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Urrizaga v. State Respondent's Brief Dckt. 40415

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

RICHARD JOHN URRIZAGA)

Petitioner-Appellant,)

vs.)

STATE OF IDAHO,)

Respondent.)

No. 40415

Twin Falls Co. Case No.
CV-2012-3104

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 G. RICHARD BEVAN
District Judge**

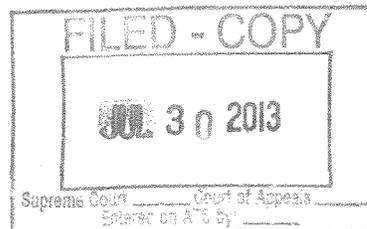
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STATEMENT OF THE CASE

Nature Of The Case

Urrizaga appeals from the judgment entered upon the district court's order summarily dismissing his successive petition for post-conviction relief. Urrizaga claims the district court erred in denying his request for counsel to pursue his successive petition.

Statement Of The Facts And Course Of The Proceedings

"In 2003, Urrizaga pled guilty to trafficking in drugs and was sentenced to a unified term of twenty-two years, with a minimum period of confinement of twelve years." Urrizaga v. State, Docket No. 39479, 2013 Unpublished Opinion No. 400 *1 (March 14, 2013). "In 2011, the State Appellate Public Defender's Office sent Urrizaga a letter indicating misconduct had previously occurred in at least one of the state's forensic laboratories and that Urrizaga may want to determine whether it had any bearing upon his case." Id. Acting on that letter, "[i]n July 2011, Urrizaga filed a petition for post-conviction relief and was thereafter appointed counsel. In addition to the petition, he submitted letters from the Idaho State Police to Idaho prosecutors generally describing the misconduct that had occurred." Id.

The letters indicated that employees at the forensic laboratory in Pocatello had wrongfully maintained a box of unaccounted for drugs that was used for tours of the facility. Employees concealed this box during audits of the facility. The letters also indicated that one employee had ordered a quantity of a drug (GHB) that was in excess of the amount authorized under the Idaho State Patrol Forensic Quality Manual. The employee also concealed this drug from inspectors and auditors.

Urrizaga at pp.1-2.

In the affidavit Urrizaga filed with his petition, he “alleged that the Idaho State Police had substituted unaccounted for drugs in place of the drugs related to his case and that the material confiscated from him was not illicit.” Urrizaga at p.2. However, “Urrizaga provided no documents or other evidence supporting his contention and failed to provide a link between the issues at the state forensic lab and his case.” Id. Accordingly, “[t]he district court filed a notice of intent to dismiss pursuant to I.C. § 19-4906(b) stating that, while the district court found Urrizaga’s petition timely, Urrizaga failed to assert facts which would entitle him to relief relating to the misconduct by the state forensic lab.” Id. Urrizaga did not file a response to the court’s notice and his case was subsequently dismissed. Id.

On appeal, Urrizaga “raise[d] two issues, neither of which was raised in his petition.” Urrizaga at p.4. “First, he allege[d] that his post-conviction attorney obtained lab results pertaining to a different case and, therefore, fairness requires that the case be remanded and that he be allowed to obtain the correct lab results and present them to the district court.” Id. “Second, he alleges ineffective assistance of counsel with respect to his post-conviction attorney because lab results from a different case were presented to the district court. In support of these issues, Urrizaga attached exhibits to his brief that were not presented to the district court.”¹ Id. The Court of Appeals declined to address

¹ Urrizaga represented himself on appeal from the denial of his original post-conviction petition. Urrizaga at p.1 (indicates “Richard John Urrizaga, St. Anthony, pro se appellant).

“these issues and documents” because they “were not presented to the district court.” Id.

The Court of Appeals did, however, address the “issues presented by the petition,” noting the district court summarily dismissed Urrizaga’s claim because he “failed to provide specific information about the misconduct that took place at the forensic lab, in what manner such misconduct related to Urrizaga’s case, or the actual impact such misconduct may have had on Urrizaga’s conviction.” Urrizaga at p.4. The Court further stated:

Urrizaga relies upon mere conclusory allegations not supported by any admissible evidence regarding misconduct at a specific forensic laboratory related to his particular case. There is no evidence indicating the drugs seized in Urrizaga’s case were tested at the affected lab referenced in the letters, nor is there any evidence regarding the type of impropriety alleged--using unaccounted for drugs in place of seized material from defendants. Therefore, the district court did not err in summarily dismissing Urrizaga’s petition for post-conviction relief.

Urrizaga at p.4.

On July 25, 2012, while his original post-conviction appeal was pending, Urrizaga filed a successive petition for post-conviction relief claiming his attorney in his original post-conviction action was ineffective because she “obtain[ed]” the wrong information and “appeal[ed] knowing the issues had to be addressed in district court. . . .” (R., pp.11-14.) Urrizaga filed two supporting affidavits. (R., pp.16-17.) In the first affidavit, Urrizaga asserted, as he did in his initial petition, his “belief that the unknown substance that police alleged was found in [his] possession was not an illegal drug” and that “the I.S.P. forensic laboratory either accidentally or purposely substituted ‘unaccounted for’ drugs that they held

hidden on the premises in order to secure a conviction or force a plea in [his] case.” (R., p.16.) In the second affidavit, Urrizaga complained that his post-conviction attorney sent him a copy of the lab results from the wrong underlying criminal case, which was not the basis of his post-conviction petition. (R., p.17.) Urrizaga attached a handwritten note from his post-conviction attorney that indicated she was providing him with “a copy of the lab material from . . . Case No. CR 03-0633,” rather than Case No. CR 03-3282, which formed the basis of his petition.² (R., pp.11, 22.) Urrizaga also filed a motion for the appointment of counsel (R., pp.27-30.)

The district court filed a notice of intent to dismiss (“Notice”) “on two grounds.” (R., p.36.) “First, the reasons for the claim have already been presented in a post-conviction relief claim.” (R., p.36.) “Second, the claim suffers from the same deficiency as his [previous] claim,” *i.e.*, Urrizaga “has failed to allege facts to show that the lab’s testing *in his case* was inaccurate.” (R., p.36 (emphasis original).) The court also denied Urrizaga’s request for an attorney because his claim was previously adjudicated with the assistance of counsel and re-asserting the same claim is “frivolous.” (R., p.37.)

Urrizaga requested an extension of time in which to file a response to the court’s Notice, which the court granted. (R., pp.40-43.) Urrizaga, however, failed to file a response within the time allotted and the court entered an order

² According to the Idaho Repository, the state charged Urrizaga with felony possession of a controlled substance on January 21, 2003 in Twin Falls County Case No. CR-2003-633, but that case was later dismissed on the state’s motion on July 9, 2003. In Twin Falls County Case No. CR-2003-3282, the state charged Urrizaga with trafficking in methamphetamine on April 11, 2003, and he pled guilty to that charge in June 2003.

dismissing his successive petition and a Judgment of Dismissal. (R., pp.45-46, 69.) Urrizaga filed a timely notice of appeal. (R., pp.45, 60-63, 69.)

ISSUE

Urrizaga states the issue on appeal as:

Whether the district court erred by not appointing post-conviction counsel in light of the fact that Mr. Urrizaga had asserted facts which raised the possibility of a viable post-conviction claim.

(Appellant's Brief, p.4.)

The state rephrases the issue as:

Has Urrizaga failed to show error in the denial of his request for counsel to represent him on his successive post-conviction petition?

ARGUMENT

Urrizaga Has Failed To Establish Error In The District Court's Denial Of His Request To Appoint Counsel To Pursue His Successive Post-Conviction Claim

A. Introduction

Urrizaga contends the district court erred in denying his request for counsel, arguing his “verified petition presents the possibility of a valid claim that post-conviction counsel’s deficient performance deprived [him] of a meaningful opportunity to pursue his post-conviction claims.” (Appellant’s Brief, p.5.) Urrizaga is incorrect. The district court correctly concluded that Urrizaga failed to show his successive post-conviction claim was any more viable than when it was litigated in his first post-conviction action. Summary dismissal without the appointment of counsel was, therefore, appropriate.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel to represent a post-conviction petitioner pursuant to I.C. § 19-4904 is discretionary. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). “In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, [t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Charboneau, 140 Idaho at 792, 102 P.3d at 1111 (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. The District Court Correctly Concluded Urrizaga Was Not Entitled To Counsel To Pursue His Successive Petition Because Urrizaga Failed To Provide Any Evidence That His Claim Was Any More Valid Than When It Was Dismissed With His First Petition

A request for the appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904. That statute provides that “[i]f the applicant is unable to pay court costs and expenses of representation ... a court-appointed attorney may be made available to the applicant in the preparation of the application.” *Id.* Although the decision to grant or deny a request for appointed counsel pursuant to I.C. § 19-4904 is discretionary, this Court has consistently held that counsel should be appointed if the petitioner qualifies financially and “alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf.” Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau v. State, 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). A trial court must “carefully consider” any request for counsel before reaching a decision on the substantive merits of the petition. Charboneau, 140 Idaho at 792, 102 P.3d at 1111. The decision whether to appoint counsel is necessarily dependent on an evaluation of the potential viability of the applicant's post-conviction claims:

When considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts. An indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record. Likewise, a *pro se* petitioner may be unable to present sufficient facts showing that his or her counsel's performance was deficient or

that such deficiency prejudiced the defense. That showing will often require the assistance of someone trained in the law. Therefore, ***the trial court should appoint counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim.*** The investigation by counsel may not produce evidence sufficient to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.

Swader, 143 Idaho at 654-55, 152 P.3d at 15-16 (emphasis added).

The abuse of discretion standard as applied to I.C. § 19-4904, “permits the trial court to determine whether the facts alleged are such that they justify the appointment of counsel; and, in determining whether to do so, every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. “If the court decides that the claims in the petition are frivolous, it should provide sufficient notice regarding the basis for its ruling to enable the petitioner to provide additional facts, if they exist, to demonstrate the existence of a non-frivolous claim.” Hust v. State, 147 Idaho 682, 684, 214 P.3d 668, 670 (Ct. App. 2009) (citing Charboneau, 140 Idaho at 793, 102 P.3d at 1112; Swader, 143 Idaho at 653–54, 152 P.3d at 14–15). If, in response, the petitioner “alleges facts to raise the possibility of a valid claim, the district court should appoint counsel in order to give the petitioner an opportunity with counsel to properly allege the necessary supporting facts.” Charboneau, 140 Idaho at 793, 102 P.3d at 1112. Otherwise, the court may deny the request for counsel and summarily dismiss the petition.

Workman, 144 Idaho at 529, 164 P.3d at 809; Hust, 147 Idaho at 684, 214 P.3d at 670.

Urrizaga contends the district court erred in denying his request for counsel because, he asserts, he “did articulate facts which raise the possibility of a valid claim . . . , specifically, that his post-conviction attorney performed deficiently.” (Appellant’s Brief, p.7 (footnote omitted).) The alleged ineffective assistance of post-conviction counsel is “not among the permissible grounds for post-conviction relief,” rather “[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 and n.3, 177 P.3d 400, 403 and n.3 (citations omitted). The inquiry relevant to the issue raised on appeal is not whether Urrizaga could overcome the prohibition on successive petitions, I.C. § 19-4908, but whether he raised the possibility of valid substantive claim that required the appointment of counsel. Urrizaga failed to do so.

The substantive claim Urrizaga alleged in his successive petition was the same claim raised in his initial petition - his “belief that the unknown substance that police alleged was found in [his] possession was not an illegal drug” and that “the I.S.P. forensic laboratory either accidentally or purposely substituted ‘unaccounted for’ drugs that they held hidden on the premises in order to secure a conviction or force a plea in [his] case.” (R., p.16.) This allegation did not raise the possibility of a valid claim. As noted by the district court, Urrizaga “failed to

allege facts to show that the lab's testing in his case was inaccurate." (R., p.36 (emphasis original).) Urrizaga has known since his original post-conviction action that such a connection was necessary, but he failed to raise the possibility of a valid connection in his successive petition and did not respond to the court's Notice advising him, again, of this deficiency. Urrizaga's reassertion of his unsubstantiated belief in a successive petition does not raise the possibility of a valid claim. Moreover, contrary to Urrizaga's assertion, the district court was not required to accept his "unrebutted" *beliefs* as factual truths. (Appellant's Brief, p.9.) While "uncontroverted allegations of fact contained in a verified application for post-conviction relief are deemed to be true . . . even when the state has not directly controverted the allegations with affidavits or depositions, an applicant's conclusory allegations, unsubstantiated by any admissible evidence, need not be accepted as true." Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994) (citations omitted). Mere speculation based on form letters indicating that irregularities occurred at a particular lab is insufficient to establish the possibility of a valid claim in every drug case filed in the State of Idaho during that time was impacted by those irregularities. Urrizaga has failed to establish otherwise and has, therefore, failed to establish any entitlement to reinstatement of and appointment of counsel on the frivolous claim alleged in his successive petition.

CONCLUSION

The state respectfully requests this Court to affirm the district court's orders denying counsel and summarily dismissing Urrizaga's successive petition for post-conviction relief.

DATED this 30th day of July 2013.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of July 2013 served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

BIRAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



JESSICA M. LORELLO
Deputy Attorney General

JML/pm