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Cadue v. State Respondent's Brief Dckt. 40286

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PERRY WAYNE CADUE)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

No. 40286

Twin Falls Co. Case No.
CV-2012-839

BRIEF OF RESPONDENT

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

HONORABLE RANDY J. STOKER
District Judge

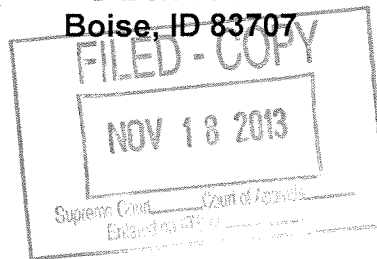
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STATEMENT OF THE CASE

Nature Of The Case

Perry Wayne Cadue appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In October 2008, the state charged Cadue with aggravated battery. (See R., pp.4, 114-115.) A jury found Cadue guilty of the charged offense and the district court imposed a unified 15-year sentence with five years fixed. (See R., pp.4, 117-118.) Cadue filed an unsuccessful appeal in which he only challenged his sentence. State v. Cadue, 2011 Unpublished Opinion No. 487 (Ct. App. 2011).

Cadue filed a timely *pro se* petition for post-conviction relief. (R., pp.4-95.) The court appointed counsel and the state filed an Answer, a Statement of Facts, and a Motion for Summary Dismissal with a supporting memorandum. (R., pp.99, 110-141.) The state also filed a motion asking the court to take judicial notice of a number of pleadings and transcripts from Cadue's underlying criminal case. (R., pp.142-236.) Cadue, with the assistance of counsel, filed a written response to the state's motion for summary dismissal. (R., pp.250-265.)

The court granted the state's motion for judicial notice and conducted a hearing on the state's motion for summary dismissal after which it entered an order granting the state's request for summary dismissal. (See generally Tr.; R., pp.267-273.) The court entered Judgment dismissing Cadue's petition and Cadue filed a timely notice of appeal. (R., pp.274-276, 278-281, 290.) The court appointed the State Appellate Public Defender ("SAPD") to represent Cadue on appeal (R.,

pp.282-284); however, the case was reassigned by the SAPD to a different attorney who was later allowed to withdraw after Cadue requested that he be allowed to proceed *pro se* (Letter notifying Court of change of assigned attorney, dated December 21, 2012; Order Granting Motion to Withdraw as Counsel and Allow Appellant to Proceed *Pro Se*, dated June 19, 2013).

ISSUES

Cadue states the issues on appeal as (verbatim):

- 1). WHETHER THE DISTRICT COURT IN GRANTING MOTION FOR SUMMARY DISPOSITION, IMPROPERLY DECIDED DISPUTED FACTUAL ISSUES.

- 2). WHETHER CADUE'S FACTUALLY ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, DUE PROCESS, RAISED A MATERIAL ISSUE UNDER THE SIXTH AND FOURTEENTH AMENDMENT.

- 3). WHETHER CONFLICT COUNSEL THAT WAS APPOINTED TO REPRESENT CADUE'S POST CONVICTION PETITION WAS INEFFECTIVE TO PROCEED WITH ONLY (30) DAYS TO VIGOROUS [sic] ADVOCATE, DEFEND, LITIGATE, BY ESTABLISHING THE FACTS ANED EVENTS OF HIS INDIVIDUAL CLAIM[S].

(Appellant's Brief, p.3 (capitalization original).)

The state rephrases the issue as:

1. Has Cadue failed to establish the district court erred in summarily dismissing his untimely petition for post-conviction relief?

2. Should this Court decline to consider Cadue's claim, raised for the first time on appeal, that post-conviction counsel was ineffective?

ARGUMENT

I.

Cadue Has Failed To Show Error In The Summary Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

Cadue contends the district court erred in summarily dismissing his post-conviction petition. Review of the record and the applicable legal standards shows otherwise. Because Cadue failed to allege a genuine issue of material fact in support of any claim alleged in his petition, he was not entitled to an evidentiary hearing and summary dismissal was appropriate.

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. 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).

C. The District Court Correctly Dismissed Cadue's Petition Without An Evidentiary Hearing

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence

establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal pursuant to I.C. § 19-4906 “if the applicant’s evidence raises no genuine issue of material fact” as to each element of petitioner’s claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. When a post-conviction petitioner alleges ineffective assistance of counsel, in order to survive summary dismissal of his petition, he must specifically allege that “(1) a material issue of fact exists as to whether counsel’s performance was deficient, and (2) a material issue of fact exists as to whether the deficiency prejudiced the applicant’s case.” Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). “To establish deficient assistance, the burden is on the petitioner to show that his attorney’s conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent.” Id. “[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.” Id. “To establish prejudice, the claimant must show a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id.

While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations,

unsupported by admissible evidence, or the applicant's conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)). "Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id. A review of the record shows Cadue failed to allege a genuine issue of material fact entitling him to an evidentiary hearing.

Cadue asserts summary dismissal was improper because, he contends, there "is a question of fact as to whether [he] was in fact in fear of great bodily harm or death due to the knife at the time of the incident," and the "trier of fact must weigh the testimony and evidence regarding this upon the record of these proceedings."¹ (Appellant's Brief, pp.7-8.) Cadue then seems to tie this "factual dispute" into his allegations that trial counsel was ineffective for not "let[ting]" him testify and not "fil[ing] a motion to compel the production of the razor knife," which the state "never produced." (Appellant's Brief, pp.8-9.) Cadue then concludes: "Accordingly, there is clearly a material question of fact as to whether trial counsel's performance constituted ineffective assistance of counsel, which must be taken up at an

¹ Cadue's arguments on why he believes summary dismissal was improper are contained in his second argument section; his first argument section only recites legal standards. (Appellant's Brief, pp.4-11.) The state will, therefore, treat Cadue's first and second sections as one.

evidentiary hearing in this matter” and “summary disposition was inappropriate.” (Appellant’s Brief, p.9.)

Cadue’s assertion that counsel was ineffective for not “let[ting] him testify” was not alleged in his petition. (R., pp.4-22.) Instead, Cadue did not make such an assertion until he filed his response to the state’s motion for summary dismissal. “Idaho Code section 19-4903 mandates that the application for post-conviction relief ‘specifically set forth the grounds upon which the application is based All grounds for relief . . . must be raised in [the defendant’s] original, supplemental, or amended **application.**’ I.C. § 19-4908.” Dunlap v. State, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (emphasis added, alteration original). The state objected to Cadue’s efforts to assert a claim for the first time in his responsive memorandum for this reason – noting no such claim was properly before the court because Cadue did not raise it in his petition. (Tr., p.6, L.23 – p.7, L.7, p.8, Ls.16-20, p.24, Ls.13-21, p.30, L.23 – p.31, L.7.) Post-conviction counsel conceded as much, but argued the claim was “essentially inherent in the pleadings.” (Tr., p.11, Ls.6-11, p.17, L.8 – p.18, L.10, p.20, Ls.4-19.)

The district court rejected Cadue’s attempt to raise a new claim for the first time in his memorandum filed in response to the state’s motion for summary dismissal. The court noted the claim was not alleged in Cadue’s petition, he did not seek leave to file an amended petition, nor did his affidavit allege “how he received

ineffective assistance of counsel regarding testifying at trial.”² (R., p.271; also p.272 (“Allegations in petitioner’s counsel’s memorandum do not serve as evidence.”).) Because Cadue was not entitled to an evidentiary hearing on a claim he did not properly allege, he has failed to show error in the summary dismissal of his “claim” that counsel was ineffective for not “let[ting]” him testify.

Cadue also argues there “is a genuine issue of material fact that is disputed, and calls for a [sic] evidentiary hearing to resolve it” in relation to the victim’s testimony that he had a knife in his pocket that the hospital returned to him but the knife is not listed on the “emergency department belongings list” and Brenda Gully testified she removed the knife on scene and gave it to an officer. (Appellant’s Brief, p.10.) The closest claim alleged in the petition to this argument is that counsel failed to “acquire ‘Brenda Gully’ [sic] Report of ‘Treatment,’ showing the knife was collected and given to [sic] custody of Officer Frick.” (R., p.17 (quotations and capitalization original, emphasis omitted).) Assuming the claim Cadue is raising on appeal is the same claim raised in his petition, he failed to allege a genuine issue of material fact warranting an evidentiary hearing.

Brenda Gully, a paramedic who responded to the scene of the battery, testified that she removed the knife from the victim “and gave it to the officer on scene” but did not know what happened to the knife after that. (R., p.209.) It is also

² The closet allegation in Cadue’s supporting affidavit is that his “side of the story needed to be shown to the jury but was not.” (R., p.34.) In addition to the fact that there was no claim in the petition, this allegation is insufficient to establish a prima facie case of ineffective assistance of counsel as it fails to provide any factual basis for a claim that counsel prevented Cadue from testifying. Indeed, when read in context, Cadue’s allegation that “his side of the story needed to be shown to the jury” could be referring to the deficiencies actually alleged in the petition.

apparent from the transcript of her testimony that defense counsel had Gully's "patient care report," which was marked as Defendant's Exhibit D. (R., p.209.) Thus, any claim that counsel failed to acquire the report is disproved by the record.

As for Cadue's assertions relating to the victim's testimony regarding the disposition of the knife, the victim admitted at trial that he had "razor knife" in his front pocket at the time of the altercation and when asked what happened to it, he said: "I think I got it back from the safe out of the hospital when I got -- I was discharged out of the hospital." (R., pp.184-185.) Although Cadue claims this was a "lie[]" based on the "emergency department belongings list" (Appellant's Brief, p.10), he offered no evidence of such. Nor was the victim necessarily lying about retrieving the knife from the hospital just because Brenda Gully said she gave the knife to the officer on scene. Since the officer obviously did not collect the knife as evidence, it could have very well been left with the victim's other possessions at the hospital, which he retrieved upon discharge. In any event, Cadue failed to allege how he was prejudiced by counsel's failure to exploit any alleged lie by the victim as to whether he retrieved the knife from the hospital or not. Having failed to allege a prima facie case of deficient performance or prejudice on this claim, summary dismissal was appropriate.

Finally, Cadue claims there is a genuine issue of material fact on whether Officer Frick ever authored an undisclosed police report. (Appellant's Brief, p.11.) Cadue was not entitled to an evidentiary hearing on this claim because he failed to produce any actual evidence that such a report exists. Rather, he speculates that Officer Frick wrote a report at one time that contained a reference to the victim's

knife but later amended his report to omit that reference.³ (Appellant's Brief, pp.10-11.) Conclusory, speculative allegations unsupported by evidence are insufficient to create a genuine issue of material fact. Workman, supra. Cadue failed to allege a prima facie case that counsel was deficient for failing to obtain a report, which there is no evidence exists, or that he was prejudiced as a result given that the victim admitted at trial that he had a razor knife in his pocket. (See R., pp.115-116.) Summary dismissal was therefore appropriate.

Cadue has failed to show the district court erred in summarily dismissing his petition.

II.

Cadue's Claim That Post-Conviction Counsel Was Ineffective Is Not Properly Before This Court

In his second claim, Cadue appears to contend post-conviction counsel was ineffective. (Appellant's Brief, pp.11-16.) This claim is not properly before the Court for consideration.

It is well-established that this Court, as a general rule, does not consider ineffective assistance of counsel claims raised for the first time on appeal. State v. Mitchell, 124 Idaho 374, 375-376, 859 P.2d 972, 973-974 (Ct. App. 1993) ("it is generally inappropriate to raise a claim of ineffective assistance of counsel on direct appeal from the judgment of conviction"). If Cadue wishes to challenge the performance of post-conviction counsel, the proper course of action is to file a successive petition. Idaho Code § 19-4908 permits a petitioner to file a successive

³ The state denied there were two reports authored by Officer Frick. (R., p.132; Tr., p.15, Ls.1-7.)

petition if the petitioner can establish “sufficient reason” to do so. Ineffective assistance of post-conviction counsel in relation to an initial petition can constitute a sufficient reason for pursuing a successive petition. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (citations omitted) (“Ineffective assistance of prior post-conviction counsel may, however, provide sufficient reason for permitting newly-asserted allegations or allegations inadequately raised in the initial petition to be raised in a subsequent post-conviction petition.”). It appears Cadue has taken advantage of this option as evidenced by his request to suspend this appeal prior to briefing in light of his successive petition filed in Twin Falls County Case No. CV-2013-1072.⁴ (Motion to Suspend Appeal and Statement in Support Thereof, filed April 2, 2013.) Cadue’s claim that post-conviction counsel was ineffective is not preserved and should not be considered for the first time on appeal

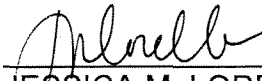
Because Cadue has failed to establish any basis for reversing the district court’s dismissal of his post-conviction petition or any other basis for relief, the district court’s order should be affirmed.

⁴ The state objected to Cadue’s motion to suspend the appeal pending adjudication of Cadue’s successive petition and the Court denied Cadue’s motion. (Objection to “Motion to Suspend the Appeal and Statement in Support Thereof,” filed April 8, 2013; Order Denying Motion to Suspend the Appeal, dated May 1, 2013.)

CONCLUSION

The state respectfully requests this Court affirm the district court's summary dismissal of Cadue's petition for post-conviction relief.

DATED this 18th day of November, 2013.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of November 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

PERRY W. CADUE
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PO Box 70010
Boise, ID 83707



JESSICA M. LORELLO
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