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Dixey v. State Appellant's Reply Brief Dckt. 40323

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY BRIEF OF APPELLANT

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
Presiding Judge

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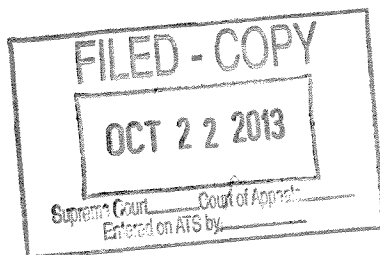


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II. ARGUMENT IN REPLY

The District Court Erred 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 Counsel 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 Presented Evidence That the Pickup's Owner Fit the Description of the Perpetrator of the September 2006 Incident

A. Mr. Dixey Presented an Issue of Fact as to Whether Post-Conviction Counsel's Ineffective Assistance Presented Sufficient Reason Justifying a Successive Petition

The state accused Mr. Dixey of burglarizing Odgen's Tires on two occasions in a primer grey pickup, once in September 2006 and again in November 2006. Mr. Dixey informed trial counsel that he did not own the pickup in question in September 2006. Additionally, the physical description of the pickup's previous driver, which matched the description of the September 2006 suspect, was provided to counsel in discovery. Providing the jury with an alternate perpetrator would have significantly bolstered Mr. Dixey's explanation that he was not at the tire store in September and, in November, he was simply trying to trade in some tires. Trial counsel nevertheless failed to present any evidence regarding the physical description of the pickup's previous driver or to corroborate Mr. Dixey's testimony that he did not own the pickup in September 2006.

In this appeal, the state argues that trial counsel's ineffective assistance for failing to present evidence regarding the pickup's previous driver cannot be litigated in successive proceedings because Mr. Dixey raised the "alibi" claim during initial post-conviction proceedings and failed to explain the reason the claim regarding the ownership of the pickup was not included in his original or amended petitions. However, as alleged in his successive post-conviction petition, Mr. Dixey informed the attorney appointed to represent him in the first post-

conviction action that he did not own the pickup in question until late October 2006 and that the person who was using that pickup during September matched the description of the person seen at Odgen's Tire in September 2006. Post-conviction counsel nonetheless failed to include or support this claim and, instead, only argued that trial counsel should have allowed Mr. Dixey to explain that he was not in Blackfoot during September because he was on misdemeanor probation and attending school. Because Mr. Dixey established an issue of fact as to whether post-conviction counsel thereby provided ineffective assistance, the district court erred in dismissing Mr. Dixey's successive petition and this Court should remand the case for further proceedings.

1. Whether post-conviction counsel failed to present the claim regarding pickup ownership or inadequately presented that claim is not dispositive

On appeal, the state notes that post-conviction counsel alleged that trial counsel should have allowed Mr. Dixey "to explain to the jury he could not have been present at the location of the first burglary offense because he was busy elsewhere" and because "the [alibi] claim was raised in Dixey's amended petition for postconviction relief [it] cannot now be asserted in a successive petition for postconviction relief." Respondent's Brief p. 10. However, as Mr. Dixey clarified in his Opening Brief, the portion of his successive petition discussing an "alibi" is distinct from the "alibi" claim raised in initial proceedings. Appellant's Brief, p. 11-17. During the initial post-conviction proceedings, post-conviction counsel alleged that trial counsel should have allowed Mr. Dixey to explain to the jury that he was busy between misdemeanor probation and school. Conversely, the "alibi" portion of Mr. Dixey's successive petition alleges that trial counsel failed to investigate and present evidence corroborating that he did not drive the primer

grey pickup until October 2006 and establishing that the pickup's previous driver matched the description of the Native American with a ponytail seen at Odgen's Tire in September 2006. R. 5-7. The latter claim regarding pickup ownership was not addressed during the initial proceedings.

Regardless of whether the "alibi" claim in the initial proceedings can be equated with the pickup ownership issues raised in the successive petition, the claim can be raised in a successive proceeding as a result of post-conviction counsel's ineffective assistance. A ground for relief may be raised in a successive application if the court finds "sufficient reason" explaining why the ground "was not asserted *or was inadequately raised* in the original, supplemental, or amended application." I.C. § 19-4908 (emphasis added). Mr. Dixey informed post-conviction counsel that he did not own the pickup in question in September, informed counsel that the prior driver matched the physical description of the suspect and provided counsel with witness information. Post-conviction counsel's failure to properly develop the claim was ineffective whether characterized as failing to include or as inadequately presenting the claim.

2. Mr. Dixey presented an issue of fact concerning whether post-conviction counsel's ineffective assistance presented sufficient reason justifying raising the pickup ownership issues in a successive petition

After Mr. Dixey provided post-conviction counsel with the relevant background and witness information regarding the pickup ownership issues, counsel should have developed and included his claim. R. 6-7, 46. Without addressing this argument, the state contends that Mr. 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." Respondent's Brief, p. 10. In so arguing, it appears that the

state contends that Mr. Dixey necessarily waived the claim by not raising it in his pro se petition and that post-conviction counsel had no duty to further develop the claim even after Mr. Dixey provided the necessary information.

However, “a court-appointed attorney may be made available to the [indigent] applicant in the preparation of the application” I.C. § 19-4904. “The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law” and “[w]hile confined to prison, . . . is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.” *Martinez v. Ryan*, 132 S.Ct. 1309, 1317 (2012). “Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy” and, thus, require the assistance of an effective attorney. *Id.* at 1317. As an unrepresented inmate, Mr. Dixey could not “be expected to know how to properly allege the necessary facts.” Appointment of post-conviction counsel should have given Mr. Dixey “an opportunity with counsel to properly allege the necessary supporting facts.” *Charboneau v. State*, 140 Idaho 789, 794-95, 102 P.3d 1108, 1112-13 (2004).

In a hand-written petition on a pre-printed form totaling four pages, Mr. Dixey explained that he “did not know that [he] could file this petition [himself until] by chance [he] called appellate [sic] court in Boise.” R. 4. After counsel was appointed to assist, Mr. Dixey provided his post-conviction attorney with the information necessary to properly develop his claim by informing him of its factual basis and providing him witness information. Under these circumstances, Mr. Dixey cannot be said to have voluntarily and intelligently waived his ineffective assistance of counsel claim by failing to include it in his original, pro se petition.

The state also claims Mr. Dixey offered “no explanation for why [information regarding the pickup ownership issue] was not available to him . . . when, together with his appointed attorney, he filed his amended petition and an affidavit; . . . when he and his attorney filed his seconded amended petition and affidavit; or. . . when he and his attorney responded to the State's motion for summary disposition and filed an affidavit.” Respondent’s Brief p. 11, *citing* R. 105. As set forth in Mr. Dixey’s Opening Brief, Mr. Dixey explained that the claim was not included during post-conviction proceedings due to post-conviction counsel’s ineffective assistance in failing to develop and include the claim after Mr. Dixey provided the relevant information.

Moreover, had post-conviction counsel followed up on the information provided by Mr. Dixey, he would have discovered the witness and other supporting information included in the successive petition. Providing the jury with information concerning the prior driver’s description was particularly critical in light of the store employee’s testimony that he observed the September suspect from a distance of 25-30 yards and that his identifying features were that he had a long-pony tail and was Native American. *See* Trial Tr. p. 73, ln. 22 - p. 74, ln. 6; p. 77, ln. 11 - p. 78, ln. 6. Evidence regarding the pickup ownerships issues would have substantially supported Mr. Dixey’s defense and did not run the same risk as informing the jury that Mr. Dixey was busy on misdemeanor probation.

There is an issue of fact regarding whether post-conviction counsel was ineffective for failing to develop the pickup ownership issues and, instead, focusing on the allegation that Mr. Dixey should have been able to tell the jury about his court and school activities. Accordingly, the district court erred in summarily dismissing Mr. Dixey’s successive petition on the ground he failed to demonstrate sufficient reason under I.C. § 19-4908.

B. The District Court Did Not Address Whether There was an Issue of Fact as to Whether Trial Counsel was Ineffective for Failing to Develop and Present the Ownership Issues With the Pickup to the Jury and This Court Cannot Affirm the Dismissal on That Basis

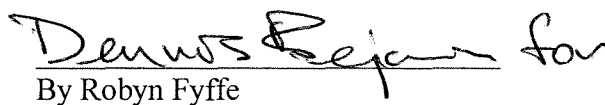
The state's motion for summary disposition did not raise and the district court did not address whether Mr. Dixey presented an issue of material fact regarding his claim that he received ineffective assistance of counsel. Thus, if this Court concluded such an issue of fact did not exist, the proper course would be to remand and provide Mr. Dixey with an opportunity to respond and further support his claim. The state does not argue to the contrary in its brief. Accordingly, no reply is required.

III. CONCLUSION

For all the reasons set forth above and in his Opening Brief, Mr. Dixey respectfully asks this Court to reverse the district court's judgment dismissing his post-conviction claims and to remand this case for further proceedings.

Respectfully submitted this 22nd day of October, 2013.

NEVIN, BENJAMIN, MCKAY & BARTLETT LLP

 Dennis Bejar for
By Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2013, I caused two true and correct copies of the foregoing to be mailed to: Nicole L. Schafer, Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.


Robyn Fyffe