1-12-2012

Dursunov v. State Appellant's Brief Dckt. 38885

IN THE SUPREME COURT OF THE STATE OF IDAHO

ILDAR DURSUNOV,	)	
	)	
Petitioner-Appellant,	)	NO. 38885
	)	
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature of the Case

Ildar Dursunov appeals from the district court's order dismissing his post-conviction claims without an evidentiary hearing.[1] Mr. Dursunov asserts that the district court erred when it concluded that there was no genuine issue of material fact necessitating an evidentiary hearing on his claim that his attorney was ineffective for failing to obtain a confidential psychosexual evaluation rather than having him submit to a court-ordered one.

Statement of the Facts and Course of Proceedings

Ildar Dursunov filed a verified petition for post-conviction relief in which he asserted that he received ineffective assistance of counsel at the sentencing stage on a charge of lewd conduct with a minor under sixteen following his guilty plea. His claims primarily concerned the preparation and use of a court-ordered psychosexual evaluation conducted by Dr. Horton. (R., pp.4-8.)

As relevant to this appeal,[2] Mr. Dursunov claimed that his attorney never obtained a confidential psychosexual evaluation prior to advising him to plead guilty, and never informed him that he could have received a confidential psychosexual evaluation. (R., pp.5-6.) He then asserted that "[h]ad [he] been so informed, [he] would have obtained such an evaluation." (R., p.6.) He further asserted that had Dr. Horton's

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[1] The district court dismissed Mr. Dursunov's claims in response to the State's Motion for Summary Disposition and after issuing a Notice of Intent to Dismiss Post Conviction Petition, noting that, with one exception, the two "paralleled" each other. (Tr., p.10, Ls.6-13.)

evaluation been a confidential psychosexual evaluation, he would not have released it to the court because it was unfavorable to him, and would have instead obtained a second such evaluation from Gail Ater,[3] which would have been favorable. (R., p.6.) In addition to his verified petition, Mr. Dursunov offered transcripts from his Rule 35 hearing, sentencing hearing, and the Court of Appeals' opinion from his direct appeal. As for prejudice, Mr. Dursunov alleged, "[t]here is a reasonable probability that the Court would have imposed a lesser sentence had it only considered Ms. [sic] Atler's [sic] evaluation and not been exposed to Dr. Horton's evaluation." (R., pp.4-8.)

The State filed an answer in which it asserted the usual affirmative defenses. (R., pp.145-47.) It then filed a Motion for Summary Dismissal along with a Brief in Support of Motion for Summary Dismissal, in which it argued, *inter alia*, that all of Mr. Dursunov's claims should be dismissed because he "did not support his application for post-conviction relief with any affidavit or other evidence other than the record of the case below." (R., p.159.)

With respect to Mr. Dursunov's claim that, had the psychosexual evaluation been confidential, he would not have turned it over to the district court and would have obtained a second evaluation from Gail Ater, the State responded by arguing,

> Not liking the results of the psychosexual evaluation is not a sufficient reason for post conviction relief. Petitioner argued that he would have shopped for a favorable psychosexual evaluation for the court if he knew

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[2] Mr. Dursunov raised a number of other claims, the dismissal of which is not being challenged on appeal.

[3] Mr. Dursunov did obtain a limited evaluation from Mr. Ater following sentencing. Mr. Ater testified at Mr. Dursunov's Rule 35 hearing that, contrary to Dr. Horton's report, "neither [his] cultural background nor [his] English language skills would prevent [him] from engaging in community-based sex offender treatment." Mr. Ater further testified that Mr. Dursunov was a "low/moderate risk to reoffend," whereas Dr. Horton opined that he was a "moderate/high risk" to do so. (R., p.6.)

> the court-ordered evaluation was going to be unfavorable. He misses the point of a psychosexual evaluation. He is not entitled to relief on this ground, which must be dismissed.

(R., pp.162-63.)

The district court then issued a Notice of Intent to Dismiss Post Conviction Petition. (R., p.334.) With respect to Mr. Dursunov's claim, the district court found,

> The Court is not aware of any law that requires defense counsel to obtain psychosexual evaluations prior to advising defendants to enter a plea in a sex case. Nor is the Court aware of any standards applicable in these types of cases that recommend that counsel obtain such evaluations. It was clear that this was an "open recommendation" plea bargain. If Dursunov had obtained such an evaluation for use in the plea bargaining process and had it been "detrimental" sure counsel would not have disclosed that to the State. If he had, surely it would not have resulted in a favorable recommendation from the State. If the evaluation had been "favorable" the Court finds that it would have made little difference in this case. The Court ordered evaluation recommended the "rider" program. The "favorable" recommendation of Mr. Ater presented at the Rule 35 hearing recommended "probation." Judge Bevan rejected both recommendations and imposed a penitentiary sentence primarily due to the seriousness of this offense and Dursunov's lack of acceptance of responsibility. The decision to obtain or not obtain such an evaluation prior to advising a defendant to enter a guilty plea is clearly a strategy decision and does not under the facts of this case constitute ineffective assistance of counsel. Assuming *arguendo* that it does, the Court finds no prejudice to Dursunov. The State had a prosecutable case. Dursunov has made no showing that a "favorable" evaluation would have deterred the State from insisting on a plea of guilty regardless of the recommendations of an evaluator. Similarly, he has made no showing that such an evaluation would have in any way affected the sentence ultimately imposed. Moreover, Dursunov stated at the time of his plea that there was not anything that he asked his attorney to do that was not done. The written guilty plea advisory form (Question 51) confirmed that he was satisfied with his attorney's representation. The Court finds there is no merit to this portion of Dursanov's [sic] claim.

(R., pp.339-40.)

Mr. Dursunov did not file any additional materials in support of his claims or in response to the State's Motion for Summary Dismissal. (Tr., p.3, L.12 – p.4, L.21.) In

granting the State's motion and dismissing on its own notice, the district court noted that the two "paralleled" each other, except for one issue covered in its notice but not covered in the State's motion.[4] Mr. Dursunov filed a Notice of Appeal timely from the district court's order dismissing his post-conviction petition. (R., p.369.)

[4] The additional issue had to do with Mr. Dursunov's answers to questions in the Guilty Plea Advisory Form. (Tr., p.5, L.20 – p.6, L.2.)

ISSUE

Did the district court err when it summarily dismissed Mr. Dursunov's post-conviction claim?

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. Dursunov's Post-Conviction Claim

A. Introduction

The district court erred when it summarily dismissed Mr. Dursunov's claim that he received ineffective assistance of counsel when his attorney failed to advise him that he could have obtained a confidential psychosexual report prior to pleading guilty. He contends that the district court erred in finding, at the summary judgment stage, that failing to do so did not constitute deficient performance, and when it found that, assuming it was deficient performance, there was no prejudice shown.

B. Standards Of Review

1. Summary Dismissal

An application for post-conviction relief is civil in nature. *Gilpin-Grubb v. State*, 138 Idaho 76, 79-80 (2002). An application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

The court may summarily dismiss a petition for post-conviction relief when the court is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. I.C. § 19-4906 (b). In considering summary dismissal in a case where evidentiary facts are not disputed, summary dismissal may be appropriate, despite the possibility of conflicting inferences, because the court alone will be

responsible for resolving the conflict between the inferences. *See State v. Yakovac*, 145 Idaho 437, 444 (2008) (addressing case where State did not file a response to petition) (citing *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519 (1982) (addressing case with stipulated facts)). However, where the facts are disputed, a court is required to accept the petitioner's unrebutted factual allegations as true, but it need not accept the petitioner's conclusions. *Charboneau v. State*, 144 Idaho 900, 903 (2007).

Summary disposition on the pleadings and record is not proper if a material issue of fact exists. I.C. § 19-4906. When genuine issues of material fact exist that, if resolved in the applicant's favor, would entitle the applicant to relief, summary disposition is improper and an evidentiary hearing must be held. *Baldwin v. State*, 145 Idaho 148, 153 (2008). At the summary dismissal stage the petitioner need only present *prima facie* evidence of both prongs. *McKay v. State*, 148 Idaho 567, 571 (2010).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, the reviewing court applies the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Therefore, on review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and liberally construes the facts and reasonable inferences in favor of the non-moving party. *Charboneau*, 144 Idaho at 903 (citation omitted). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

2. Ineffective Assistance Of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case the right to counsel, which includes the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). Further, the Constitution guarantees a fair trial through its Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. *Id.* at 685.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Sixth Amendment "relies ... on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In light of the Sixth Amendment's reliance upon the legal profession's standards, the Idaho Supreme Court has stated that the starting point of evaluating criminal defense counsel's conduct is the American Bar Association's Standards For Criminal Justice, The Defense Function. *Mitchell v. State*, 132 Idaho 274, 279 (1998).

In addition to proving deficient performance, in most instances a defendant also must prove that he was prejudiced. "The defendant must show that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* However, a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. As was recognized by Justice O'Conner, the author of the *Strickland* opinion, in her concurring opinion in *Williams v. Taylor*, 529 U.S. 362 (2000),

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that ... the result of the proceeding would have been different."

Id. at 405-06 (O'Connor, J. concurring) (quoting *Strickland*, 466 U.S. at 696).

C. The District Court Erred When It Summarily Dismissed Mr. Dursunov's Post-Conviction Claim

With respect to Mr. Dursunov's claim, the district court found,

> The Court is not aware of any law that requires defense counsel to obtain psychosexual evaluations prior to advising defendants to enter a plea in a sex case. Nor is the Court aware of any standards applicable in these types of cases that recommend that counsel obtain such evaluations. It was clear that this was an "open recommendation" plea bargain. If Dursunov had obtained such an evaluation for use in the plea bargaining process and had it been "detrimental" sure counsel would not have disclosed that to the State. If he had, surely it would not have resulted in a favorable recommendation from the State. If the evaluation had been "favorable" the Court finds that it would have made little difference in this case. The Court ordered evaluation recommended the "rider" program. The "favorable" recommendation of Mr. Ater presented at the Rule 35 hearing recommended "probation." Judge Bevan rejected both recommendations and imposed a penitentiary sentence primarily due to the seriousness of this offense and Dursunov's lack of acceptance of responsibility. The decision to obtain or not obtain such an evaluation prior to advising a defendant to enter a guilty plea is clearly a strategy decision and does not under the facts of this case constitute ineffective assistance of counsel. Assuming *arguendo* that it does, the Court finds no prejudice to Dursunov. The State had a prosecutable case. Dursunov has made no showing that a "favorable" evaluation would have deterred

> the State from insisting on a plea of guilty regardless of the recommendations of an evaluator. Similarly, he has made no showing that such an evaluation would have in any way affected the sentence ultimately imposed. Moreover, Dursunov stated at the time of his plea that there was not anything that he asked his attorney to do that was not done. The written guilty plea advisory form (Question 51) confirmed that he was satisfied with his attorney's representation.[5] The Court finds there is no merit to this portion of Dursanov's [sic] claim.

(R., pp.339-40.)

At the hearing on its notice of intent to dismiss the petition, the district court reiterated the above, while adding,

> [T]he Court of Appeals has also issued an opinion in the case of Juan Gonzalez [sic] vs. State of Idaho, which was filed on April 12th, 2011,[6] and that was filed after the briefing was filed and the court's notice was filed. Interestingly, that case answers a question that I think I raised in the court's notice with regard to the issue of a petitioner or a defendant requesting a confidential psychological evaluation. The court acknowledged, as I did, that there is no law that we're aware of in Idaho that would require that.

(Tr., p.6, Ls.3-12.)

Gonzales is distinguishable from the facts of Mr. Dursunov's case. In *Gonzales*, it was argued that defense counsel was ineffective for, *inter alia*, failing to obtain a confidential psychosexual evaluation before advising Gonzales as to whether he should participate in a court-ordered evaluation. During the court-ordered evaluation, Gonzales disclosed a number of uncharged crimes involving both the victim of the lewd conduct charge to which he pleaded guilty (his minor daughter) and two other victims. In rejecting this claim, the Court noted, "[c]ounsel's failure to arrange a defense evaluation

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[5] This basis for rejecting Mr. Dursunov's claim is unpersuasive in light of his sworn statement that he was never advised that he could have obtained such an evaluation. Obviously, Mr. Dursunov could not have requested that his attorney do something that he did not know his attorney could do.

[6] *See Gonzales v. State*, 151 Idaho 168 (Ct. App. 2011).

in order to prepare for the possible incriminating outcome of a subsequent evaluation does not constitute deficient performance." *Gonzales*, 151 Idaho at 173-74.

Mr. Dursunov has put forth a different argument, namely that his attorney was ineffective for failing to ensure that any psychosexual evaluation that he participated in was confidential unless and until he decided to disclose it to the district court and the State. Furthermore, in *Gonzales* the petitioner was aware of his ability to obtain an independent psychosexual evaluation, as his attorney informed the court that he would obtain such an evaluation *in addition to* the court-ordered evaluation at the time it was ordered.[7] *Id.* The failure to advise Mr. Dursunov of the ability to obtain such a confidential evaluation, along with the contents of the court-ordered evaluation, raised a genuine issue of material fact as to ineffective assistance of counsel, which, as will be argued below, resulted in prejudice in the form of a greater sentence.

In *Hughes v. State*, 148 Idaho 448 (Ct. App. 2009), the Idaho Court of Appeals announced a three factor test in assessing the prejudice prong with respect to psychosexual evaluations. *Id.* at 464-65. This test was set forth as follows:

> The first factor is whether the content of the PSE itself is materially unfavorable. The PSE should be reviewed to determine the extent and harmful character of statements and admissions made by the applicant and the conclusions of the evaluator based upon those statements and admissions to determine the level of negativity, if any. If the PSE is not materially unfavorable, then the second prong of the *Strickland* standard has not been met. If the PSE is materially unfavorable to the applicant, the level of its negativity will then be weighed with two additional factors. The second factor is the extent of the sentencing court's reliance on the PSE if it can be demonstrated from the record. The third factor is the totality of the evidence before the sentencing court.

Id. at 464.

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[7] Inexplicably, a separate defense evaluation was not conducted. *Id.* at 173.

As quoted above, with respect to the prejudice prong, the district court held that there was no prejudice because a favorable report, such as the one testified to by Mr. Ater, "would have made little difference in this case" as Judge Bevan's decision to impose a penitentiary sentence was "primarily due to the seriousness of this offense and Dursunov's lack of acceptance of responsibility." (R., p.339.) The district court further held that Mr. Dursunov "has made no showing that such an evaluation would have in any way affected the sentence ultimately imposed." (R., p.340.) For the reasons set forth below, the district court's holdings on the prejudice prong are incorrect.

A review of the numerous references made by the district court to the evaluation demonstrates that Mr. Dursunov made a *prima facie* showing of the first (that the report was materially unfavorable) and the second (extent of reliance) factors. Those references are as follows:

> Dr. Horton recommends that in his words perhaps the court consider retained jurisdiction or county jail. I reject such a suggestion. As noted, and somewhat ironically in his report given that recommendation, the defendant is not amenable to treatment. *He remains in extreme denial* and, if placed on probation, would be subject to what Dr. Horton would have to be very tight supervision. Unfortunately, very tight supervision is nonexistent in the Idaho probation system today.

(R., p.22 (Sentencing Tr.,[8] p.40, Ls.7-17) (emphasis added).)

> [T]his is not a standard lewd and lascivious case, because, frankly, I find from the nature of the record before me, *including Dr. Horton's report* as well as the letters, frankly, from your own family, that *this is a case in which all blame has been attempted to be deflected onto this minor child, both by yourself and your family ... so I determine that you clearly have attempted to deflect blame for your own conduct onto the minor child, which in any lewd and lascivious case supports the determination that a significant sentence is in order.*

[8] The sentencing transcript was made a part of the record in the post-conviction file.

(R., p.22 (Sentencing Tr., p.42, Ls.5-23) (emphases added).)

> *In terms of Dr. Horton's report*, I believe it should be referenced in terms of my conclusions in this case, first of all, that the defendant is a moderate risk for reoffense, but beyond that and *more importantly as noted by the doctor, that the defendant is in extreme denial*, to quote his words, that recidivism is a potentiality, particularly in this court's experience where the defendant is not eligible for, due to several factors, treatment, has little motivation for the same *and is, quote, apparently lying about the incident to minimize the effect upon the victim and project some blame on the victim for the incident.* Again, that factor, in this court's view, is an appropriate one to consider given the nature of this charge and my conclusion relative to an appropriate and just sentence.

(R., pp.22-23 (Sentencing Tr., p.43, L.12 – p.44, L.4).)

> I determine, based upon the total circumstances involved, Mr. Dursunov, *including the report from Dr. Horton* and the lack of motivation for treatment that you have, that treatment and rehabilitation in the community is not an option.

(R., p.23 (Sentencing Tr., p.45, Ls.9-15) (emphasis added).)

As can be seen from the sentencing court's statements, not only did the court rely upon Dr. Horton's report to reach its sentencing decision, it specifically relied upon portions of Dr. Horton's report in concluding that Mr. Dursunov had not accepted responsibility, which the post-conviction court concluded was one of the two primary reasons that the sentence received by Mr. Dursunov was imposed.

With respect to the third factor, the totality of evidence before the sentencing court, the passages quoted above indicate that the only other cited source for a failure to accept responsibility were the letters from his family. (R., p.22 (Sentencing Tr., p.42, Ls.5-23).) The district court explained that both Dr. Horton's report "as well as the letters, frankly from your own family" indicated that Mr. Dursunov and his family were attempting to deflect blame onto the victim. (*Id.*) Obviously, Mr. Dursunov cannot control what his family writes, and the main evidence indicating a lack of acceptance of

responsibility on the part of Mr. Dursunov came from Dr. Horton's report. A review of the PSI shows that the PSI writer's conclusion concerning Mr. Dursunov's failure to take responsibility and to blame the victim came from that writer's review of Dr. Horton's report.[9] (PSI, pp.10-12.)

Because Mr. Dursunov made a *prima facie* showing as to both prongs of *Strickland*, the district court erred when it summarily dismissed his claim. As such, Mr. Dursunov respectfully requests that this Court vacate the district court's order summarily dismissing his claim, and remand this matter for an evidentiary hearing.

D. The State's Claim That Mr. Dursunov's Petition Was Not Supported By An Affidavit Was Incorrect

The State filed a Motion for Summary Dismissal along with a Brief in Support of Motion for Summary Dismissal, in which it argued, *inter alia*, that all of Mr. Dursunov's claims should be dismissed because he "did not support his application for post-conviction relief with any affidavit or other evidence other than the record of the case below." (R., p.159.) On this point, the State was incorrect, as the facts set forth in Mr. Dursunov's verified petition, which were uncontroverted, were required to be accepted as true for purposes of deciding whether to hold an evidentiary hearing. *Cooper v. State*, 96 Idaho 542, 545 (1975) ("[U]ntil the allegations contained in a verified application for post-conviction relief are controverted by the State, they must be deemed to be true for the purpose of determining if an evidentiary hearing is to be held. A

[9] In his statements to the PSI writer, Mr. Dursunov expressed remorse and regret, describing his behavior as a "mistake" that he was still "processing." (PSI, p.11.) In describing how he felt about committing the crime, Mr. Dursunov stated, "'I feel really bad and guilty about what I done. I'm so sorry for my mistake and lack of judgement

motion to dismiss, unsupported by affidavits, depositions or other materials, does not controvert the allegations in the petition") (citations omitted).[10]

CONCLUSION

For the reasons set forth herein, Mr. Dursunov respectfully requests that this Court vacate the district court's order dismissing his post-conviction petition as to the claim raised in this appeal, and remand this matter for an evidentiary hearing on that claim.

DATED this 12th day of January, 2012.

SPENCER J. HAHN
Deputy State Appellate Public Defender

[sic].'" (PSI, p.4.) This could hardly be described as blaming the victim or failing to take responsibility.

[10] Although the district court does not appear to have relied upon the State's argument on this point in dismissing Mr. Dursunov's claims (Tr., p.5, L.20 – p.10, L.13), Mr. Dursunov rebuts the argument here lest this Court rely upon it in a "right for the wrong reason" analysis.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of January, 2012, 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:

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ISCI
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DISTRICT COURT JUDGE
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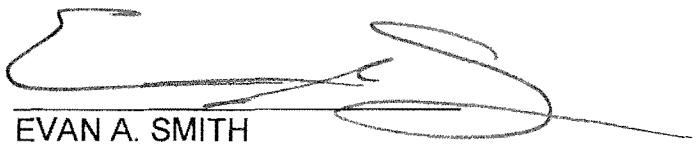

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