

11-27-2009

# Willie v. State Respondent's Brief Dckt. 35506

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

FRED WILLIE, )  
 )  
 Petitioner-Appellant, ) NO. 35506  
 )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF BEAR LAKE**

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**HONORABLE PETER D. MCDERMOTT  
District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Fred Willie appeals through counsel from the district court's order dismissing his petition for post-conviction relief after an evidentiary hearing.

### Statement of the Facts and Course of the Proceedings

Willie was found guilty by a jury of three counts of lewd and lascivious conduct, and was sentenced concurrently on each count to five years determinate and fifteen years indeterminate, for a unified twenty-year sentence. (R., pp.126-27; 11-9-06 Tr., p.41, L.23 - p.42, L.1.) Willie did not appeal his convictions or sentences. Willie filed a Rule 35 motion for reduction of sentence, which motion was granted by the trial court by reducing each of his concurrent sentences to three years fixed plus five years indeterminate for a total of eight years. (11-9-06 Tr., p.44, L.17 - p.45, L.2.)

Willie filed a timely *pro se* petition for post-conviction relief, raising nine separate claims of ineffective assistance of counsel, and one claim of prosecutorial misconduct. (R., pp.11-15.) One of the claims in Willie's petition was that his trial counsel, Keith Roark, had failed to consult with Willie "about the case, prior to trial, during trial, [and] after trial" and also "told him nothing about how to appeal."<sup>1</sup> (R., pp.12-13.) After the state answered the petition (R., pp.30-34), the district court set a hearing date for it to "consider whether or not to grant

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<sup>1</sup> Willie filed two affidavits in support of his post-conviction petition, neither of which made any mention of Roark's alleged failure to consult with him about an appeal. (See R., pp.16-18, 75-79.)

an evidentiary hearing and/or whether or not to grant or dismiss the petition" (R., pp.38, 42).

At the February 22, 2008 hearing on Willie's post-conviction petition, the attorney-client privilege between Willie and his trial counsel, Roark, was waived to enable Willie's post-conviction counsel to obtain information from Roark (through a deposition) about his representation of Willie. (R., pp.114-115; 2-22-08 Tr., p.2, Ls.17-24.) Additionally, the court set an evidentiary hearing for May 27, 2008, for the parties to present evidence on Willie's post-conviction claims. (R., pp.114-115; 2-22-08 Tr., p.9, Ls.4-11, p.12, Ls.3-4.)

At the evidentiary hearing, Willie, represented by counsel, only presented the claim that his trial counsel had been ineffective by failing to adequately investigate Willie's physical condition -- an alleged loss of feeling and numbness in his hands and fingers which allegedly made the allegations of lewd conduct less credible. (5-27-08 Tr., pp.15-57.) During the evidentiary hearing, only one witness was called to testify,<sup>2</sup> and no mention was made by anyone of Willie's trial counsel having failed to either file an appeal or consult with Willie about his appellate rights. (Id.) The deposition of Roark was admitted for the evidentiary hearing (5-27-08 Tr., p.10, Ls.6-11; p.15, Ls.7-15), but did not contain any reference to Willie's contention that Roark failed to consult with him about his

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<sup>2</sup> That witness was an attorney named Kelly Kumm, who opined as an expert that Roark had been ineffective for failing to adequately investigate the medical condition of Willie's hands. (5-27-08 Tr., p.16, L.23 - p.34, L.6.)

appeal rights.<sup>3</sup> (See generally 4-4-08 Deposition of Ray Keith Roark, pp.2-73.) At the end of the evidentiary hearing, the court took the case under advisement (5-27-08 Tr., p.57, Ls.15-17), and subsequently issued a Memorandum Decision and Order denying all of Willie's claims and dismissing his post-conviction petition with prejudice (R., pp.126-144). In addressing Willie's claim that Roark had failed to inform him of his right to appeal, the court explained, "Mr. Willie again only makes a general allegation in this regard, offering nothing in support," and that [during Roark's deposition], "Petitioner's current counsel failed to even question Mr. Roark about Mr. Willie's allegations regarding his appeal options." (R., p.142.) Willie timely appealed. (R., pp. 145-49.)

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<sup>3</sup> A letter by Roark to both post-conviction counsel, dated April 4, 2008 (Def's. Exhibit 1), was the only other item entered into evidence during the evidentiary hearing. (See 5-27-08 Tr., p.A.)

ISSUE

Willie states the issue on appeal as:

Did the district court err when it dismissed Mr. Willie's petition for post-conviction relief because trial counsel failed to consult with Mr. Willie about filing an appeal when a rational defendant in Mr. Willie's position would want to appeal?

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Has Willie failed to show any basis for reversal of the district court's order dismissing his post-conviction petition because Willie failed to present any evidence or argument at the evidentiary hearing regarding the claim that his trial counsel failed to consult with him about filing an appeal?

## ARGUMENT

### Willie Has Failed To Show Any Basis For Reversal Of The District Court's Order Dismissing His Post-Conviction Petition Because Willie Failed To Present Any Evidence Or Argument At The Evidentiary Hearing Regarding The Claim That His Trial Counsel Failed To Consult With Him About Filing An Appeal

#### A. Introduction

On appeal Willie argues, "the district court erred when it denied his claim that he received ineffective assistance of counsel regarding counsel's failure to consult with him about his appeal rights." (Appellant's Brief, p.6.) The record plainly shows, however, that Willie failed to present any evidence or argument at his evidentiary hearing to support that claim. The district court correctly applied the law in concluding Willie failed to establish he was entitled to post-conviction relief on his claim of ineffective assistance based on trial counsel's alleged failure to consult with Willie about his appeal rights.

#### B. Standard of Review

A post-conviction relief petitioner bears the burden of proving by a preponderance of the evidence all of the factual allegations upon which his request for post-conviction relief is based. Idaho Criminal Rule 57(c); Estes v. State, 111 Idaho 430, 438, 725 P.2d 135, 143 (1986); Mata v. State, 124 Idaho 588, 591, 861 P.2d 1253, 1256 (Ct. App. 1993).

When reviewing a district court's denial of post-conviction relief following an evidentiary hearing, this Court must defer to the district court's findings of fact unless they are clearly erroneous. McKinney v. State, 133 Idaho 695, 700, 992

P.2d 144, 149 (1999). This Court freely reviews the district court's application of relevant law. Id.

C. Willie Did Not Meet His Burden of Proving His Claim That His Trial Counsel Was Ineffective For Failing To Consult With Him About An Appeal Based Upon A Preponderance Of The Evidence Because He Did Not Present Any Evidence On That Claim At The Evidentiary Hearing

Willie's primary claim for post-conviction relief was that his trial counsel, Roark, rendered ineffective assistance by failing to adequately investigate Willie's alleged numbness and lack of sensitivity in his hands and fingers, a claim that was vigorously pursued at the evidentiary hearing through the expert testimony of attorney Kelly Kumm. (See 5-27-08 Tr., pp.16-34.) Willie's post-conviction petition also alleged that Roark failed to consult with Willie "about the case, prior to trial, during trial, [and] after trial" and "told him nothing about how to appeal." (R., pp.12-13.) However, Willie's claim that Roark failed to consult with him about an appeal was not mentioned by anyone during the May 27, 2008, evidentiary hearing. (See generally 5-27-08 Tr., pp.15-57.)

Willie bore the burden of producing evidence supporting his allegations on each post-conviction claim. The state did not have any duty to rebut Willie's claim in the absence of evidence supporting the claim. Idaho Criminal Rule 57(c) placed the burden of production on Willie, not the state. At the evidentiary hearing, Willie was required to prove his claim of ineffective assistance of counsel by a preponderance of the evidence, and the standard for avoiding summary dismissal, in which the district court was required to accept his

allegations as true, was no longer applicable. See, e.g., Dunlap v. State, 126 Idaho 901, 909, 894 P.2d 134, 143 (Ct. App. 1995).

Because Willie presented no evidence at his evidentiary hearing on his claim that Roark failed to consult with him about his appeal rights, the district court did not err by finding that Willie offered nothing to support his claim and dismissing his claim. See State v. Jensen, 126 Idaho 35, 38, 878 P.2d 209, 212 (Ct. App. 1994) (holding district court did not err by failing to find ineffective assistance of counsel after petitioner presented no evidence at his post-conviction evidentiary hearing regarding his claim).

D. The State Did Not Bear Any Burden of Rebutting Willie's Claim

Willie contends the district court was required to accept his verified allegations in his petition as true because the state did not present any evidence to rebut his claim -- as alleged in his verified petition -- that Roark failed to consult with him about his appeal rights. (Appellant's Brief, pp.8-9.) Willie states:

Here, Mr. Willie alleged that his trial counsel failed to consult with him about appealing. (R., p.13.) Mr. Willie made this assertion in his verified petition for post-conviction relief, which is the functional equivalent to an affidavit. 'A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is in substance an affidavit, and is accorded the same probative force as an affidavit.' Mata v. State, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993). Therefore, the undisputed facts were that trial counsel failed to consult with Mr. Willie about his appeal rights.

(Appellant's Brief, pp.8-9.)

Willie confuses the role his verified petition had with his burden of avoiding summary dismissal, and his burden of proving his allegations by a preponderance of the evidence once he has obtained an evidentiary hearing. Willie's verified petition was not admitted as evidence during (or for) the evidentiary hearing; thus, the state was not required to rebut it. In Loveland v. State, 141 Idaho 933, 936, 120 P.3d 751, 754 (Ct. App. 2005), the Idaho Court of Appeals rejected a similar argument, methodically explaining:

At the evidentiary hearing, Loveland was required to prove his claim of ineffective assistance of counsel by a preponderance of the evidence, and the standard for avoiding summary dismissal, in which the district court was required to accept his allegations as true, was no longer applicable. See, e.g., *Dunlap v. State*, 126 Idaho 901, 909, 894 P.2d 134, 143 (Ct. App. 1995).

Loveland also asserts that, because the Uniform Post-Conviction Procedure Act permits the district court to accept affidavits as evidence, his application and affidavits automatically constituted evidence for purposes of the evidentiary hearing. A verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is, in substance, an affidavit and is accorded the same probative force as an affidavit. *Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App. 1993). *However, the purpose of pleadings is to frame the issues upon which a cause is to be tried. Unless introduced into evidence, pleadings are not evidence. That Loveland's application was verified did not dispense with the need to prove his allegations.*

At a post-conviction evidentiary hearing, the court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. I.C. § 19-4907. Section 19-4907, therefore, modifies the rules of evidence insofar as it permits the admission of certain forms of hearsay that might otherwise be inadmissible. See I.R.E. 801-05. *However, Section 19-4907's modification of what evidence can be admitted during a post-conviction evidentiary hearing does not establish that all potentially admissible documents are automatically admitted into evidence. Thus, Section 19-4907 does not support Loveland's position that his verified application and affidavits were automatically introduced into evidence at the*

*evidentiary hearing.* Further, the adoption of such an interpretation would deprive the parties of the opportunity to object to the admissibility of any such proof. See I.R.E. 103.

The district court specifically indicated which documents were being made part of the record at the evidentiary hearing. Those documents included portions of the record from the underlying criminal proceeding and did not include any of the pleadings in the post-conviction action. *Loveland never offered his pleadings or affidavits in an attempt to introduce them into evidence at the evidentiary hearing. Because Loveland declined to present any evidence that his counsel ignored his request to file a direct appeal, we conclude that the district court did not err in dismissing his application*

As in Loveland, there is no indication that the district court in Willie's post-conviction case admitted his verified petition into evidence to be considered at the evidentiary hearing. The record shows that, apart from the live testimony of Kelly Kumm, the only other evidence admitted was the deposition of Roark (5-27-08 Tr., p.10, Ls.6-11; p.15, Ls.7-15), and a letter dated April 4, 2008 by Roark (5-27-08 Tr., p.56, Ls.1-15 (admitted as Def's. Exhibit 1)) -- none of which mentions Willie's current claim that Roark was ineffective for failing to consult with him about his appeal rights. Inasmuch as Willie, like the petitioner in Loveland, failed to present or admit any evidence -- including his verified petition -- at the evidentiary hearing in support of his post-conviction claim, the district court did not err in dismissing that claim.

In sum, it is a post-conviction petitioner's burden, at an evidentiary hearing, to present evidence and to prove his claim by a preponderance of the evidence. Because the record of Willie's evidentiary hearing is devoid of any reference to his claim that his trial counsel was ineffective for failing to consult

with him about his appeal rights, Willie has failed to demonstrate any error in the district court's dismissal of that claim.

CONCLUSION

The state respectfully requests this Court to affirm the district court's decision, following an evidentiary hearing, dismissing Willie's post-conviction petition.

DATED this 24<sup>th</sup> day of November 2009.

  
\_\_\_\_\_  
JOHN C. MCKINNEY  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 24<sup>th</sup> day of November 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE M. WALKER  
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.

  
\_\_\_\_\_  
John C. McKinney  
Deputy Attorney General

JCM/pm