

5-20-2013

Condon v. State Respondent's Brief Dckt. 40346

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"Condon v. State Respondent's Brief Dckt. 40346" (2013). *Not Reported*. 1101.
https://digitalcommons.law.uidaho.edu/not_reported/1101

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

TIMOTHY CHARLES CONDON,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

No. 40346

Canyon Co. Case No.
CV-2011-8976

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

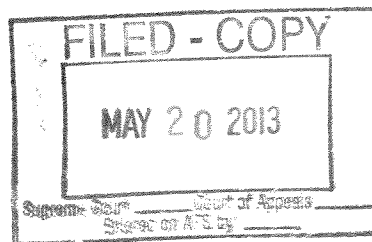
HONORABLE BRADLY S. FORD
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

RUSSELL J. SPENCER
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

REBEKAH A. CUDÉ
Attorney at Law
PO Box 1983
Boise, ID 83701
(208) 284-8099



ATTORNEYS FOR
RESPONDENT

ATTORNEY FOR
PETITIONER-APPELLANT

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUE	3
ARGUMENT	4
Condon Has Failed To Show Error In The District Court's Dismissal Of His Petition For Post-Conviction Relief	4
A. Introduction	4
B. Standard Of Review	4
C. The District Court Correctly Dismissed Condon's Post-Conviction Petition	4
CONCLUSION	10
CERTIFICATE OF MAILING	11

TABLE OF AUTHORITIES

CASES

PAGE

<u>Aragon v. State</u> , 114 Idaho 758, 760 P.2d 1174 (1988)	6
<u>Baldwin v. State</u> , 145 Idaho 148, 177 P.3d 362 (2008)	6, 8
<u>Ferrier v. State</u> , 135 Idaho 797, 25 P.3d 110 (2001)	6
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 57 P.3d 787 (2002)	4
<u>Goodwin v. State</u> , 138 Idaho 269, 61 P.3d 626 (Ct. App. 2002).....	5
<u>Harrington v. Richter</u> , 131 S.Ct. 770 (2011)	8, 9
<u>Ivey v. State</u> , 123 Idaho 77, 844 P.2d 706 (1992)	8
<u>Monahan v. State</u> , 145 Idaho 872, 187 P.3d 1247 (Ct. App. 2008).....	5
<u>Pizzuto v. State</u> , 146 Idaho 720, 202 P.3d 642 (2008).....	5
<u>Pratt v. State</u> , 134 Idaho 581, 6 P.3d 831 (2000)	5
<u>State v. Bearshield</u> , 104 Idaho 676, 662 P.2d 548 (1983).....	5
<u>State v. Lovelace</u> , 140 Idaho 53, 90 P.3d 278 (2003)	5, 6
<u>State v. Payne</u> , 146 Idaho 548, 199 P.3d 123 (2008).....	5, 10
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	6
<u>Stuart v. State</u> , 118 Idaho 865, 801 P.2d 1216 (1990)	6
<u>Wolf v. State</u> , 152 Idaho 64, 266 P.3d 1169 (Ct. App. 2011).....	7
<u>Workman v. State</u> , 144 Idaho 518, 164 P.3d 798 (2007)	4, 5, 6

STATUTES

I.C. §19-4901.....	4
I.C. §19-4903.....	5, 10
I.C. §19-4906.....	5

RULES

I.C.R. 46 7

I.R.C.P. 8..... 5

STATEMENT OF THE CASE

Nature Of The Case

Timothy Charles Condon appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In the underlying case, Condon was arrested for driving under the influence on December 1, 2010. (38584 R., pp.3-4.) At Condon's subsequent arraignment, the magistrate set bail at \$1 million. (38584 R., pp.7, 9.) Because Condon pleaded guilty to a felony DUI in 2003, the state charged Condon with felony DUI as a second offense in 15 years. (38584 R., pp.12-15.) Pursuant to a plea agreement, Condon pleaded guilty to the felony DUI in exchange for the state not filing a persistent violator charge. (38584 1/10/2011 Tr., p.2, Ls.7-14; p.13, L.2 – p.14, L.6.)

After the change of plea, Condon's counsel filed a motion for pre-trial release on the basis that bond was excessive. (38584 R., pp.23-24.) At the hearing on the motion on February 1, having already received the PSI, defense counsel withdrew the motion and requested an earlier sentencing date, which was granted. (38584 R., pp.25-26; see also 2/15/2011 Tr., p.10, Ls.10-16.) The district court entered judgment against Condon and sentenced him to ten years with five years fixed. (38584 R., pp.49-50; see also 2/15/2011 Tr., p.23, L.17 – p.26, L.5.) Condon filed a Rule 35 motion for reduction of sentence (R., pp.86-88), which the district court denied (R., pp.92-97). Condon appealed. (38584 R., pp.35-36.) In an unpublished decision, the Court of Appeals affirmed both Condon's conviction and sentence, and the denial of his Rule 35 motion. (R., pp.99-100.)

On September 13, 2011, Condon filed a timely petition for post-conviction relief claiming that his counsel was ineffective, that his conviction was unlawful because he was not indicted, and that his sentence was excessive. (R., pp.4-17.) The state moved to dismiss Condon's petition on the ground that it failed to raise an issue of material fact. (R., pp.101-11.) The district court, addressing each of Condon's claims, granted the state's motion and summarily dismissed Condon's petition for post-conviction relief. (R., pp.140-55.) Condon filed a timely notice of appeal. (R., pp.159-63.)

ISSUE

Condon states the issue on appeal as:

Condon's trial counsel filed a motion for his pre-trial release without bail, on the grounds that bail was excessive, so that Condon could begin alcohol treatment prior to sentencing. Counsel later withdrew the motion and asked that sentencing be expedited. At sentencing, the district court relied, in part, on Condon's failure to ever obtain or complete alcohol treatment when it determined his unified sentence of ten years, with five years fixed. Did the district court err when it summarily dismissed Condon's claim that his counsel was ineffective in his handling of the issue of Condon's excessive bail?

(Appellant's brief, p.5.)

The state rephrases the issue as:

Has Condon failed to show error in the district court's dismissal of his petition for post-conviction relief?

ARGUMENT

Condon Has Failed To Show Error In The District Court's Dismissal Of His Petition For Post-Conviction Relief

A. Introduction

In his petition for post-conviction relief, Condon raised issues of ineffective assistance of counsel, being charged by information instead of an indictment, and excessive sentence. (R., pp.4-17.) The state moved to dismiss Condon's petition on the ground that it failed to raise an issue of material fact. (R., pp.101-11.) The district court, addressing each of Condon's claims, granted the state's motion and summarily dismissed Condon's petition for post-conviction relief. (R., pp.140-55.) On appeal, Condon argues that the district court erred by dismissing his claim that his attorney was ineffective for failing to pursue his motion for pre-trial release on the ground of excessive bail. (Appellant's brief, pp.6-13.) Application of the correct legal standards to Condon's claim, however, shows no error.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file" Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Correctly Dismissed Condon's Post-Conviction Petition

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a

new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

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 “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c));

Lovelace, 140 Idaho at 72, 90 P.3d at 297. 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)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. 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.

On appeal, Condon argues that the district court erred in dismissing his claim that his counsel was ineffective "when he withdrew Condon's motion for excessive bail, preventing Condon from obtaining the benefit of pre-sentencing alcohol treatment, which might have induced the sentencing judge to impose a lesser sentence." (Appellant's brief, pp.6-13.) Where the petitioner alleges entitlement to relief based on ineffective assistance of counsel, he must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To establish deficient performance, the petitioner must overcome the strong presumption that counsel's performance was adequate and "show that his attorney's conduct fell below an objective standard of reasonableness." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (citations omitted). "[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 petitioner must show “a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id. Condon has failed to meet this burden.

Condon argues that defense counsel was deficient because he filed and then withdrew a motion for pre-trial release based on a claim that Condon’s bail was excessive. (Appellant’s brief, pp.9-12.) When a petitioner claims his counsel was ineffective for failing to file or pursue a motion, “the district court may consider the probability of success of the motion in question in determining whether the attorney’s inactivity constituted incompetent performance.” Wolf v. State, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011). Condon’s motion for pre-trial release, based on excessive bail and brought after he pleaded guilty, was unlikely to be successful. First, because Condon had already pleaded guilty and lost the presumption of innocence, he was no longer entitled to release on bail. I.C.R. 46. Second, after reviewing the case, the district court found that the magistrate acted within its discretion when it set bail, considering Condon’s criminal record and the facts of the charge. (R., p.152.) This finding, that bail was not excessive but within the magistrate’s discretion, significantly undermines Condon’s ground for requesting pre-trial release. Finally, Condon’s purported motive for the motion, to get alcohol treatment for purposes of sentencing mitigation, was moot before the hearing on the motion. As noted in the minutes from that hearing, both the PSI and GAIN assessment were completed before the scheduled

hearing. (38584 R., p.25.) Neither was positive, with both recommending confinement. (See 38584 PSI, pp.17-18; 38584 GAIN, pp.4-5.)

The district court further found that defense counsel acted in his client's behalf when it made the tactical decision to withdraw the motion for pre-trial release and request an earlier sentencing date. (R., p.152.) Condon disputes this. (Appellant's brief, pp.10-12.) He has not, however, presented any evidence to overcome the presumption that trial counsel's decision to withdraw the motion and request an expedited sentencing was based on reasonable strategy and was instead "based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation," as he was required to do. See Baldwin, 145 Idaho at 153-54, 177 P.3d at 367-68. Condon has failed to show that his counsel's alleged deficient performance was anything other than a tactical decision. "The constitutional requirement for effective assistance of counsel is not the key to the prison for a defendant who can dredge up a long series of examples of how the case might have been tried better." Ivey v. State, 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). That Condon, in hindsight, would now make a different tactical decision does not make his defense counsel objectively deficient for withdrawing a motion and expediting sentencing. See Harrington v. Richter, 131 S.Ct. 770, 788 (2011) ("Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to only one technique or approach") (citation and quotations omitted).

Even assuming counsel's failure to pursue the motion for pre-trial release constitutes deficient performance, Condon has failed to show prejudice in counsel's tactical decision to withdraw the motion and expedite sentencing. Condon claims that

“the judge relied, in part, on Condon’s failure to obtain or complete alcohol treatment when it imposed the five-year fixed sentence.” (Appellant’s brief, p.9.) Below, he also speculated that “had his bail been set reasonably—or had he been release to treatment, he could have shown the Court and his pre-sentence report that he was amendable to treatment and receive a lighter sentence.” (R., p.120.) This argument fails for two reasons. First, the district court’s concern was not that Condon failed to seek alcohol treatment between his arrest and sentencing on the instant offense; it was that, over the course of seven confirmed DUI convictions, Condon had *never* sought or completed treatment for his alcohol addiction and, Condon claimed, only *now*, after the seventh conviction, did he recognize that he had a problem that needed to be addressed. (38584 2/15/2011 Tr., p.16, L.23 – p.18, L.11.) Second, speculation does not establish prejudice. “It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding.” Richter, 131 S.Ct. at 787. Rather, the petitioner must show a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding *would* have been different. Id.

Condon’s argument that counsel’s purported deficient performance affected the ultimate outcome of the proceedings, in this case his sentence, requires a long chain of assumptions. At a minimum, the Court must assume that the motion for release would have been successful and Condon would have been released after he had already pleaded guilty to the crime, while pending sentencing on the felony, where he was a repeat offender. The Court must next assume that Condon would have been accepted into treatment. The Court must then assume that Condon, despite his documented history of alcohol abuse and alcohol-related crimes, would have been successful in


treatment. Finally, the Court must assume that this temporary success in treatment, lasting at most a couple months before his sentencing hearing, would have resulted in the district court imposing a lesser sentence, despite Condon's lengthy history of driving while intoxicated (see 38584 PSI, pp.3-11), and despite defense counsel requesting the sentence ultimately imposed (ten years with five years fixed), albeit with an initial period of retained jurisdiction (see 38584 2/15/2011 Tr., p.11, Ls.8-12).

A chain of assumptions is not evidence. As noted above, without evidentiary support, a post-conviction claim is subject to summary dismissal. Payne, 146 Idaho at 561, 199 P.3d at 136 (citing I.C. § 19-4903). Because Condon failed to show that his counsel's tactical decision of withdrawing his motion for pre-trial release and requesting expedited sentencing was objectively deficient, summary dismissal was appropriate. Because Condon failed to present evidence of prejudice, summary dismissal was appropriate. Condon has therefore failed to show error in the district court's summary dismissal of his ineffective assistance of counsel claim.

CONCLUSION

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

DATED this 20th day of May, 2013.

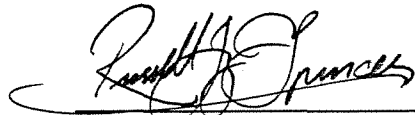


RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

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

REBEKAH A. CUDÉ
Attorney At Law
P.O. Box 1983
Boise, ID 83701

A handwritten signature in black ink, appearing to read "Russell J. Spencer", written over a horizontal line.

RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm