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Colon v. State Appellant's Brief Dckt. 38746

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSEPH L. COLON, JR.,)	
)	
Petitioner-Appellant,)	NO. 38746
)	
v.)	
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

BRIEF OF APPELLANT

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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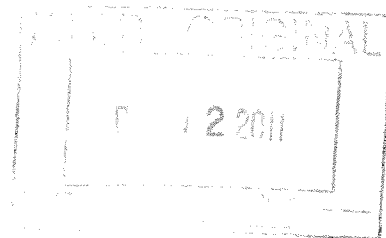


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STATEMENT OF THE CASE

Nature of the Case

Joseph L. Colon, Jr. appeals from the district court's Order Dismissing Petition for Post-Conviction Relief. In his amended post-conviction petition, Mr. Colon asserted seven ineffective assistance of counsel claims. Six of the claims were properly ruled upon. However, the district court failed to rule on claim six, that defense counsel failed to file a notice of appeal from the judgment of conviction as requested. On appeal, Mr. Colon asserts that his case must be remanded for the district court to properly rule on the second claim. Further, he asserts that the claim presented a genuine issue of material fact and that an evidentiary hearing should be held upon remand.

Statement of Facts and Course of Proceedings

On September 26, 2007, Mr. Colon was sentenced to two unified life sentences, with twenty years fixed, for the crimes lewd conduct with a minor under sixteen. (R., p.5.) Mr. Colon filed an Idaho Criminal Rule 35 (*hereinafter*, Rule 35) motion which was denied. (R., p.6.) An appeal was filed from the denial of the Rule 35 motion and a remittitur issued in March of 2009. (R., p.6.)

On March 4, 2010, a Petition for Post Conviction Relief was filed. (R., pp.5-15.) Mr. Colon asserted several claims: that his incarceration for 89 days on an agent's warrant without a probation revocation hearing violated due process; that the State breached the plea agreement (the state was supposed to recommend a 15 year sentence but after reading the Presentence Investigation Report (*hereinafter*, PSI), recommend life, with 20 fixed, which breached the plea agreement); that his transfer to

an out-of-state facility interfered with his right to meaningful access to the courts and his ability to perfect an appeal or seek appointment of counsel; that the State changed the indictment and substituted one count for another, changing the names of the victim and the situation, which deprived him the opportunity to prepare a defense; and that he received ineffective assistance of counsel. (R., pp.5-10.) Specifically, Mr. Colon asserted the following ineffective assistance of counsel claims: he was never shown records of the grand jury proceedings and was told he could not see them, that information in those transcripts could have been used to discredit or disprove statements and it could have affected the outcome of the trial; when Mr. Colon asked if he could change his plea prior to sentencing his attorney told him he could not, which prejudiced the outcome of the case; counsel failed to move to suppress the letters, used by the court at sentencing, written by the client to his wife about depression, confusion and emotional distress during incarceration; counsel failed to advise his client about his Fifth Amendment rights prior to the psychosexual evaluation; counsel failed to file a motion to suppress the psychosexual evaluation and the evaluation played a "major" part in the sentencing; counsel failed to argue against statements made by the prosecutor at sentencing and such failure prejudice Mr. Colon; counsel failed to allow petitioner to review tapes and videos of statements and when he asked if he could see them, counsel would not let him, this prejudiced his right to participate in his defense; counsel failed to show for the arraignment, failed to investigate witnesses and facts given to him by the petitioner based on lack of money; counsel failed to file a notice of appeal even though the petitioner asked him to; counsel failed to argue any of the

information contained in the PSI and the petitioner never got to see the PSI before sentencing. (R., pp.10-13.) Counsel was appointed. (R., p.33.)

The State filed an answer asserting the following affirmative defenses: the petition fails to state a claim upon which relief can be granted, claims that could have been raised on direct appeal are procedurally defaulted, and the petition contains bare and conclusory allegations and therefore fails to raise a genuine issue of material fact. (R., pp.37-40.) The State also filed a Motion for Summary Dismissal asserting that "in light of the pleadings, answers, admissions, and the record in the underlying criminal case, the petition fails to raise a genuine issue of material fact." (R., pp.43-44.)

On May 11, 2010, an Amended Petition for Post-Conviction Relief was filed. (R., pp.58-61.) In the Amended Petition, Mr. Colon asserted that he had requested his attorney to file an appeal from his judgment of conviction, but the attorney did not do so, claim six, and that he also received ineffective assistance of counsel in the following ways, claim seven: (a) failing to review or request a copy of the grand jury proceedings; (b) failing to share the grand jury evidence with Mr. Colon; (c) failing to advise of Fifth Amendment rights regarding the psychosexual evaluation; (d) failing to advise the client of his right to withdraw his guilty pleas or filing such motion; (e) failing to allow the petitioner to review tapes and/or videos of the arrest interviews; (f) failing to allow the petitioner to review his own PSI prior to sentencing. (R., pp.59-61.) The petition was verified by Mr. Colon. (R., p.62.) He also supplied three letters in support of the Amended Petition. (R., pp.64-67.) The first letter discussed Mr. Colon's desire to have a Rule 35 motion or appeal filed. (R., p.64.) The second letter, from counsel, informed Mr. Colon that counsel was going to withdraw and noted timelines for filing an appeal.

(R., pp.65-66.) Mr. Colon also supplied the district court with an affidavit in support of his claims. (R., pp.68-69.)

The State filed an Answer to Amended Petition asserting the same affirmative defenses as in the original answer. (R., pp.70-75.) The district court held a hearing on the State's Motion for Summary Dismissal. (R., p.100.) At the hearing, Mr. Colon presented argument on each of his claims, including the failure to file an appeal claim. (Tr.8/16/2010, p.10, L.16 – p.15, L.2.) The State asserted that Mr. Colon had received an appeal. (Tr.8/16/2010, p.15, Ls.5-14.) Mr. Colon then informed the district court that the appeal was an appeal of the Rule 35 motion. (Tr.8/16/2010, p.17, Ls.24-25.) The district court then commented on the appeal, noting that "it was just on the sentence." (Tr.8/16/2010, p.18, Ls.2-6.) At the hearing, the district court specifically dismissed the ineffective assistance of counsel claims (a), (b), (e), and (f) and allowed for claims (c) and (d) to go forward. (Tr. 8/16/2010, p.25, L.20 – p.26, L.18.) Following the hearing, the district court issued an Order Granting In Part Respondent's Motion to Dismiss stating that:

IT IS HEREBY ORDERED that allegations 7(a), 7(b), 7(e) and 7(f) of the Amended Petition for Post Conviction Relief are hereby DISMISSED pursuant to Idaho Code section 19-4906(b) and based upon the grounds articulated on the record. The Petitioner is granted (20) days to file a Second Amended Petition as to the dismissed allegations and submit further specific pleadings in their support.

IT IS FURHTER ORDERED that allegations 7(c) and 7(d) may proceed to evidentiary hearing as alleged in the Amended Petition.

(R., p.104.) 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. (R., p.104; Tr.8/16/2010, p.18, L.17 – p.26, L.18.)

The remaining claims proceeded to an evidentiary hearing. At the hearing, both Mr. Colon and prior counsel, Mr. McKinnie, testified regarding their conversations about Mr. Colon wanting to withdraw his guilty pleas and whether or not Mr. Colon was advised of his right to not participate in the PSI and Psychosexual Evaluation. (Tr.3/11/2011, p.2, L.23 – p.45, L.5.) The district court then found Mr. McKinnie to be credible, Mr. Colon to not be credible, that Mr. Colon was advised of his rights, and the court dismissed the remaining allegations. (Tr.3/11/2011, p.45, Ls.16-25.) The district court entered an Order Dismissing Petition for Post-Conviction Relief. (R., p.114.) Mr. Colon filed a Notice of Appeal timely from the Order Dismissing Petition for Post-Conviction Relief. (R., pp.115-118.)

ISSUE

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?

ARGUMENT

The District Court Erred 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

A. Introduction

Mr. Colon asserted seven ineffective assistance of counsel claims in his post conviction petition. Four of the claims were dismissed at the summary dismissal stage and two other claims were denied after an evidentiary hearing. However, the district court failed to rule on the failure to file a notice of appeal as requested issue. Mr. Colon asserts that this claim presents a genuine issue of material fact and that his case must be remanded to allow for an evidentiary hearing on this claim.

B. Standard Of Review

In an appeal from post conviction proceedings, the appellate court will exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434 (Ct. App. 1992) (citations omitted). The review of "a district court's construction and application of a statute, the Uniform Post-Conviction Procedure Act (UPCPA), is a matter of free review." *Evensioski v. State*, 136 Idaho 189, 190 (2001) (citations omitted).

C. The District Court Erred 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

In his Amended Petition, Mr. Colon asserted that he had requested that his attorney file an appeal from his judgment of conviction, but the attorney did not file the

requested appeal. (R., pp.59-61.) He also supplied letters in support of the Amended Petition. (R., pp.64-67.) The first letter discussed Mr. Colon's desire to have a Rule 35 motion or appeal filed. (R., p.64.) The second letter, from counsel, informed Mr. Colon that his attorney was going to withdraw and noted timelines for filing an appeal. (R., pp.65-66.)

The district court held a hearing on the State's Motion for Summary Dismissal. (R., p.100.) At the hearing, Mr. Colon presented argument on each of his claims, including the failure to file an appeal claim. (Tr.8/16/2010, p.10, L.16 – p.15, L.2.) The failure to file an appeal claim was also discussed by the State and district court. (Tr.8/16/2010, p.15, Ls.5-14, p.18, Ls.2-6.) The district court specifically dismissed the ineffective assistance of counsel claims (a), (b), (e), and (f) and allowed for claims (c) and (d) to go forward. (Tr. 8/16/2010, p.25, L.20 – p.26, L.18; R., p.104.) 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. (R., p.104; Tr.8/16/2010, p.18, L.17 – p.26, L.18.)

Proceedings under the post conviction procedure act contemplate the receipt of pleadings and evidence by the parties, followed by the district court's decision based upon findings of fact and conclusions of law. *State v. Morris*, 101 Idaho 120, 124 (1980). Idaho Code § 19-4907(a) provides that “[t]he court shall make *specific* findings of fact, and state *expressly* its conclusions of law, relating to *each issue presented*.” *Id* (emphasis added). Without a specific statement by the trier of fact detailing what facts are found to be true, and what conclusions of law are reached, the appellate courts are “severely hampered in its assessment of defendant's appeal.” *Morris*, 101 Idaho at 124.

However, the failure of a district court to make specific findings of fact or to state its conclusions of law upon denial of a petitioner's post conviction claim does not necessarily require reversal. *Maxfield v. State*, 108 Idaho 493, 497-502 (Ct. App. 1985). The absence of such findings of fact or conclusions of law can be disregarded, but only if the record is clear and yields an obvious answer to the relevant questions raised on appeal. *Id.*

In the case at hand, none of the trial court's orders discuss the claim of ineffective assistance of counsel related to counsel's failure to file a notice of appeal from the judgment of conviction as requested. This is not a case where the district court merely did not thoroughly address each claim, but is instead a case where the appellate courts are unable to ascertain whether the trial court actually considered the claim at all. *See Morris*, 101 Idaho at 124 (holding that the Idaho State Supreme Court was "unable to ascertain whether the trial court actually considered the very serious claim of ineffective assistance of counsel" and, therefore, reversal was required). As such, Mr. Colon asserts that his case must be remanded to address his ineffective assistance of counsel claim related to defense counsel's failure to file an appeal so that the district court can properly rule on the claim, providing "specific findings of fact" and stating "expressly its conclusions of law" as required by I.C. § 19-4907(a).

D. 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, Presents A Genuine Issue Of Material Fact And An Evidentiary Hearing Should Be Held Upon Remand

A Petition for Post-Conviction Relief is separate and distinct from the underlying criminal action which led to the petitioner's conviction. *Peltier v. State*, 119 Idaho 454,

456 (1991). It is a civil proceeding governed by the Uniform Post-Conviction Procedure Act (*hereinafter*, UPCPA) (I.C. §§ 19-4901 to 4911) and the Idaho Rules of Civil Procedure. *Peltier*, 119 Idaho at 456. Because it is a civil proceeding, the petitioner must prove his allegations by a preponderance of the evidence. *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). However, the petition initiating post-conviction proceedings differs from the complaint initiating a civil action. A post-conviction petition is required to include more than “a short and plain statement of the claim”; it “must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not attached.” *Id.*; I.C. § 19-4903. “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Small v. State*, 132 Idaho 327, 331 (Ct. App. 1998).

Just as I.R.C.P. 56 provides for summary judgment in other civil proceedings, the UPCPA allows for summary disposition of petitions where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. I.C. § 19-4906(c). In analyzing a post-conviction petition under this standard, the district court need not “accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Martinez*, 126 Idaho at 816-17. However, if the petitioner presents some shred of evidentiary support for his allegations, the district court must take the petitioner’s allegations as true, at least until such time as they are controverted by the State. *Tramel v. State*, 92 Idaho 643, 646 (1968). This is so even if the allegations appear incredible on their face. *Id.* Thus, only

after the State controverts the petitioner's allegations can the district court consider the evidence. *Drapeau v. State*, 103 Idaho 612 (Ct. App. 1982). But in doing so, it must still liberally construe the facts and draw reasonable inferences in favor of the petitioner. *Small*, 132 Idaho at 331.¹

If a question of material fact is presented, the district court must conduct an evidentiary hearing to resolve that question. *Small*, 132 Idaho at 331. If there is no question of fact, and if the State is entitled to judgment as a matter of law, dismissal can be ordered *sua sponte*, or pursuant to the State's motion. I.C. § 19-4906(b), (c).

In his Amended Petition, Mr. Colon asserted that his rights were violated when his counsel failed to file an appeal after Mr. Colon requested that an appeal be filed. (R., pp.59-61.) Mr. Colon supplied evidence supporting his assertion; a verification of the Amended Petition and letters proving the issue has been discussed. (R., pp.64-66.) Additionally, the U.S. Supreme Court has held that when an attorney's constitutionally deficient performance deprives a defendant of an appeal that they otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim. *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). Thus, Mr. Colon has raised an issue with regard to the assistance of counsel that he received in his underlying criminal action, which is certainly a potentially viable post conviction issue. See *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Hayes*, 138 Idaho 761 (Ct. App. 2003). Mr. Colon has satisfied his burden of presenting a genuine issue of material fact. As such, the proper course of action was for the district court to conduct an evidentiary

¹ The district court need not accept those of the petitioner's allegations which are "clearly disproved by the record." *Coontz v. State*, 129 Idaho 360, 368 (Ct. App. 1996).

hearing on the issue. Accordingly, the case should be remanded and an evidentiary hearing held on claim six.

CONCLUSION

Mr. Colon respectfully requests that this Court find that the district court did not properly rule on claim six, related to defense counsel's failure to file a notice of appeal from the judgment of conviction as requested, and remand his case for further proceedings.

DATED this 12th day of , 2011.



ELIZABETH ANN ALLRED
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of December, 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:

JOSEPH L COLON JR
INMATE #64595
ICC
PO BOX 70010
BOISE ID 83707

MICHAEL R MCLAUGHLIN
DISTRICT COURT JUDGE
E-MAILED BRIEF

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Hand delivered to the Attorney General's mailbox at the Supreme Court.

A handwritten signature in black ink, appearing to read "EAS", is written over a horizontal line.

EVAN A. SMITH
Administrative Assistant

EAA/eas