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Perez v. State Appellant's Brief Dckt. 38892

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARIANO PEREZ, JR. ,)	
Petitioner-Appellant,)	No. 38892/38893
v.)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
Respondent.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

**HONORABLE JUNEAL C. KERRICK
District Judge**

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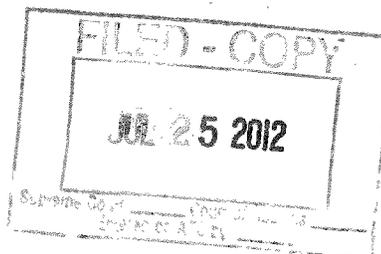


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I. TABLE OF AUTHORITIES

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I. STATEMENT OF THE CASE

A. Nature of the Case

Mariano Perez, Jr. appeals from the district court's order granting summary dismissal dated April 30 2011, and filed May 2, 2011 (R., pp. 24-39), and the district court's judgment of dismissal thereon (R., pp. 41-42). Mr. Perez asserts that the district court erred by summarily dismissing his petition for post-conviction relief.

B. Statement of the Facts & Course of Proceedings

On May 18, 2009, Mr. Perez filed a *pro se* petition and affidavit for post-conviction relief along with a supporting Memorandum, alleging ineffective assistance of counsel regarding the performance of attorneys in both his underlying criminal cases. (R., pp. 2-8, 54-60).

Mr. Perez filed an verified amended petition on March 15, 2010. (R., pp. 83-87), alleging ineffective assistance of counsel in both of his two underlying cases at the trial and appellate level, specifically as follows:

- a. cruel, inhuman and coercive conditions of confinement prior to sentencing;
- b. failure to investigate petitioner's fitness to stand trial, evaluate plea options, leading to a plea of guilty and be sentenced;
- c. failure to advocate for adequate pre-trial conditions of detention;
- d. utilization of coercive conditions of pre-trial detention to force Petitioner to enter pleas of guilty; and
- e. Failure to research and present arguments on appeal as directed by petitioner.

Mr. Perez's original verified petition and affidavit stated that he complained to his trial counsel about his conditions of confinement; (R., pp. 5, 57), that he was locked down 24 hours a day under constant fluorescent light, in isolation without contact with other humans, and only 5 hours a week out of his cell for attorney and family phone, recreation or hygiene. If he showered, then he could not go outside, and was in shackles. (R., pp. 5, 57). He stated that he was moved to better conditions, but approximately one week later, when he told his attorney he rejected a plea deal to plead as charged with open recommendations, his attorney got mad, and told him that he would be going back to the facility with the poor living conditions. As a result, he felt compelled and coerced to take the deal. (R., pp. 6, 58).

The State filed a motion for summary dismissal on April 6, 2010, alleging that Petitioner had failed to raise a genuine issue of material fact. (R., pp. 266-267).

In its Order on State's Motion for Summary Dismissal, the district court granted the State's motion and summarily dismissed Mr. Perez's petition. (R., pp. 24-39)

Mr. Perez timely filed his appeal. (R., pp. 327-330).

II. ISSUES PRESENTED ON APPEAL

- A. **Did the district court err when it summarily dismissed Mr. Bank's Petition for Post-Conviction Relief?**

III. ARGUMENT

A.

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

Summary dismissal of an application for post-conviction relief is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

1. Mr. Perez presented facts demonstrating a genuine issue of fact, requiring a hearing rather than summary dismissal regarding the ineffective assistance of his trial attorney.

It is Mr. Bank's position that the facts alleged in his *pro se* petition and affidavit and amended petition raised genuine issues of fact.

As stated above, summary dismissal of an application is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a

factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

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.*

Mr. Perez contends that he raised substantial facts in his verified pleadings concerning the performance of his attorneys. Mr. Perez's factual contention was that his plea was not truly voluntary because he was being housed in inhuman conditions, then when he was placed in better conditions and wanted to reject a plea agreement, his attorney got mad at him and told him he would be going back to the poor living conditions. Under such pressure, he went along with it and "took the deal". (R., pp. 2-8, 54-59).

Therefore, he had not been properly advised and was in not a good condition to

enter into a plea agreement on such a serious matter, because his attorney had not consulted or prepared with him regarding mental health and his living conditions and the effect those conditions had on him, and that had his attorney done those things, he would not have entered a guilty plea.

Such a contention goes to the very core of a defendant's right to counsel in the plea process; the knowing and voluntary entry of a guilty plea after having been properly informed. Mr. Perez's clear statement in his verified pleadings was that if he had been housed better and had his attorney fought for him for better housing, and had his attorney evaluated his condition more thoroughly, his decision whether or not to exercise his constitutional right to a trial by a jury of his peers would have been different.

The District Court focused primarily on the change of plea hearing and the testimony given by Mr. Perez at that hearing concerning the voluntariness of that plea. (R., pp. 12-16). However, Mr. Perez raised genuine issues regarding the voluntariness of his plea, and the performance of his attorney with regard to that plea negotiation and change of plea hearing in his sworn pleadings which detailed the living conditions he was subjected to and was threatened to be returned to. These specific sworn allegations provided a basis for a genuine issue of fact concerning the voluntariness of his plea and the performance of his attorney in connection with the negotiation and plea.

It is Mr. Watt's position that the culmination of the above factors constituted ineffective assistance of counsel, in regards to his entry of a guilty plea and that therefore his plea was not voluntarily entered but was rather entered under duress and coercion. Further, Mr. Perez contends that his trial attorney performance fell below the

objective standard of reasonable performance by failing to object and pursue correction of the inhuman living conditions he was subjected to, by failing to ascertain his condition to enter a plea, and that therefore, his plea was not truly entered voluntarily, despite his testimony at his change of plea hearing. Due to the contradictory evidence, genuine issues of fact existed requiring a hearing.

IV. CONCLUSION

In sum, Mr. Perez contends that because he raised his claims regarding the effectiveness of his trial attorney, and supported them with the facts in his pleadings which the district court specifically considered (R., pp. 26, 33-34), that genuine issues of fact existed regarding these claims and that summary dismissal was in error. It is his position that the district court failed to find a genuine issue of fact exists based on his verified pleadings, and affidavit as required by law.

Therefore the district court erred by summarily dismissing his petition. Based on the above, Mr. Perez respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief, and remand the matter for further proceedings.

DATED this 19 day of July, 2012.


STEPHEN D. THOMPSON
Conflict Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24 day of July, 2012, 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
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STEPHEN D. THOMPSON
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