6-30-2010

Gonzales v. State Respondent's Brief Dckt. 36625

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUAN MIGUEL GONZALES,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 36625

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Juan Miguel Gonzales appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings, Supreme Court Docket No. 35211[1]

Gonzales, 54 at the time, repeatedly molested his 13 year old daughter most nights from April 2007 until August 2007, when she reported the abuse. (PSI, pp.2-3.) The state charged Gonzales with two counts of lewd and lascivious conduct with a minor under 16 years of age and one count of rape. (R., p.31-32.) Gonzales pled guilty to one count of lewd and lascivious conduct with a minor under 16 years of age and the state dismissed the remainder of the charges. (1/4/08 Tr., p.13, L.15 – p.14., L.5.) During the change of plea hearing, the district court advised Gonzales that he had the right to remain silent during the psychosexual evaluation, and Gonzales indicated he understood that right. (1/4/08 Tr., p.10, L.20 – p.11, L.3.)

The district court entered judgment and imposed a unified sentence of 20 years with 5 years fixed. (R., pp.49-55; 5/12/08 Tr., p.18, Ls.2-6.) Gonzales appealed his sentence (R., pp.59-61, 70-72); the Idaho Court of Appeals affirmed it in State v. Gonzales, Docket No. 35211, 2009 Unpublished Opinion No. 318.

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[1] Contemporaneous to the filing of his Appellant's brief, Gonzales filed a motion for this Court to take judicial notice of the Record in his underlying criminal appeal, State v. Gonzales, Idaho Supreme Court Docket No. 35211.

Statement of Facts and Course of Post-Conviction Proceedings, Supreme Court Docket No. 36625

Gonzales filed a timely *pro se* petition for post-conviction relief (R., pp.2-9) claiming he was "denied effective assistance of Counsel in violation of the Sixth Amendment 'assistance of counsel' clause" (R., p.4 (capitalization in original)). Gonzales also filed a motion for appointment of counsel. (Augmentation, Supreme Court File, Docket No. 36625.) The specific allegations of ineffective assistance of counsel found in Gonzales' petition and affidavit in support involve an Estrada[2] claim. (R., pp.2-9.) Gonzales alleged that his trial attorney "rendered deficient performance by failing to advise me not to participate in the presentence investigation interview and the [psychosexual] evaluation with Dr. Smith." (R., p.8.) Gonzales also claimed that his attorney should have had a second doctor do a psychosexual evaluation "where the results of the evaluation would have been privileged unless favorable and therefore, voluntarily disclosed by me and Counsel." (Id.) Notably, in his affidavit in support of his petition, Gonzales admits that the trial "Court advised me that I had a right to remain silent as far as my participation in the presentence investigation interview as well as my participation in the psychosexual evaluation." (R., p.7.)

The district court issued a notice of intent to summarily dismiss the petition and gave Gonzales 20 days to respond. (R., pp.10-22.) The court also denied Gonzales' motion for appointment of counsel "for the time being, as the claims appear to be frivolous, pending the petitioner's response to the court's notice of intent to dismiss." (R., p.13.) The state filed an answer to Gonzales' petition.

[2] Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006).

(R., pp.23-25.) Gonzales responded to the district court's notice of intent to summarily dismiss his petition with a second personal affidavit of support and a letter from his appellate counsel. (R., pp.26-33.) The district court summarily dismissed Gonzales' petition for post-conviction relief (R., pp.34-48), finding that Gonzales' claims "[were] frivolous and the petitioner [did] not present[ ] any facts showing the possibility of a valid claim" (R., p.38). Gonzales timely appealed. (R., pp.50-52.)

ISSUES

Gonzales states the issues on appeal as:

1. Did the district court err in summarily dismissing Mr. Gonazales' petition for post-conviction relief?

2. Did the district court err in denying Mr. Gonazales' motion for appointment of post-conviction counsel?

(Appellant's brief, p.12.)

The state rephrases the issues on appeal as:

Has Gonzales failed to establish that the district court erred when it summarily dismissed his petition for post-conviction relief and denied Gonzales' motion for appointment of counsel?

ARGUMENT

Gonzales Has Failed To Establish That The District Court Erred When It Summarily Dismissed Gonzales' Petition For Post-Conviction Relief And Denied Gonazeles' Request For Post-Conviction Counsel

A. Introduction

Gonzales claims the district court erred when it summarily dismissed his petition for post-conviction relief and denied Gonzales' request for post-conviction counsel. (See generally, Appellant's Brief.) Specifically, Gonzales contends his trial counsel was ineffective for failing to advise him of his right not to participate in the court ordered psychosexual evaluation and for failing to arrange a second, confidential psychosexual evaluation with a private doctor.[3] (See Apellant's brief, pp.13-32.) Gonzales' claims fail. A review of the record demonstrates Gonzales failed to establish a *prima facie* case for his ineffective assistance of counsel claims and thus supports the district court's summary dismissal of those claims and its denial of Gonzales' request for post-conviction counsel.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App.

[3] On appeal, Gonzales does not pursue one of his original post-conviction claims—that trial counsel was ineffective for failing to advise Gonzales not to participate in the presentence investigation. (See Appellant's brief, p.13.)

1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, "[t]his Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review." Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001).

C. Gonzales Has Failed To Establish The District Court Erred When It Summarily Dismissed Gonzales' Petition For Post-Conviction Relief

A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999). Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief 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. Downing, 132 Idaho at 863, 979 P.2d at 1221; Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995).

In order to establish a prima facie case of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307

(1989). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989).

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

1. Gonzales Has Failed To Establish He Was Entitled To An Evidentiary Hearing on his *Estrada* Claim

In Estrada v. State, the Idaho Supreme Court held defense counsel was deficient for "failing to inform Estrada of his right to assert the privilege against self-incrimination" in relation to a court-ordered psychosexual evaluation and that Estrada was prejudiced as a result because the evaluation "play[ed] an important role in the sentencing." 143 Idaho 558, 564-565, 149 P.3d 833, 839-840 (2006). In order to establish an Estrada violation, a post-conviction petitioner must demonstrate not only that counsel was deficient for failing to advise him of his "right to assert the privilege against self-incrimination" in relation to a psychosexual evaluation, but also that he was prejudiced as a result. Estrada,

supra. As noted by the Court in Estrada, "[a] defendant shows prejudice by establishing 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" 143 Idaho at 565, 149 P.3d at 840 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

The Idaho Court of Appeals recently elaborated on the "essential factors which make up the prejudice determination" in the "unique circumstances of a [psychosexual evaluation]" in Hughes v. State, 148 Idaho 448, ---, 224 P.3d 515, 531 (Ct. App. 2009), *review denied*. The Court described the "essential factors" as follows:

> The PSE[4] 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.
>
> The first factor focuses on the actual content of the PSE itself, not the extent of reference thereto by the sentencing court. It is presumed that the sentencing court would read a PSE which it ordered prior to sentencing. Therefore, regardless of any actual references to the PSE by the court at sentencing, the level of negativity of the PSE itself weighs on the determination of prejudice. Obviously, the more or less negative the PSE, the more or less weight it lends toward a finding of prejudice. The second factor focuses on the discernable reliance placed by the sentencing court on the information from the applicant recorded in the PSE and

[4] "PSE" is an acronym used for psychosexual evaluation. Hughes, 148 Idaho at ---, 224 P.3d at 517.

> the conclusions based thereon by the evaluator. . . . The third factor takes into consideration all of the evidence bearing on sentencing other than the PSE. Application of this factor does not shift our analysis to a determination of whether the sentence imposed is supported by the evidence. Rather, the inquiry is whether it can be said, considering all of the evidence before the sentencing court, that there is a reasonable probability that the PSE resulted in a greater sentence.

Hughes, 148 Idaho at ---, 224 P.3d at 531-532.

The state submits that also relevant to a court's prejudice analysis is whether the defendant would have declined to participate in the psychosexual evaluation had he been advised of his Fifth Amendment right to do so. Cf. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (in order to establish prejudice for a claim of ineffective assistance of counsel in relation to a guilty plea, the defendant must demonstrate a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial); Ridgley v. State, 148 Idaho 671, ---, 227 P.3d 925, 930 (2010).

Application of the foregoing factors to Gonzales' case demonstrates he failed to establish he was entitled to an evidentiary hearing on his Estrada claim. Although Gonzales alleged in his petition and (first) affidavit in support that counsel failed to advise him of his right not to participate in the PSE (R., pp.8), he never alleged, either in his petition, affidavits in support or response to the court's notice of summary dismissal, that had counsel advised him of his right, he would have refused to undergo the evaluation (see R., pp.2-9; 26-31). In addition, Gonzales admitted in his first affidavit in support of his petition that the district court advised him of his right not to participate in the PSE: "This Court advised me that I had a right to remain silent as far as my participation in . . . the

psychosexual evaluation." (R., p.7.) The transcript of the change of plea hearing confirms this:

> THE COURT: Now, sir, when we conclude here today, I will be ordering a presentence investigation report. Given the nature of the offense, I will also be ordering a psychosexual evaluation.
>
> Sir, while you've waived your right to remain silent for purposes of the change of plea, do you understand that you retain your right to remain silent as far as your participation in the presentence investigation interview as well as your participation in the psychosexual evaluation?
>
> [Gonzales]: Yes, Your Honor.
>
> THE COURT: Do you understand that you can say as little or as much or nothing at all in those interviews?
>
> [Gonazales]: Yes, Your Honor.
>
> THE COURT: However, do you understand that it's the information that I receive in those interviews and those reports upon which I base my determination as to what an appropriate sentence would be?
>
> [Gonzales]: Yes, Your Honor.

(#35211 1/4/08 Tr., p.10, L.16 – p.11, L.8.)

In summarily dismissing Gonzales' claim, the district court correctly noted that "the decision of the petitioner to waive his right to remain silent is a decision to be made by the petitioner and not his attorney; counsel can and should advise as to the consequences of waiving the right but ultimately it is the decision of the petitioner." (R., p.41.) Gonzales' petition and supporting affidavits simply alleged counsel rendered deficient performance for "failing to advise me not to participate" in the PSE (R., p.8); Gonzales does not explain or allege what, if any, discussions he and his attorney had about the PSE, nor does he provide

evidence that counsel's alleged failure to tell Gonzales not to participate in the PSE changed the outcome of his case. (See, R., pp.2-9; 26-31). The district court also explained that Gonzales made "no showing that [he] made any disclosure to his trial counsel that would have led counsel to caution or advise [Gonzales] to limit his disclosures or exercise his right to remain silent." (R., p.43.) So while Gonzales clearly had notice directly from the court of his right not to participate in the PSE, he provided no evidence to support his claim that but for counsel's alleged failure to advise against participation in a PSE Gonzales would not have participated in the PSE or that he would have pled not guilty and gone to trial.

Gonzales also claims he established prima facie evidence of prejudice due to counsel's failure to advise against his participation in the PSE because the trial court "made specific, repeated references to [the PSE] in imposing sentence . . . it appears that [the PSE] was the single biggest factor underlying the prison sentence ultimately imposed." (Appellant's brief, p.31.) The district court's own order summarily dismissing Gonzales' petition belies this claim. As the district court explained:

> The fact remains that this court without the benefit of a psychosexual evaluation that assesses [Gonzales'] ameniability to treatment, his risk to the community, and his risk to reoffend, would not have found the petitioner a candidate for probation or retained jurisdiction at the time of sentencing. If the defendant had elected not to participate in a psychosexual evaluation based on his right to remain silent, this court would not have granted probation because of his inherent risk to the community and there would be no reason for the court to retain jurisdiction to have him further assessed in the sex offender program if he intended to remain silent. The court did rely on the evaluation conducted by Dr. Smith *as well as the petitioner's significant prior record, his substance abuse history,*

and the fact that the [sic] his substance abuse increased his risk to reoffend.

(R., p.47 (emphasis added).) Contrary to Gonzales' assertions, then, the court, *without the benefit of the PSE*, might have imposed a harsher sentence upon Gonzales (especially given the other factors it considered during sentencing aside from the PSE). Gonzales, then has failed to show prejudice with regard to his counsel's alleged failure to advise against his participation in the PSE.

2. Gonzales Has Failed To Establish Ineffective Assistance Of Counsel Because His Trial Counsel Did Not Pursue A Second Independent PSE

Gonzales claims that "there is simply no tactical reason for defense counsel not to obtain independent psychosexual evaluations in virtually every case in which a client is awaiting sentencing for a sex crime." (Appellant's brief, p.21.) Gonzales, however, fails to support this argument with any binding legal authority—Idaho courts and statutes have never mandated this type of action by defense attorneys and have never held an attorney ineffective for failing to do so. As such, this claim is waived and this Court should decline to consider it. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.").

D. Gonzales Has Failed To Establish The District Court Erred In Denying His Motion For Post-Conviction Counsel

A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. Quinlan v. Idaho Comm'n for Pardons and Parole,

138 Idaho 726, 730, 69 P.3d 146, 150 (2003). The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to Idaho Code § 19-4904 is discretionary. Plant v. State, 143 Idaho 758, 761, 152 P.3d 629, 632 (Ct. App. 2007) *review denied* (citing Charboneau, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Fox v. State, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997)).

Counsel should be appointed if the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf." Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. A petitioner's application for post-conviction relief shall "specifically set forth the grounds upon which the application is based." I.C. § 19-4903. As Swader instructs:

> When considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts. An indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record. Likewise, a pro se petitioner may be unable to present sufficient facts showing that his or her counsel's performance was deficient or that such deficiency prejudiced the defense. That showing will often require the assistance of someone trained in the law. Therefore, the trial court should appoint counsel if the petition 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. The investigation by counsel may not produce evidence sufficient to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.

143 Idaho at 654-55, 152 P.3d at 15-16.

Therefore, when a motion for appointment of counsel is presented, the abuse of discretion standard as applied to Idaho Code § 19-4904, "permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. If, on the other hand, the claims are so patently frivolous and without basis that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel, 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).

Gonzales contends that his claims "are sufficient to meet the standard for appointment of counsel, *i.e.*, they raise the possibility of a valid claim." (Appellant's brief, p.33.) In its notice of intent to summarily dismiss Gonzales' petition, the district court explained that although Gonzales' claims appeared to be frivolous, it would "reassess the request for appointment of counsel" depending upon Gonzales' response to the notice. (R., p.13.) Gonzales, however, did not provide additional evidence or support of his bare, conclusory allegations in his response. (See R., pp.26-33.) Contrary to Gonzales' argument, as already discussed in sub-section C above and incorporated herein

by reference, Gonzales' petition for post-conviction relief and supporting documents did not raise a possibility of a valid claim, or a claim that could have been rendered viable with the assistance of counsel. As such, the district court properly denied Gonzales' request for post-conviction counsel.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Gonzales' petition for post-conviction relief and request for post-conviction counsel

DATED this 30th day of June 2010.

JENNIFER E. BIRKEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of June 2010, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ERIK R. LEHTINEN
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.

JENNIFER E. BIRKEN
Deputy Attorney General

JEB/pm