

2-6-2012

Colon v. State Respondent's Brief Dckt. 38746

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JOSEPH COLON,)	
)	
Petitioner-Appellant,)	NO. 38746
)	
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 MICHAEL R. MCLAUGHLIN
District Judge

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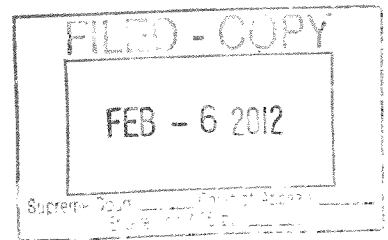


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STATEMENT OF THE CASE

Nature Of The Case

Joseph Colon appeals from the dismissal of his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

Colon pled guilty to two counts of lewd and lascivious acts with a minor pursuant to a plea agreement with the state. (R., pp. 24-30, 89-90.) On each count, the district court sentenced him to indeterminate life with twenty years fixed. (R., pp. 5, 97.) Colon did not file an appeal from his judgment of conviction and sentence. Colon filed an Idaho Criminal Rule 35 motion, which was denied, and he appealed. (R., p. 6.) The Court of Appeals affirmed the district court's denial of Colon's Rule 35 motion in State v. Colon, Docket No. 35008, 2008 Unpublished Opinion No. 753 (Ct. App., December 24, 2008). The remittitur was issued March 13, 2009. (See #35008 R., Remittitur.)

Colon filed his petition for post conviction relief on March 4, 2010. (R., pp. 5-15.) In his petition, he asserted seven ineffective assistance of counsel claims, including that his attorney failed to file an appeal. (R., pp. 1-13.) The same seven claims were re-asserted in the amended petition for post-conviction relief filed by post-conviction counsel. (R., pp. 58-63.) In support of his allegation that his attorney failed to file an appeal, Colon attached a letter that he wrote to his attorney and his attorney's reply. (R., pp. 64-66.) The state filed an answer to Colon's amended petition and moved to dismiss. (R., pp. 43-44, 70-74.)

After the hearing on the state's motion for summary dismissal, the district court dismissed four of Colon's claims. (R., p. 104.) The court ordered that two of the remaining claims proceed to an evidentiary hearing. (Id.) The order did not mention Colon's claim that his attorney was ineffective for failing to file an appeal on his behalf. (See Id.) The court subsequently held an evidentiary hearing at which Colon's attorney presented evidence in support of two of the remaining claims. (See 3/11/11 Tr., p. 3, L. 3 – p. 35, L. 2.) He did not, however, present evidence in support of Colon's claim that trial counsel was ineffective for failing to file an appeal nor was this claim discussed at the hearing. (See generally 3/11/11 Tr.) After the evidentiary hearing, the district court dismissed all of Colon's remaining claims. (R., p. 114.) Colon timely appealed. (R., pp. 115-18.)

ISSUE

Colon states the issue on appeal as:

Did the district court err in failing to rule on claim six of Mr. Colon's Amended Petition for Post-Conviction Relief, related to prior counsel's failure to file an appeal from the judgment of conviction, a claim which presents a genuine issue of material fact?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Colon failed to show error in the district court's dismissal of his post-conviction petition?

ARGUMENT

Colon Has Failed To Demonstrate That The District Court Erred In Dismissing His Petition For Post-Conviction Relief

A. Introduction

Colon asserts that the district court erred in dismissing his petition for post-conviction relief because, he argues, the district court failed rule on his claim that his attorney provided ineffective assistance of counsel for failing to file an appeal on his behalf. (Appellant's brief, pp. 7-9.) Colon also asserts he is entitled to a hearing on this claim. (Appellant's brief, pp. 7, 9-11.) Contrary to his assertion on appeal, however, the district court did dismiss each of Colon's claims. Moreover, the court conducted an evidentiary hearing at which Colon had the opportunity to present evidence in support of his claim. That Colon failed to do so does not establish error by the district court. In addition, although the district court did not make specific findings of fact and conclusions of law as required by I.C. § 19-4907 prior to dismissing his failure to file an appeal claim, because Colon did not object to the district court's ruling on these grounds below, he is not entitled to relief on this basis. Finally, a review of the record shows that Colon's claim of ineffective assistance of counsel for failing to file an appeal is without merit.

B. Standard Of Review

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92

Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. Colon Has Failed To Demonstrate That The District Court Erred In Dismissing His Petition For Post-Conviction Relief

On appeal, Colon asserts that the district court failed to rule on his claim that his attorney was ineffective for failing to file an appeal, that the district court failed to make sufficient factual findings before dismissing his claim, and that because “this claim presents a genuine issue of material fact,” this “case must be remanded to allow for an evidentiary hearing on this claim.” (Appellant’s brief, pp. 7, 8.) Colon’s appellate claims are without merit.

Colon argues, “Neither the district court’s order nor statements at the summary dismissal hearing indicate that the district court ruled on the failure to file an appeal issue.” (Appellant’s brief, p. 8.) However, contrary to Colon’s

assertion on appeal, the district court ruled on all of his claims in its Order Dismissing Petition For Post-Conviction Relief, which read in its entirety:

This matter came fore [sic] the Court on March 11, 2011, for an evidentiary hearing, and the Court received evidence in this matter through exhibits, the record of the prior proceedings in the criminal case NO. CR-FE-2001-971, as well as testimony of the petitioner and the testimony of trial counsel Mr. Jeffrey McKinnie.

The Court having evaluated each of Petitioner's claims, and in each instance having considered all evidence in a light most favorable to the petitioner, the Court finds that it is satisfied that the Petitioner is not entitled to post-conviction relief, and the Petition is hereby DISMISSED. I.C. § 19-4907.

IT IS SO ORDERED.

(R., p. 114.) Thus, the district court did, in fact, dismiss all of Colon's claims, including his claim that his attorney was ineffective for failing to file an appeal on his behalf.

If this Court finds that the district court did not dismiss all of Colon's claims, including his claim for ineffective assistance of counsel for failing to file an appeal, then this appeal must be dismissed because there is no adverse ruling forming the basis of the appeal. It is well settled that the appellate court "will not 'review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for an assignment of error.'" State v. Barnes, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993)). If there is no adverse ruling, then this Court must decline to rule on it on appeal. Id.

Colon next asserts that the district court erred because it failed to comply with I.C. § 19-4907 before dismissing his claim. (Appellant's brief, pp. 8-9.)

Idaho Code § 19-4907 provides that “the court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” The purpose behind the requirement that a district court make specific findings of fact and state its conclusions of law on each issue is to afford the appellate court an adequate basis upon which to assess any appeal arising from the denial of a petition for post-conviction relief. Davis v. State, 116 Idaho 401, 405, 775 P.2d 1243, 1247 (Ct. App. 1989); Maxfield v. State, 108 Idaho 493, 497, 700 P.2d 115, 119 (Ct. App. 1985). Failure to provide such a record can result in reversal of the district court's denial of the application. Id. Here, the district court did not make findings of fact before dismissing Colon's claim that his attorney was ineffective for failing to file an appeal. However, Idaho Rule of Civil Procedure 52(b) provides in relevant part: “No party may assign as error the lack of findings unless the party raised such issue to the trial court by an appropriate motion.” Colon did not raise the issue of lack of findings to the district court. Thus, he may not assign as error the district court's lack of findings and this Court should decline to consider it on appeal.

Finally, Colon asserts on appeal that he raised a genuine issue of material fact that entitles him to an evidentiary hearing on his claim that counsel was ineffective for failing to file an appeal. (Appellant's brief, p. 9-12.) Colon fails to recognize that he already received an evidentiary hearing and he has cited nothing showing that he is entitled to a second evidentiary hearing. That Colon failed to present evidence at his evidentiary hearing does not establish error by the district court.

Even if this Court considers the letters between Colon and his trial counsel as evidence and considers Colon's claim on its merits, Colon has still failed to establish his counsel was ineffective for failing to file an appeal. In support of his claim, Colon attached a letter that he had written to his trial counsel. (R., p. 16.) In the letter Colon writes, "If you don't do the appeals please give me some advice." (Id.) In response to the letter, which Colon's trial counsel asserted contained a veiled threat, his trial counsel wrote, "[E]ffective today, I am filing a Motion to Withdraw as your attorney of record. Let me remind you again, that you have forty-two (42) days from the Judgment of Conviction date to file an appeal.... I suggest you apply for assistance from the Public Defender's office." (R., pp. 17-18.) It is clear from the letters that Colon requested advice on what to do if his trial counsel did not file an appeal, his trial counsel gave that advice, and his trial counsel then withdrew from his representation.

To establish a Sixth Amendment claim of ineffective assistance of counsel based upon counsel's failure to file an appeal, a defendant must show either that (1) the attorney failed to follow the defendant's express instructions with respect to an appeal, or (2) the attorney failed to consult with the defendant and (a) a rational defendant would want to appeal, or (b) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 477-480 (2000). Colon cannot establish either prong of this test: he cannot show that he expressly requested his attorney to file an appeal, nor can he show that his attorney failed to consult with him. In fact, the letters prove the opposite. Colon requested advice concerning his appeal


rights, his attorney gave him that information, and then his attorney withdrew from his representation. Thus, even if this Court overlooks Colon's failure to present any evidence in support this claim at the evidentiary hearing and considers the information submitted in support of the petition as evidence, that "evidence" is insufficient to satisfy Colon's burden of proving, by a preponderance of the evidence, that counsel was ineffective for failing to file an appeal.

Because the district court properly dismissed each of Colon's post-conviction claims and because Idaho Rule of Civil Procedure 52(b) bars Colon from raising the issue of the court's lack of findings of fact on appeal, the district court's dismissal of Colon's petition for post-conviction relief should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's dismissal of Colon's petition for post-conviction relief.

DATED this 6th day of February, 2012.


ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of February, 2012, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

ELIZABETH ANN ALLRED
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.


ELIZABETH A. KOECKERITZ
Deputy Attorney General

EAK/pm