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Dixey v. State Respondent's Brief Dckt. 40323

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CLYDE OWEN DIXEY,)	
)	No. 40323
Petitioner-Appellant,)	
)	Bingham Co. Case No.
vs.)	CV-2011-2688
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM**

**HONORABLE DARREN B. SIMPSON
District Judge**

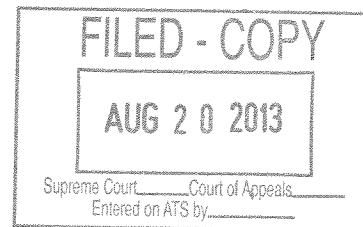
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STATEMENT OF THE CASE

Nature of the Case

Clyde Owen Dixey appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

Statement of Facts and Course of Prior Post-Conviction Proceedings

The facts and course of proceedings relating to Dixey's first post-conviction action are as set forth by the district court in its order granting the state's motion for summary dismissal:

1. In August of 2007, Dixey was tried by jury and found guilty of two counts of Burglary, both being felonies. Attorney Cindy Campbell represented Dixey at trial.
2. Attorney Kevin Peterson substituted in as Dixey's counsel of record prior to sentencing.
3. Dixey was sentenced to a fixed and determinate period of four (4) years, together with an indeterminate period of four (4) years (not less than four years nor more than eight (8) years) on each count, with the sentences to run concurrently. Dixey's sentence was suspended and Dixey was placed on probation for a period of five (5) years.
4. Dixey later admitted to violating the terms of his probation and his probation was modified.
5. Dixey admitted to violating the terms of his modified probation. His probation was revoked, his sentence was reimposed, and his sentence was suspended. The Court retained jurisdiction. Attorney Kevin Peterson continued to represent Dixey through the revocation of his probation.
6. Upon receipt of the *Addendum to the Presentence Investigation* from the North Idaho Correctional Institution, the Court, on May 28, 2009, relinquished jurisdiction and reimposed Dixey's original sentence.

7. On October 19, 2009, attorney Kevin Peterson was allowed to withdraw as Dixey's counsel of record. Attorney Manuel Murdoch was appointed in Kevin Peterson's place.

8. Dixey did not appeal his conviction or sentence, but he did file a motion for sentence reduction. Dixey's motion for sentence reduction was denied. Dixey did not appeal the denial of his sentence reduction motion.

9. On November 18, 2008, Dixey filed his original petition for post-conviction relief. He amended his petition twice before it was adjudicated.

10. On December 13, 2010, this Court denied all of Dixey's ineffective assistance of counsel claims save for one: post-trial counsel's failure to timely appeal Dixey's conviction.

11. Dixey's judgment of conviction for Burglary was affirmed on appeal.

(R., pp.97-99 (footnotes omitted).)

Statement of Facts and Course of Successive Post-Conviction Proceedings

Dixey filed a *pro se* successive petition for post-conviction relief in December of 2011. (R., pp.4-16.) In it, Dixey raised seven separate issues of ineffective assistance of counsel which he asserted were not properly raised in his initial petition for post-conviction relief, including a claim post-conviction counsel had been ineffective in presenting a claim that trial counsel had failed to investigate alternative perpetrator evidence related to the truck used in the burglaries. (R., pp.5-7.) Although the district court appointed Dixey post-conviction counsel (R., pp.61-62), there was no amended petition filed on Dixey's behalf.

The state file a motion for summary disposition asserting "the claims were not inadequately raised" and Dixey was "simply try[ing] to reargue the claim[s]."

(R., p.73.) At a hearing on the motion for summary dismissal, Dixey conceded all but the issue relating to the ineffectiveness of counsel for failing to adequately present his alternate suspect evidence at trial. (R., p.96; Tr., p.12, L.7 – p.21, L.10.) The state argued at hearing that Dixey's claims in his successive petition for post-conviction relief were barred because they should have been raised in his initial petition. (Tr., p.22, Ls.4-7.)

Following a hearing on the state's motion, the court issued a written decision granting summary disposition finding "Dixey's alibi defense was previously raised in his original post-conviction petition" and that "Dixey waived his ineffective assistance of post-conviction counsel claim with regard to ownership of the grey truck." (R., p.106.)

ISSUE

Dixey states the issue on appeal as:

Did the district court err in summarily dismissing Mr. Dixey's successive petition for post-conviction relief because he presented an issue of material fact as to whether post-conviction counseled [sic] was ineffective for failing to present and support his claim that trial counsel should have corroborated that Mr. Dixey did not own the pickup and that the pickup's owner fit the description of the perpetrator of the September 2006 incident?

(Appellant's brief, pp.6-7.)

The state rephrases the issue on appeal as:

Has Dixey failed to establish that the district court erred by summarily dismissing his successive post-conviction petition?

ARGUMENT

Dixey Has Failed To Establish That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

The district court dismissed Dixey's successive petition, finding Dixey failed to raise, in his original petition, the issue of whether trial counsel was ineffective for failing to gather evidence regarding ownership of the vehicle used in the burglaries and did not show why that issue was not raised in his initial petition for post-conviction relief. (R., p.106.) The district court further found in dismissing Dixey's petition that he had previously raised in his original petition a claim counsel was ineffective in presenting an alibi defense. (Id.) The district court concluded Dixey failed to raise a material issue of fact regarding either issue and granted the state's motion to summarily dismiss Dixey's successive petition for post-conviction relief. (Id.) On appeal, Dixey claims "[t]he issues Mr. Dixey raised in the successive petition concerning the pickup's previous owner were not presented during Mr. Dixey's initial post-conviction action." (Appellant's brief, p.12.) Dixey also asserts that he did present "an issue of fact justifying an evidentiary hearing as to whether post-conviction counsel's ineffective assistance present[ed] sufficient reason to permit litigation the claim in a successive petition" by informing "post-conviction counsel that trial counsel failed to corroborate that he did not own the pickup in question during September 2006 and failed to present evidence that the pickup's previous owner matched the description of the suspect." (Appellant's brief, pp.15-16.) Dixey's arguments are without merit.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). 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. Dismissal Of Dixey's Successive Petition For Post-Conviction Relief Was Appropriate

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-

4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (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 v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it appears that the applicant is not entitled to relief. Specifically, I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Applying these principles in this case, the district court summarily dismissed Dixey's petition as being improperly successive. (R., pp.95-106.) Contrary to Dixey's assertions on appeal, a review of the record and the applicable law supports the district court's order of summary dismissal.

Dixey's petition was correctly dismissed on the basis that it failed to satisfy the criteria for a permissible successive petition under the UPCPA. Idaho Code § 19-4908 governs the filing of successive petitions and provides:

Waiver of or failure to assert claims. – All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

I.C. § 19-4908. In interpreting this statute, Idaho's appellate courts have held that "[i]neffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application." Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (footnote omitted) (citing Palmer v. Dermitt, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999)). To establish ineffective assistance of counsel, however, a post-conviction petitioner must demonstrate both that (a) his counsel's performance fell below an objective standard of reasonableness and (b) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Although Dixey argues otherwise, a review of the record shows that Dixey had previously raised the issue of his alibi evidence in his first petition for post-conviction relief. Further, Dixey has failed to explain why he did not argue the ownership of the vehicle issue in his first petition. As such, Dixey has failed to

establish a “sufficient reason” to justify the filing of his successive petition in this case.

Dixey raised in his original petition for post-conviction relief the claim of ineffective assistance of counsel for failing to present his alibi defense. Subsequent to the *pro se* filing of his original petition, counsel was appointed and filed additional documents, including a second amended petition for post conviction relief which included the claim “Petitioner does not feel like his attorney asked him adequate questions while he was on the stand to allow him to adequately present his side of the story while testifying, nor did she ask the questions that he wanted her to ask the witnesses.” (6/19/2013 Augmentation to the Record, Second Amended Post Conviction Petition, p.5.) Also filed was a response to the state’s third motion for summary disposition which included the following summary of Dixey’s alibi:

In paragraph 9 of Respondent’s motion, Respondent states that “Petitioner claims that his counsel did not ask him enough questions at trial.” This is an inaccurate statement of Petitioner’s allegation. In paragraph 9 of Petitioner’s Second Amended Petition, Petitioner states that he “does not feel like his attorney asked him adequate questions while he was on the stand to allow him to adequately present his side of the story while testifying. . .”. Petitioner alleges the following facts to show that there is a material question of fact to be resolved by the court at an evidentiary hearing. Petitioner responds that Cindy Campbell cut him off during his testimony and instructed him to only answer the questions asked. This prevented him from explaining to the jury that he wasn’t in Blackfoot during the incident of September 29, 2006. He wanted to explain to the jury that he had just been placed on misdemeanor probation and was starting school at I.S.U.; that between his court dates, looking for a place to live and looking for a vehicle, he didn’t have time to run around Blackfoot to be accused of stealing.

(6/19/2013 Augmentation to the Record, Petitioner's Response to Respondent's Third Motion for Summary Disposition, p.4.) Dixey raised the issue that his counsel was ineffective for failing to raise an alibi defense in his second amended petition for post-conviction relief and specifically addressed the claim in his response to the state's motion for summary disposition through his assertion that counsel failed to allow him to explain to the jury he could not have been present at the location of the first burglary offense because he was busy elsewhere. As such, this claim was raised in Dixey's amended petition for post-conviction relief and cannot now be asserted in a successive petition for post-conviction relief. Even if trial counsel had elicited the testimony detailed above by Dixey, such evidence does not establish an alibi for the September burglary. (See R., p.104.)

Dixey further asserts his trial counsel was ineffective for failing to investigate and present evidence at trial that he did not own the vehicle in question at the time the first burglary was committed and that the person who did bore a resemblance to himself. (Appellant's brief, pp.11-17.) Dixey does not, however, provide a reason for his failure to include this claim in his initial petition for post-conviction relief. The information of ownership of the grey truck in question and the physical attributes of the person from whom he obtained the vehicle was known to Dixey at the time of the filing of the original petition for post-conviction relief. Dixey provides no reason for his failure to raise this issue in his first petition. In granting the state's motion for summary disposition, the district court found:

Dixey argues that he did not purchase or drive the vehicle, identified at the crime scene, until late October of 2006 and that he gave this information to his trial attorney. Nowhere in Dixey's original petition, the two amendments thereto, or his affidavit in response to the State's motion for summary disposition did Dixie [sic] ever mention trial counsel's alleged failure to raise this issue at trial.

Dixie [sic] knew this information by the conclusion of his August 23, 2007 jury trial. Furthermore, a transcript of the jury trial was filed in his original post-conviction case on October 6, 2009. Thus, prior to Dixey's amended petition and affidavit, his second amended petition and affidavit, and his affidavit in response to the State's motion for summary disposition, Dixey had a full transcript of what happened at his jury trial. The transcript provided concrete proof of the evidence trial counsel did, or did not, elicit.

Dixey gives no reason for his failure to raise the issue in his first post-conviction petition. He does, however, attach the affidavit of Yank Hensley, wherein Mr. Hensley attests that Michael Crumbley used the 1977 grey primer Chevy short box pickup truck on a regular basis in September of 2006. In a separate affidavit, Mr. Hensley testifies that he informed Dixey in mid-October 2006 that the Crumbleys wished to sell their grey Chevy truck. He then testifies that he observed Dixey with the truck on October 26, 2006.

Dixey offers no explanation why this information was not available to him in November of 2008, when he filed his original, *pro se* post-conviction petition; in November of 2009 when, together with his appointed attorney, he file his amended petition and an affidavit; in May of 2010 when he and his attorney filed his seconded [sic] amended petition and affidavit; or in October of 2010 when he and his attorney responded to the State's motion for summary disposition and filed an affidavit.

(R., pp.104-105 (footnotes omitted).)

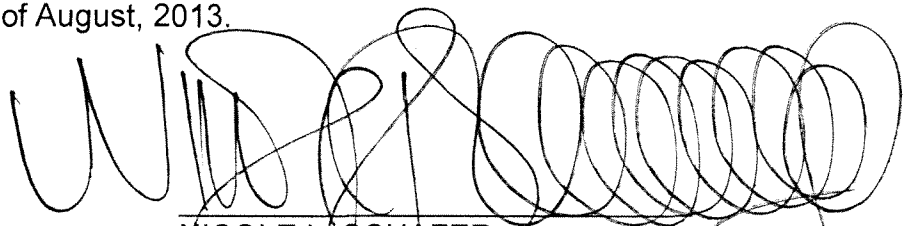
The district court correctly dismissed Dixey's petition on the ground that it did not meet the statutory requirements for a permissible successive petition under I.C. § 19-4908 as the record supports the district court's finding that Dixey raised the alibi issue in his first post-conviction relief action, and he failed to establish a sufficient reason why the issue of ownership of the vehicle used in the

commission of the first burglary was not raised in Dixey's original post-conviction relief action, thus failing to make a substantial factual showing as to the ineffectiveness of his post-conviction counsel.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Dixey's successive petition for post-conviction relief.

DATED this 20th day of August, 2013.

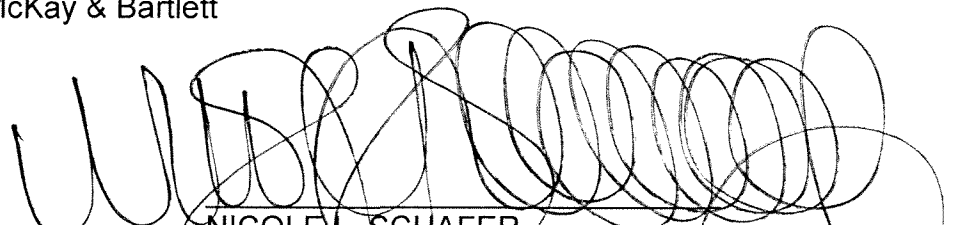


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of August, 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:

ROBYN FYFFE
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303 W. Bannock
Boise, Idaho 83701



NICOLE L. SCHAFER
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NLS/pm