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Vogel v. State Appellant's Brief Dckt. 40162

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID VOGEL,)	
)	NO. 40162
Petitioner-Appellant,)	
)	CASSIA COUNTY NO. CV 2011-858
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 CASSIA

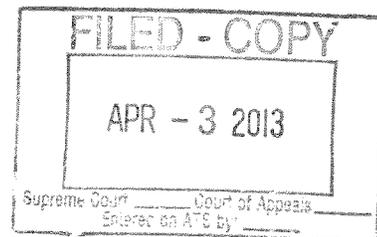
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STATEMENT OF THE CASE

Nature of the Case

David Vogel appeals from the district court's judgment summarily dismissing the claim contained in his verified, Amended Petition for Post-Conviction Relief. On appeal, he asserts that the district court abused its discretion and violated his substantial rights when it denied his motion to retest the suspected drugs in this case.

Statement of the Facts and Course of Proceedings

In the underlying criminal case, Mr. Vogel pled guilty to possession of a controlled substance for residue found on a glass tube. (R., pp.11-13.) Mr. Vogel then filed a verified petition for post-conviction relief and affidavit in which he raised a number of claims,¹ only one of which is relevant on appeal. That claim concerned "New Information from the Idaho State Drug lab." (R., pp.11-12.) In his affidavit, Mr. Vogel explained that he had received notification that there were irregularities and misconduct at the Idaho State Police forensics laboratory, including conduct involving deception and the hiding of controlled substances. He opined, "I beleive [sic] that residual residue could come from a not cleaned environment or from mishandled lab technicians." (R., p.16.)

Post-conviction counsel was appointed (R., p.31), and filed an Affidavit of Counsel to which he attached two exhibits. (R., p.36.) Those exhibits were a letter sent to Idaho prosecutors concerning "intentional deception" on the part of Lamora Lewis, an

¹ The other claims concerned allegations of ineffective assistance of counsel, including a claim that counsel was ineffective for failing to request that the evidence be retested. (R., pp.12-13.)

Idaho State Laboratory forensic analyst, and a copy of the Controlled Substance Analysis conducted in Mr. Vogel's criminal case, showing that it was conducted by Ms. Lewis. (R., pp.39-42.) Mr. Vogel then filed a Motion to Vacate Underlying Criminal Conviction and Sentence "based upon misconduct by the technician at the Idaho State Lab in testing the alleged controlled substance." (R., p.44.)

The State then filed a motion, along with a supporting brief, seeking summary dismissal or summary disposition "on the general basis that" Mr. Vogel's "claim(s) are too bare or conclusory" and because his "ineffective assistance of counsel claim(s) fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice." (R., pp.46-59.) In an Affidavit of the Petitioner filed in response to the State's motion for summary dismissal, Mr. Vogel stated, *inter alia*, that he "believe[d] the test [results] to be wrong" and "[t]o the best of my knowledge the tube in question did not have controlled substances in it." (R., pp.62-63.)

The district court granted the State's motion for summary dismissal of the ineffective assistance of counsel claims. (R., pp.69-75.) However, it gave Mr. Vogel permission to file an amended petition for post-conviction relief with respect to his claim concerning misconduct at the State crime laboratory. (R., p.67.) Mr. Vogel then filed a verified, Amended Petition (R., pp.77-80), in which he explained that his claim was based on the following facts:

- a.) New information regarding the Idaho State Drug Lab indicating that the technician testing the substance involved in my case, has admitted to wrong doing while employed at the Idaho State Drug Lab.
- b.) That I do not believe that the item tested positive for residue as the item was never used for the ingestion of drugs.

- c.) That I asked my attorney for a second test, but a second test was not conducted. I believe that second test would prove that the State Lab results are tainted.
- d.) That the only reason that I pled was because the State Lab results showed that the item tested positive for methamphetamine, and I felt that I would therefore have no defense.

(R., p.78.)

The State filed an Answer containing the boilerplate affirmative defenses available under the post-conviction statute. (R., pp.82-85.) The State then filed an amended motion for summary dismissal and a brief in support of that motion in which it argued that the claim was “too bare or conclusory” and did not raise a genuine issue of material fact. (R., pp.86-96.)

Mr. Vogel then filed a motion requesting that the evidence in his case be retested, at the State’s expense pursuant to Idaho Code § 19-4904, for the presence of controlled substances. (Motion for Testing.²) The State objected to the request, arguing that it “is essentially a request for post-conviction relief,” and that such a motion should not be granted until and unless the State’s motion for summary dismissal was ruled on. (R., pp.105-06.)

At the hearing on the Motion for Testing, the district court engaged in a colloquy with post-conviction counsel, explaining that it needed an explanation as to “the statutory or case law basis for the testing – the request to test this particular drug pipe, I guess, at this point. What is the authority for conducting an independent test at this time on that item?” (Tr., p.27, L.18 – p.28, L.5.) In response to this inquiry for legal

² A file-stamped copy of the Motion for Testing is attached to a Motion to Augment filed contemporaneously with this brief.

authority authorizing such testing, post-conviction counsel explained, "I don't have any." (Tr., p.28, L.6.) The district court denied the motion, reasoning, "well, for the reasons stated previously in my comments to [post-conviction counsel], I don't believe that there is a basis at this point for a separate and independent test of the drug pipe, even if it does [still] exist." (Tr., p.30, Ls.11-14.)

Later, the district court granted the State's motion for summary disposition of the claim raised in the Amended Petition. In doing so, the district court appears to have misunderstood the claim raised in the Amended Petition, believing it to have been a restatement of a claim of ineffective assistance of counsel that was previously summarily dismissed.³ In its order, the district court explained,

[T]his claim is still bare, conclusory, and unsubstantiated. Mr. Vogel has not provided admissible evidence to show that the test performed on the substance in the underlying criminal case was flawed, tainted, or rendered unreliable by misconduct at the Idaho State Police Forensics Laboratory. He has not provided admissible evidence to show any probability that a second test would have produced different results. Without this evidence, there has been now showing that Mr. Vogel's attorney's performance fell below an objective standard of reasonableness

(R., pp.119-20.) The district court then issued a judgment dismissing Mr. Vogel's Amended Petition. (R., p.114.)

Mr. Vogel filed a Notice of Appeal timely from the judgment summarily dismissing his Amended Petition. (R., p.128.)

³ The misunderstanding is understandable in light of post-conviction counsel's own apparent confusion as to what issues he was litigating. (R., pp.100-03 (Brief of post-conviction counsel attempting to respond to the State's motion for summary dismissal of the non-ineffective assistance of counsel claim in which post-conviction counsel only discusses the previously-dismissed ineffective assistance of counsel claims).) Regardless of the misunderstanding, the district court's dismissal was based on the lack of any information showing that the pipe would have retested negative for drugs.

ISSUE

Did the district court abuse its discretion and violate Mr. Vogel's substantial rights, when it denied his request to retest the evidence based on its mistaken belief that there was no lawful authority to order such testing?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Vogel's Request To Retest The Evidence Based On Its Mistaken Belief That There Was No Lawful Authority To Order Such Testing And Violated His Substantial Rights When It Denied His Request Despite Evidence Suggesting Flaws In The Testing

A. Introduction

Mr. Vogel asserts that the district court abused its discretion and violated his substantial rights when it denied his request to retest the evidence. Because there is lawful authority to order such testing, the district court abused its discretion when it denied Mr. Vogel's Motion for Testing. Additionally, because Mr. Vogel produced evidence that the person who performed the test in his case has admitted to engaging in "intentional deception" in her work at the State's crime laboratory, the district court violated his substantial rights when it denied his Motion for Testing.

B. Standard Of Review

When an exercise of discretion is reviewed on appeal, the appellate court engages in a three part inquiry to determine whether that discretion was abused. First, the district court must have perceived the issue as one of discretion. Second, the district court must have acted within the outer boundaries of such discretion and consistently with any applicable legal standards. Third, the district court must have reached its decision in an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600 (1989).

C. The District Court Abused Its Discretion When It Denied Mr. Vogel's Request To Retest The Evidence Based On Its Mistaken Belief That There Was No Lawful Authority To Order Such Testing And Violated His Substantial Rights When It Denied His Request Despite Evidence Suggesting Flaws In The Testing

Idaho Code § 19-4904 provides:

If the applicant is unable to pay court costs and expenses of representation, including stenographic, printing, witness fees and expenses, and legal services, these costs and expenses, and a court-appointed attorney may be made available to the applicant in the preparation of the application, in the trial court, and on appeal, and paid, on order of the district court, by the county in which the application is filed.

I.C. § 19-4904.

While post-conviction proceedings are civil in nature, “the provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings unless and only to the extent ordered by the trial court.” I.C.R. 57(b). “The decision to authorize discovery during post-conviction relief is a matter left to the sound discretion of the district court.” *Raudebaugh v. State*, 135 Idaho 602, 605 (2001) (citations omitted). “Unless discovery is necessary to protect an applicant’s substantial rights, the district court is not required to order discovery.” *Id.* The Idaho Court of Appeals has explained that “failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process.” *Hernandez v. State*, 133 Idaho 794, 799 (Ct. App. 1999) (citing *Abbott v. State*, 129 Idaho 381, 385 (Ct. App. 1996)).

In *Raudebaugh*, the petitioner filed for post-conviction relief following his conviction for second degree murder following a jury trial. *Raudebaugh*, 135 Idaho at 603. Raudebaugh claimed, *inter alia*, that his trial attorney was ineffective for failing to have the murder weapon (a knife) tested for fingerprints by a defense expert after the State’s expert found no fingerprints, including Raudebaugh’s, on the knife. In attempting to support the prejudice prong of that claim, Raudebaugh unsuccessfully sought release of the knife to his expert for analysis. *Id.* at 604. In summarily dismissing Raudebaugh’s claim, after denying his request to test the knife, the district

court reasoned that the prejudice prong had not been satisfied because he “made only conclusory and speculative assertions as to what testimony an independent investigator or expert witness might have provided at trial.” *Id.* at 604-05.

At the outset of its analysis, the Idaho Supreme Court quoted Idaho Criminal Rule 57(b), which provides that “provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to the proceedings [in post-conviction] unless and only to the extent ordered by the trial court.” *Id.* at 605 (quoting I.C.R. 57(b)). The Court then explained, “[t]he decision to authorize discovery during post-conviction relief is a matter left to the sound discretion of the district court. Unless discovery is necessary to protect an applicant’s substantial rights, the district court is not required to order discovery.” *Id.* (citations omitted). In upholding the district court’s denial of Raudebaugh’s request for testing of the knife prior to ruling on the State’s motion for summary dismissal, the Court reasoned that Raudebaugh had made “no showing that the state’s testing was flawed or that there is new technology that would make current testing more reliable.” *Raudebaugh*, 135 Idaho at 605.

In *Murphy v. State*, 143 Idaho 139 (Ct. App. 2006), the Court of Appeals considered the denial of a post-conviction petitioner’s request for retention of an expert pathologist to provide support for an ineffective assistance of counsel claim concerning the failure to obtain an expert pathologist to testify at a murder trial. The key facts in *Murphy* were that, for the four years preceding trial, including during testimony before the grand jury, the State’s pathologist maintained that suicide was a possible cause of death. *Murphy*, 143 Idaho at 148. Then, “the night before the trial,” the State’s pathologist changed his opinion after reviewing a gunshot residue report, concluding

that the “gunshot wound could not have been self-inflicted.” *Id.* Finding “that the allegations on the prejudice prong certainly go beyond speculation” and that “[t]he record before us raises serious questions on the reliability of Dr. Patterson’s opinion concerning the manner of death that can only be addressed by an expert interpreting all the relevant facts and reports produced on this question,” the Court of Appeals held that “the I.C. § 19-4904 motion for funding to retain an expert witness should have been granted to protect Murphy’s substantial right to effective assistance of counsel” and that “[t]he district court erred in summarily dismissing the claim of ineffective assistance of counsel without first granting Murphy the opportunity to consult with a forensic pathologist.” *Id.* at 149.

Significant differences exist between the facts in *Raudebaugh* and the facts of Mr. Vogel’s case, namely, Mr. Vogel has established that the crime laboratory employee, Lamora Lewis, who tested the evidence in his case has admitted to engaging in “intentional deception” while working at the laboratory. (R., pp.40-42.) In light of those differences, his case is more akin to *Murphy* in that he has demonstrated that the new information concerning the State’s expert’s dishonesty while employed by the crime laboratory necessitates retesting. The Idaho State Police summarized Ms. Lewis’ misconduct while employed at the facility as follows:

On February 23, 2011, at approximately 4:45 p.m., ISP Headquarters Lab Manager Skyler Anderson and Region 5 Lab Manager Shannon Larson had a telephone conversation. Mr. Anderson told Ms. Larson that there was a box of drugs in the Region 5 Lab that was used for “tours” and “show and tell.” He also told Ms. Larson that the drugs in the box were not tracked and were untraceable. He told her the box of drugs might be in the vault, but since there was an audit coming up, it might be somewhere else. Mr. Anderson told Ms. Larson that Lamora Lewis would know where the box was. When Ms. Larson asked Ms. Lewis about the box of drugs that was used for “tours,” Ms. Lewis climbed up on the drug bench, lifted

the ceiling tiles, and pulled out a box of drugs. When interviewed, she explained how she became involved in this *intentional deception*. She stated that she knew that intentionally hiding the box from auditors was wrong and stated “because if you are hiding it obviously something is wrong, but I know I should have said something.”

(R., p.40 (emphasis added).) In light of the admitted dishonest conduct on the part of Ms. Lewis, including her having unrestricted access to untraceable controlled substances near the bench where she conducted the testing in this case, Mr. Vogel has made a sufficient demonstration of potential flaws in the testing of the evidence in his case. Depriving him of the opportunity to provide additional evidence of the flawed nature of the testing violated Mr. Vogel's substantial rights.

Furthermore, the district court did not recognize that it had discretion to grant or deny Mr. Vogel's Motion for Testing, and did not know that it had the lawful authority to grant the motion. Specifically, after asking for any lawful authority to allow it to grant the motion and receiving no such authority from post-conviction counsel, the district court denied the motion, explaining, “[w]ell, for the reasons stated previously in my comments to [post-conviction counsel], I don't believe that there is a basis at this point for a separate and independent test of the drug pipe, even if it does [still] exist.” (Tr., p.30, Ls.11-14.) It is clear from the record that the district court did not recognize that there was a legal basis for granting Mr. Vogel's Motion for Testing and that it did not understand that the decision was one within its discretion. As such, the district court abused its discretion when it denied Mr. Vogel's Motion for Testing.

Because the district court both abused its discretion and violated Mr. Vogel's substantial rights when it denied his Motion for Testing, both its order denying his

motion and its judgment summarily dismissing his Amended Petition must be vacated, with this matter remanded for entry of an order allowing retesting of the evidence.

CONCLUSION

For the reasons set forth herein, Mr. Vogel respectfully requests that this Court vacate the order denying his Motion for Testing and the judgment summarily dismissing his Amended Petition for Post-Conviction Relief, and remand this matter for the district court to enter an order granting his Motion for Testing.

DATED this 3rd day of April, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

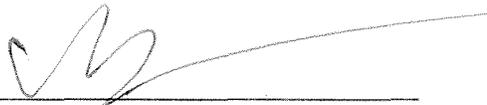
I HEREBY CERTIFY that on this 3rd day of April, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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