10-23-2012

Brennan v. State Appellant's Reply Brief Dckt. 39391

IN THE SUPREME COURT OF THE STATE OF IDAHO

PETER BRENNAN,
Petitioner. Appellant,

vs.

STATE OF IDAHO
Respondent.

2012 OCT 23 A 9:00

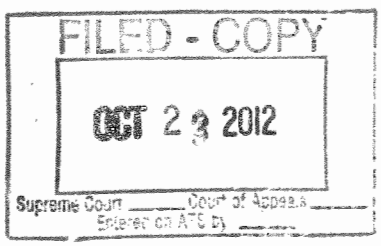
NO. 39391

PETITIONER - APPELLANTS REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

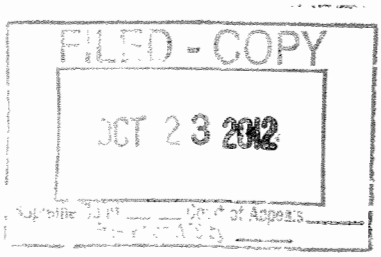
HONORABLE TIMOTHY L. HANSEN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho



PAUL R. PANTHER
Deputy Attorney General
Chief Criminal law Division

NICOLE L. SCHAFER
Deputy Attorney General
Criminal law division
P. O. Box 83720
Boise Idaho 83720-0010



PRO SE PETER BRENNAN
PETITIONER - APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATEMENT OF THE CASE

Nature of the Case

Peter Brennan appeals from the district Courts order Summarily dismissing his successive petition for Post Conviction relief

Statement of Facts and Course of Proceedings

Brennan Pled guily to one Count of lewd Conduct with a minor. (R. PP. 3-4. 32) The district Court Sentenced Brennan to a 25 year unified sentence with the first 10 years fixed (R. PP 3 32.) The district court denied Brennan's Subsequent Rule 35 requet for reduction of Sentence. (R. PP. 32. 33) Brennan did not appeal his underlying sentence or the denial of his Rule 35 motion (R. PP. 4 33)

statement of the fact and Course of Past Conviction Proceedings

Brennan filed a Pro se "Successive Petition and Affidavit for Post Conviction Relief" within one year of the Courts order denying his Rule 35 motion but more than two years following the entry of the Amended Judgment of Conviction and Commitment" (R. PP 3. 15, 33) He Claimed his Counsel had been ineffective for failing to file a suppression motion and at his sentencing (R., PP 4-5).

The district Court filed an order denying Brennan's request fo appointment of Counsel in the Post Conviction action and notice of intent to dismiss the Petition. (R, PP 31-35) The Court found Brennan's application for Post Conviction relief was untimely as it related to his underlying Sentence and Brennan's Rule 35 motion did not extend the time for filing his petition under the facts presented. (R P.P 33-34) It further found Brennan had failed to "assert facts sufficient to raise the assistance of Counsel." (R. P. 34)

Brennan filed a response to the courts notice of intent to dismiss, asserting there was no time limit on a successive petition for Post Conviction relief, (R. p 35.) Brennan then Conceded the district Court 'may be correct in denying appointment of Counsel," but Contended "the real issue here is a violation of the Petitioners (sic) Fourteenth Amendme (sic) guaranteeing the petitioner his right to due Process (sic) (id)

The district Court filed an order dismissing Brennan's Pro se successive Petition for Post Conviction relief as untimely finding Brennan had Presented nothing in either his petition or response tending to show that his Circumstances fall within those situations where the equitable tolling doctrine would apply" (R P. 42)

Brennan timely appeals from the order dismissing his Petitio (R. PP 44-48)

ISSUE

Brennan states the issues on appeal as:

1. Did the District Court issue an order to waive attorney Client Privilege allow Mr[] Brennan to Present his factual Support to his allegation/claims?

2. Did the District Court error in not issue (sic) an order to waive attorney Client Privilege?

3. Did the District Court error (sic) in dismissing mr[] Brennans Successive petition for Post Conviction relief?

4. Did the Pistrict Court errer in not granting the States motion for scheduling order waiver of attorney Client Privitege and response to motion for appointed counsel?

ARGUMENT

Mr. Brennan, argues that the District Court failed to consider the State's motion for Scheduling order waiver of attorney Client Privilege to allow MrBrennan to Present his factual support to his allegation/claims mr Brennan insist that the District Court would have Prevent a violation of his fourteenth Amendment the to due Process Because in Mr Brennan's Petition for Post conviction relief he alleged that his attorney Mr. John Sutton did not inform him that his Rule 35 was denied MrBrennan's also alleged the he was informed in Person by Mr John Sutton on January 7th 2011 That his Rule 35 was denied and that mr John Sutton failed to inform him that he didn't file his Post Conviction Petition The District Court didn't Give mrBrennan a genuine opportunity to Present his factual support claims by not Issuing an Order to waive attorney Client privilege A Claim of ineffective assistance of Counsel may Properly be brought under the Post Conviction Procedure act. Murray v. State 121 Idaho 918, 924 25 828 P.2d 1323 1329-30 (Ct App 1992). To Prevail on an ineffective assistance of Counsel Claim the defendant must show that the attorney's Performance was deficient and that the defendant was prejudiced the deficiency. Strickland Vs. Washington see U S. V ATKINS 250 F3d 1203 (8th Cir 2001).

The District Court is required to make findings of fact and rule on unresolved objections to the Presentence report.

Here are the two important supreme Court case govern due Process rights for Prisoners:

In the first case Wolff v. McDonnell 418 U.S 539 (1974) the Supreme Court found that whey prisoners lose good time Credits because of a disciplinary offense, they are entitled to: (1) written notice of the disciplinary violation: (2) the right to call witnesses at their hearing (3) a written Statement of the reasons for being found guilty and (5) a fair and impartial decision maker in the hearing.

The second important Supreme Court case Sandin v. Conner. 515 U.S. 472 (1995) however, Sharply limits the holding of wolff and sets higher Sandard that you have to meet in order to show that you have a liberty interest." If you don't have a liberty interest, "then the Prison doesn't ha to provide you with any Process at all. Any Prisoner alleging a vialation of due process should first read Sandin in Sandin, a prisoner was Placed in disciplinar segregation for 30 days and was not allowed to have witnesses at his disciplinary hearing. But the Court in Sandi found that unless the punishment an inmate receives is an atypical and significant hardship on the inmate in relation to the ordinary incidents of Prison Life." then there is no right to the five procedures laid out above, taken from wolff. " Atypical" means that the way you were treated has to be much different than the way most Prisoners are treated. Significant hardship" means that treatment must be really awful not just uncomfortable or annoying.

This means that if you want to argue that you should have been given the rights laid out in wolff. you must show that yo Punishment was extremely harsh. Frequenty, Short Periods of solito Confinement, Keeplock" or loss of privileges will not be Considered harsh enough to create a liberty interest for exampl in Key v. McKinney. 176 F. 3d 1083 (8th cir 1999) the Court found that 24 hours in shackles was not severe enough to violate due Process on the other hand, the Second Circuit has found that 305 days in solitary Confinement in one case, and 762 days in another, were severe enough to create a liberty interest. You can read Ciano v. SELSKY 238 F. 3d 223 (2d Cir 2001) and Colon v Howard 215 F3d 227 (2d Cir 2000) to get Sense of ho to make this type of claim.

Although Sandin changed the law in important ways the Supreme Court did not say they were overuling wolff. This mean that when you can show that there is a liberty interest" at stake (much harder to Prove under Sandin) The right guarante by wolff still apply. In other words if a decision by Prison officials results in conditions that are severe enough to meet the Significant and atypical "standard. the prison Must give the inmate Proredures like hearing and a chance to present evidence.

Courts have found due process violations when prisoners are disciplined without the Chance to get witness testimony have a hearing or present evidence Court have also found due process violations when punishment is based on vague claims of gang affiliation Some cases in which these types of Claime were successfully made are: Ayers v. Ryan, 152 F.3d 77 (2d Cir 1998); Taylor v. Rodriquez 238 F.3d 188 (2d Cir 2001) and Hatch v District of Columbia 188 F 3d 845 (DC.Cir 1999) on the other hand, it is also true the Court will not requie the prison to call witneses when calling additional witness would be unnecessary or irrelevan Kalwasinski v. Morse 201 F3d 103 (2d Cir 1999).

The Facts in mr Brennan's Case here are much like those in Wolff v. McDonnell 418 U. 539 (1974) U.S Supreme Court.

MR. Brennan argues that it is Clear here that the District Court error in not issuing an order to waive attorney Clien Privilege to Give mr Brennan a genuine opprotunity to present his factual support to his Clain in the open Court.

The district court held that mr Brennans Post conviction Petition was barred by the statute of limilations but mr Brennans still insist that this Case Fail on the merits. and that this court must hold only that the Claims fails on the merits and any basis supported by the record Thompson v. Paul 547 F.3d 1055, 1055 1058.59 (9th Cir 2008) and therefore declin to express any view as to whether mr Brennans Claims are barred by the statute of limitation the Court must hold only that the Claim Fail on the merits.

Because most prison inmates like mr Brennan lack legal Counsel and have little hope of obtaining Professional assistance. a great many petitions for Collateral relief and filed by inmates themselves. These Pro se Pleadings are usually poorly drown, Substituting for specific factual allegations an endless legal argument buttressed by Citation to an equally endless string of irrelevant Cases. Consequently they often fail to Present Claims well or in Proper form or Pass over issues altogether and in the main they receive short shrift in the Courts The result is that attorneys may Came into Cases after their inmate Clients have already unsuccessfully Sought relief on their own. The following sections address the extent to which Poior Post Conviction petitions my affect Subsequent Proccedings specifically, the questions are two the Consideration a federal Court will give to a subsequa application presenting the Same ground relied upon unsuccessfully in a prior Petition that Presents a new ground that was not but could have been included in an earlier application for relief.

Hemstreet v. Greiner 367 F.3d 135 (2d Cir 2004) Judgment vacated on reconsideration on other grounds 378 F.3d 265 (2d Cir 2004).

Barreto-Borreto v. U.S. 551 F. 3d 95 (1st Cir 2008)

U.S. v. Miller 557 F Supp. 2d 487 (D. Del 2008)

Hibbert v. U.S 2009 WL 235479 (S.D. Miss 2009).

The Proper treatmen of Post Conviction Petitions Challenging federal or state convictions that raise claims that were or should have been presented on direct review of the original Criminal Judgment is a matter different from yet related to the Problems treated in this and following section in that Context, a federal petitioner's failure to raise such claims before the appellate Court is viewed as a Procedural default, which may foreclose later Collateral review - according to the Standards established by the relevant decisions. See Ch 6; § 7:25. At the same time the standards for Cutting off Claims because of Procedural default blur into those considered here for rejecting successive Petitions for Collateral relief. The Court has made it Clear that the issues are essentially the Same in each instance. See Davis v. U.S 417 U.S 333, 342, 94, S Ct. 2298 41 L. Ed 2d 109 (1974) (applying the Standard for appraising Successive 2255 motion in a

Case in which the Prior treatment of the movant's Case was on direct review rather then in an earlier application for 2255 relief)

See § 2:18 Nor, in all fairness can it be seriously proposed the statues forcebse successive applications for relief on the theore that in cases in which the petitioner failed to appeal from a prior unfavorable judgment a federal court's willingness to entertain a subsequent application raising the same claim would effectively extend the time limit for seeking direct review. See Lawary V. U.S. 599 F 2d 218 221 (7th Cir 1979) (Collecting Cases adopting such a rationale but failing to apply it in the case at bar).

also See Vaughan V. Estelle, 671, F2d 152, 153. (5th Cir 1982) reiterating that dismissal for "abuse" of Post Conviction remedies is of "rare and extrordinary application) But see Jones V. Estelle, 722 F 2d 159, 171 (5th Cir 1983) (williams J. dissenting) (arguing that the majority had departed from Vaughn and adopted a much less sympathetic approach). see Moore V. Zant 885 F2d 1497 (11th Cir 1989) (applying "new law" exception to abuse of writ issue and holding that under objective standard reasonably Competent competent Counsel should have anticipated in November of 1978 extension of miranda to to sentencing phase of bifurcated Capital Proceeding based on supreme Courts recognition by that time of applicability of some Constitutional Protections during Sentencing proceeding likewise court held that in 1978 Counsel on first habeas petition should have reasonable anticipated extension of Constitutional right of Confrontati into Context of Capital Sentencing Proceeding and as such, initial habeas petition.

Faret V. Whitley 965 F. 2d 18 (5th cir 1992) (if state asserts that Petition is abuse of writ then District Court is obliged to address this issue fefore it reaches merits of Case). Sanders V. U.S. 373 U.S 183 S.Ct. 1068 10. Ed 2d 148 (1963) See § 2:7

See §§ 9:19, 9:22.

The district Court error for failing to consider the State's motion for scheduling order waiver of attorney client Privilege to allow Mr Brennan to present his factual support to his allegation /claim Mr Brennan insist that this case fail on the merits and that this court must hold only that the Claims fail on the merits and any basis supported by the record.

Conclusion

For those reasons set forth this brief the Petitioner / Appellant Peter Brennan respectfully requests that this Court vacate the district courts order of October 6 2011 and remand this case For further Proceeding on his fourteenth Amendmen right to due process of the united states Constitution and also to allow the district court to Conduct an ingleiry on Mr Brennan's Concern.

CERTIFICATE OF MAILING

I HEREBY CERTIEY that on this 11th day of October 2012, I Caused two true and Correct copies of the foregoing REPLY BRIEF to be Placed in the United states mail Postage prepaid addressed to:

To The Clerk of the Supreme Court
Mr STEPHEN W. KENYON
P.O. Box 83720
Boise IDAHO 83720-0101

TO NICOLE L. SCHAFER
OFFICE OF THE ATTORNEY GENERAL Criminal Law Division
P.O. Box 83720
Boise, Idaho
83720-0010

AFFIDAVIT AND PROOF OF SERVICE

Comes Now Peter, Brennan, the appellant in the foregoing matter as captioned and Certifies under penalty of Perjury and /or false Swearing in an official Proceeding that all matters here in are true and correct to the best of my Knowledge, experience belief and recall. The appellant / Petitoner Further affirms I have served by first Class mail Party / parties listed belaw the certificate of mailing by Placing these matters in the hands of prison authorities for that Purpose in accordance with HOUSTO vs. LOCK 487 U.S 266 108 S. Ct 2379 (1988). Holding a Prisoner's Pro se Papers subscribed and sworn to before me this 19TH day of October 2012.

Peter, Brennan,
Appellant Petitoner Pro se

Sworn and Subscribed this 19TH day October 2012

NOTARY FOR IDAHO

COMMISSION EXPIRES 9-10-2013

JAMES G. QUINN
NOTARY PUBLIC
STATE OF IDAHO