the district court err in dismissing Mr. Turney's Petition for Post-conviction Relief because the claims presented issues of material fact?
2. Did the district court err by failing to appoint counsel to assist Mr. Turney in the post-conviction proceedings?

(Appellant's brief, p. 6 (capitalization original).)

The state rephrases the issue as:

Has Turney failed to show that he asserted any claim for post-conviction relief that was not frivolous?

ARGUMENT

Turney's Claims For Post-Conviction Relief Were Properly Found To Be Frivolous

A. Introduction

The district court concluded that Turney's claims were unsupported by admissible evidence and frivolous. (R., pp. 68-80.) On appeal, Turney claims he presented sufficient evidence to justify appointment of counsel in relation to his claims that the prosecution presented perjured testimony by Officer White (Appellant's brief, pp. 9-12) and ineffective assistance of trial counsel for allegedly failing to call a material witness, Travis Anderson (id. at pp. 14-18). Review of Anderson's claims of error show them to be without merit.¹

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to I.C. § 19-4904 is discretionary. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Plant v. State, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2007).

¹ The state herein will address only the legal standard applicable to appointment of counsel because failure to present sufficient evidence to meet that standard will necessarily mean failure to meet the higher standard of presenting sufficient evidence to avoid summary dismissal of claims. Gonzales v. State, 151 Idaho 168, ___, 254 P.3d 69, 75 (Ct. App. 2011) (failure to present evidence sufficient to warrant appointment of counsel "compels a conclusion that the application did not raise a genuine issue of material fact").

C. Counsel Was Properly Denied Because Turney's Claims Are Frivolous

Post-conviction counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." Swader v. State, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007); see also Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). If the claims are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel, however, the court may deny the motion for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Newman v. State, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). "Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel." Gonzales v. State, 151 Idaho 168, ___, 254 P.3d 69, 73 (Ct. App. 2011). Application of this standard to the two claims that Turney asserts on appeal should not have been dismissed without appointment of counsel shows no error by the trial court.

1. Turney's Claim That The Prosecution Presented False Testimony By Officer White Is Frivolous As A Matter Of Law

In its Order Denying Appointment of Counsel the district court evaluated Turney's claim that the prosecution had presented perjured testimony as follows:

Essentially Turney appears to argue that there is "newly discovered evidence" consisting of the fact that subsequent to the trial, Officer White lost his job with the Boise City Police Department for "conduct unbecoming of an officer, violations of law and making

inconsistent statements during an internal investigation.” The relief he seeks includes a new trial. At trial, Officer White testified that Turney was the driver of the taxi that hit the police cars.

The subsequent disciplinary action does not establish Officer White perjured himself at trial. Furthermore, Turney cannot meet the second requirement of the *Drapeau* test for a new trial. The second *Drapeau* element is that the evidence be *material*, not merely *impeaching*. This is impeachment material only and does not meet the *Drapeau* requirements. Therefore, this is not a basis for post-conviction relief.

(R., pp. 73-74 (citation and footnotes omitted).) In dismissing the petition the district court employed the same analysis. (R., pp. 400-01.) On appeal Turney contends he should have counsel and an opportunity to conduct discovery into whether there is evidence to impeach Officer White. (Appellant’s brief, pp. 11-12.) Turney’s argument fails because, even if his allegations were entirely true and supported by the evidence he alleges would exist, this count is not viable as a matter of law.

In State v. Drapeau, 97 Idaho 685, 551 P.2d 972 (1976), the Idaho Supreme Court articulated the four-part test a defendant must satisfy in order to be entitled to a new trial based upon newly discovered evidence. That test requires a defendant to show, as the second element of his claim, that the evidence offered in support of his motion for a new trial is material, not merely cumulative or impeaching. Id. at 691, 551 P.2d at 978; see also Grube v. State, 134 Idaho 24, 30, 995 P.2d 794, 800 (2000); State v. Dopp, 129 Idaho 597, 605, 930 P.2d 1039, 1047 (Ct. App. 1996). Here Turney admits that he seeks counsel and further discovery to seek evidence of White’s alleged “roguish misconduct” to

impeach Officer White's testimony. Because Turney's very goal is to pursue evidence that will never sustain a viable claim, his claim is frivolous.

2. Turney's Claim That His Counsel Was Ineffective For Failing To Call Anderson As A Witness Is Frivolous Because There Is Absolutely No Admissible Evidence To Support It

The district court denied the request for counsel to pursue a claim of ineffective assistance of trial for failing to call Travis Anderson as a witness, finding it frivolous, as follows:

Turney further claims in his Supplemental that his counsel was ineffective by failing to call a witness, Travis Anderson, at trial or to interview him. Travis Anderson was in Officer White's patrol car at the time of the incident where he had been placed under arrest for driving under the influence. However, Turney does not support his claim with admissible evidence of what Travis Anderson would have testified, whether he had any admissible evidence and never filed any affidavits creating a factual issue.

This Court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or a Petitioner's conclusions of law.

Therefore, Turney has failed to meet his burden and this claim does not raise a viable claim.

(R., p. 77 (citations omitted); see also R., p. 404.) Turney claims that trial counsel's "decision not to corroborate Mr. Turney's version of events and/or to impeach the credibility of Officer White's testimony was not a strategic choice" and is therefore "not entitled to deference." (Appellant's brief, p. 16 (footnote omitted).) Turney also contends counsel should have been appointed to "properly assess the validity of claims and to afford the applicant the means in which to demonstrate prejudice." (Appellant's brief, pp. 17-18.) This argument,

which apparently assumes deficient performance, misapprehends the applicable law.

To prevail on an ineffective assistance of counsel claim, a defendant is generally required to show that counsel's performance was deficient and that he or she was prejudiced by that deficiency. LaBelle v. State, 130 Idaho 115, 118, 937 P.2d 427, 430 (Ct. App. 1997) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

To establish a deficiency in an attorney's performance, 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); Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). Strategic decisions of trial counsel will not be second-guessed, but must be shown to have been based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. Howard v. State, 126 Idaho 231, 233, 880 P.2d 261, 263 (1994). What witnesses to call at trial is a tactical or strategic decision presumed to be reasonable. State v. Chapman, 120 Idaho 466, 469, 816 P.2d 1023, 1026 (Ct. App. 1991).

To establish prejudice, the applicant must generally show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. Aragon, 114 Idaho at 761, 760 P.2d at 1177; Russell, 118 Idaho at 67, 794 P.2d at 656. The deficiency of counsel's performance must have "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Ivey

v. State, 123 Idaho 77, 80, 844 P.2d 706, 711 (1992); State v. Beorchia, 135 Idaho 875, 880, 26 P.3d 603, 608 (Ct. App. 2001).

Turney presented no admissible evidence whatsoever that suggests Turney had a potentially viable claim of ineffective assistance of counsel. Contrary to Turney's argument on appeal, he had the burden of presenting admissible evidence that his attorney did not call Anderson as a witness because of an objective shortcoming, such as inadequate preparation. "The decision of what witnesses to call is an area where [the court] will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." State v. Payne, 146 Idaho 548, 563, 199 P.3d 123, 138 (2008) (quotations and citations omitted). Although Turney asserts that counsel failed to interview Anderson, such assertion is merely conclusory and without any admissible evidence because there is no indication that Turney had any personal knowledge of what efforts his counsel made to ascertain what Anderson may have been able to testify about. (R., p. 43.) There is no evidence suggesting that Anderson did not in fact make a statement, either to the defense or to police. (R., p. 43.) There is no evidence that Anderson would not have also testified that Turney was in fact the driver of his own vehicle at the time of the accident. (R., p. 43.) Although Turney alleges that Anderson's testimony was "potentially favorable" to his defense (R., p. 43), such is abject speculation.

Although there is evidence Anderson was physically present² there is no evidence that he actually saw anything relevant, much less exculpatory, that he has a memory of events, or that he could provide any testimony at all helpful to the defense. Turney's claim that there may have been prejudice is also nothing more than the abject speculation that Anderson would have testified in this case differently than the other witness and inconsistently with the physical evidence. The mere showing that there is a person who may have knowledge about the case, who was not called to be a witness at trial, is insufficient to show that post-conviction counsel must be appointed to investigate whether there might be a viable claim of ineffective assistance of trial counsel. It would be ironic indeed to accept Turney's argument that a complete lack of evidence is exactly what makes the claim subject to investigation by appointed counsel and therefore non-frivolous.

The district court denied the motion for appointment of counsel and ultimately dismissed Turney's claims for post-conviction relief. The district court concluded that Turney was asserting a claim of newly discovered impeachment evidence, which by law is not a viable claim. The district court also concluded that Turney was asserting an entirely conclusory claim of ineffective assistance of counsel regarding calling Anderson as a witness at trial. The failure to present

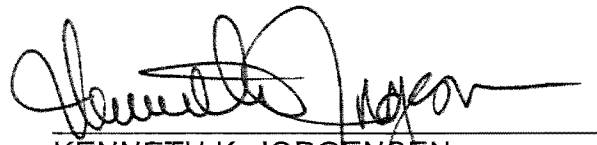
² The district court concluded Anderson "was in Officer White's patrol car at the time of the incident where he had been placed under arrest for driving under the influence." (R., p. 404.) This fact was apparently gleaned from the trial transcript. (R., p. 394.) The state does not contest the district court's factual determinations based on the transcript, but notes that none of the record from the underlying criminal case, that the district court took notice of, has been included in the appellate record in this case.

any admissible, non-conclusory evidence on this claim rendered it frivolous. Turney has therefore failed to show error by the district court in either dismissing his petition or denying his motion for appointment of counsel.

CONCLUSION

The state respectfully requests this Court to affirm the district court order and judgment summarily dismissing the petition and the order denying the motion for appointment of counsel.

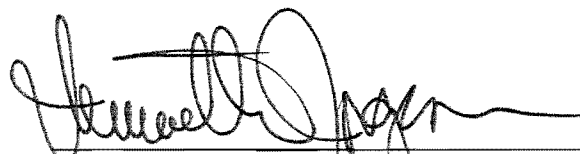
DATED this 12th day of March, 2012.


KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of March, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

PHILIP A. TURNEY
IDOC #24289
ICC G-116 A
PO Box 70010
Boise, Idaho 83707


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm