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IN THE SUPREME COURT OF IDAHO

LARRY DEAN CORWIN)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

Docket No. 40618-2013

BRIEF OF APPELLANT

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

HONORABLE THOMAS J. RYAN
DISTRICT JUDGE

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STATEMENT OF THE CASE

A. Introduction

Corwin brings before this Court a question of law, asking if criminal evidence that had a statute of limitations expired, and revived by unreasonable application of a legislative act, is action that is reprehensible and objectionable to the interest of finality in judgments of constitutional conclusions of guilty pleas, the substantive due process doctrine, statutory law, and the ex post facto clause.

B. Statement Of The Facts and Course Of The Proceedings.

On January 31, 1998, Corwin was issued a Uniform Citation for Driving Under the Influence of Alchole (DUI), Idaho Code section (I.C. §), 18-8004. Judgment was entered March 12, 1998. "R", pp. 71 & 73. In conjunction with the advice given about Corwin's statutory and constitutional rights, including the right to counsel, at sentencing the Court gave Corwin written notice of penalties for subsequent violations of the DUI statute. "R", p. 75.

On November 17, 1998, a Washington Uniform Court Dockett was filed charging Corwin with DUI from intoxicating liquor or drugs. Corwin entered a guilty plea on January 26, 1999, in the Ritzville District Court, State of Washington. "R", p. 77 & 81.

On October 24, 2007, Corwin was convicted by jury trial of a DUI violation, I.C. § 18-8004. One day later, the court found Corwin guilty of felony DUI, after accepting the above two convictions as criminal evidence. A direct appeal was filed, and upon its finalization, a petition for post-conviction was

filed on September 15, 2010.

The Court filed a notice of intent to dismiss, and counsel on February 28, 2011, responded that Corwin was standing upon the previous pleadings in this matter as well as the applicable statutory and case law. "R", p. 103.

Seven months later, on November 2, 2011, Corwin gave Notice to the Court that he was having a conflict with counsel's representation. He asserted that counsel had failed to amend his first cause of action, and went on to clarify that counsel had not consulted with him on whether legal research or a brief would be filed. "R", pp. 112, 113 & 116. See also p. 124.

The record reflects Corwin wanted to correct and amend the record, and to substitute counsel. A motion was filed on February 17, 2012, to suspend the proceedings and was never heard. "R", pp. 125-126. Corwin further submitted as cause, a letter counsel sent to him advising him that he felt Judge Ryan was going to grant him an evidentiary hearing. Counsel felt he would be able to present evidence to support his petition, and get the judge to withdraw his guilty plea. "R", p. 141.

An evidentiary hearing was held on November 29, 2012. The court filed its Findings of Facts and Conclusions of Law, and on January 2, 2013, counsel filed a notice of appeal. As preliminary issues, he presented two questions regarding the Court's abuse of discretion in denying the Motion to Withdraw a guilty plea. "R", p. 174.

STATEMENT OF THE ISSUES

I

Is the use of expired criminal evidence by unreasonable application of a legislative act, reprehensible and objectionable to the interest of finality in constitutional conclusions of guilty pleas, the substantive due process doctrine, and the ex post facto clause?

II

Should the district court have resolved a conflict of interest issue, and substituted counsel before addressing the claims on their merits?

I

Is the use of expired criminal evidence by unreasonable application of a legislative act, reprehensible and objectionable to the interest of finality in constitutional conclusions of guilty pleas, the substantive due process doctrine, and the ex post facto clause.

C. Standards Of Review.

In order to prevail in a post-conviction proceeding, the allegations must be proven by a preponderance of the evidence. I.C. § 19-4907; McKinney v. State, 133 Idaho 695, 699-700, 992 P.2d 144, 148-49 (1999). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's findings unless they are clearly erroneous. I.R.C.P. 52(a); Id. at 700, 992 P.2d at 149. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Larkin v. State, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct.App.1988). The Appeal's Court exercises free review of the district court's application of the relevant law to the facts. Roberts v. State, 132 Idaho 494, 496, 495 P.2d 782, 784 (1999).

D. Ineffective Assistance of Post-Conviction Counsel.

A defendant may raise issues of ineffective assistance of trial counsel either on direct appeal or in a petition for post-conviction relief, but not both. Matthews v. State, 122 Idaho 801, 839 P.2d 1215 (1992). Corwin raises ineffective assistance of post-conviction counsel only on the first issue. Corwin acknowledges that ineffective assistance claims usually cannot

be treated on direct review for want of an opportunity to develop and include in the record evidence bearing on the merits of the allegations. Cf. Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (1989)(inadequately raised issues on post-conviction are permitted to be raised in a subsequent application.) In this case Corwin asserts the record is sufficient to permit a fair evaluation of the merits of his claim.

E. The Argument

Corwin asserts that criminal evidence that has a statute of limitations, which has expired, cannot be used in a subsequent prosecution of the DUI statute without offending the interest of finality in constitutional conclusions of guilty pleas, the substantive due process doctrine, and the ex post facto clause. This affirmation is derived because the constitution does not permit infringement on finality of judgments, the substantive due process doctrine does not permit unreasonable application of a legislative act, and the ex post facto clause protects more than liberty.

In 1998, I.C. § 18-8005 defined, created, and regulated Corwin's conduct as a violator of the DUI statute. The statute's intent to deter Corwin from committing another DUI described that: if a defendant was found guilty of the DUI statute and had two prior convictions within five (5) years, that person would be guilty of a felony. I.C. § 18-8005, further mandated the court give notice of the penalties that would be imposed for subsequent violations. From this law Corwin's two 1998 DUI convictions became criminal evidence to a subsequent violation, if that violation occurred within five years.

From the above substantive law one can only presume the legislature intended an expiration date on what has been determined as the sentencing objective of deterrent. See State v. Nickerson, 121 Idaho 925, 929, 828 P.2d 1330 (Ct.App.1992)(held that the legislature's ultimate objective to mandate the notice of I.C. § 18-8005, was a means of accomplishing the sentencing objective of deterring future offenses.) Therefore, a subsequent violation within that time period, permitted admission of convictions as evidence to aggravate the penalties that may be imposed.

In 1998, Corwin in two separate occasions was cited, and convicted of two DUIs. He entered plea agreements in both cases, and pled guilty voluntarily with the foregoing understanding. Those convictions in 2003 became "null and void" as evidence in any subsequent violation. The state nonetheless under authority of the 2006 amended DUI statute (1) unreasonably applied time-barred criminal evidence, and (2) the statute itself was enacted after the pre-existing period had expired on that evidence.

Post-conviction counsel abdicated this claim and did not present it to the court by brief or at the evidentiary hearing. The District Court was left with only the allegations made in the first cause of action of the petition. The Court's analysis of State v. Lamb, 147 Idaho 133, 206 P.3d 497 (Ct.App.2009), was employed in concluding that Corwin's substantive due process violation was without merit. The court viewed Corwin's claim as being the same as in Lamb. This was error.

The precepts in Lamb were that a trial court's advisement of the risk of future penalties under a recidivist statute is

a warning designed to deter a defendant from committing future offenses, not a promise that puts restraints on future prosecutions. (The Lamb Court citing, State v. Nickerson, 121 Idaho 925, 928, 828 P.2d 1330, 1333 (Ct.App.1992)). That conclusion ensued from Lamb's assertion that the trial Court's warnings in his prior DUI convictions, somehow had become part of his plea agreement. This Court held his claim was frivolous.

In contrast to Lamb and Nickerson Corwin brings before this Court two questions of law entwined to the same end. The first is: Is criminal evidence that had a statute of limitations expire and revived by unreasonable application of a legislative act, is that action reprehensible and objectionable to the interest of finality in judgments of constitutional conclusions of guilty pleas? The second is: Does the Federal and State Constitution's ex post facto clauses protect individuals from cruel and unusual punishments, by preventing governments from applying enacted statutes unreasonably, that are "manifestly unjust and oppressive" in its retroactive effect?

The Court in its Findings of Fact and Conclusions of Law reflected that Corwin was asserting "the revision of I.C. § 18-8005(5) constituted a violation of the contracts clause and the state would have been estopped by judgment and law from relitigating those two prior DUIs." "R", p. 165. The Court therefore quoted State v. Lamb, 147 Idaho 133, 206 P.3d 497 (Ct.App.2009), as rejecting the same claim raised by Corwin. This error committed by the Court was due to post-conviction counsel's abdication of this claim.

Corwin contended by petition that the validity of negotiated convictions and the integrity of their judgments could not be compromised. "R", p. 6. Entwined with this claim was that retrospective application of law which makes evidence that was made incompetent by substantive law, to then become competent alongside competent evidence was unreasonable classification of Corwin as a violator of felony law. "R", p. 5. It was post-conviction counsel's duty to make that clear. Of how the essence of due process is to protect unreasonable action. Black's Law Dictionary, 6th Ed., 13th reprint-1998.

Post-conviction counsel's abdication of this claim allowed the Court to derive its conclusions from assertions made in the petition. The adjudicative facts perceived by the Court are therefore lacking in clarity and logic as to why Corwin is legally innocent of a felony.

F. The Finality Of Judgments And Guilty Pleas.

The law at issue here created an extended ten years "look back" period extending the time in which the State would be allowed to inquire into the admissibility of criminal evidence to aggravate the prosecution of a DUI. I.C. § 18-8005(6) states that anyone who is found guilty of violating I.C. § 18-8004, and has had two prior convictions of that code within ten years shall be guilty of a felony. This law was unreasonably used to permit evidence that was "null and void" to be admitted, which the passage of time had previously barred. Do this features of the law taken together produce the kind of retroactivity that State law and the Constitutions and U.S. Supreme Court decisions forbid?

Corwin concludes that they do.

The admission of criminal evidence is prohibited by the interest in finality of judgments when a guilty plea is at issue. United States v. Timmreck, 441 U.S. 780, 784 (1979) ("When a guilty plea is at issue, "the concern with finality served by limitation on collateral attack has special force.") This Court just as many others have held that a defendant has no right under the Constitution to collaterally attack the validity of prior misdemeanor DUIs. See State v. Weber, 140 Idaho 89, 92, 90 P.3d 314 (2004). Similarly, the state has not acquired by statutory law a right to permeate the understanding and validity of voluntary guilty pleas. These are accrued rights under the due process clause. I.C. § 73-106 directs as follows:

"No action or proceeding commenced before the compiled laws take effect, and no right accrued, is effected by their provisions, but the proceeding therein must conform to the requirements of the compiled laws as far as applicable."

In this case finality of judgments of constitutional conclusions were at rest, final.

The retroactive application of the amended law bestowed the state with an acute form of penetrating finality of judgments. It is undisputed that Corwin has performed as mandated by law and plea agreements, and complied with the terms of his original judgment. The state received the benefits of its bargain and the legislature received its five years deterrence of its sentencing objective. It would therefore be unjust to allow one party to permeate the understanding a court and Corwin had when they finalized the constitutional conclusions involved.

A plea that is entered with a full understanding of what the plea connotes and its consequences is a valid plea. E.g., Ray v. State, 133 Idaho 96, 99, 982 P.2d 931, 934 (1999). Corwin thus asserts the integrity of contractual judgments cannot be compromised by a change in the law.

The United States Supreme Court in Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992), noted that principles of finality associated with habeas corpus actions applied with at least equal force, if a defendant sought to attack a previous conviction used for sentencing. Similarly, the extension of an expired statute of limitations, by retroactive application of a legislative act the state has manipulated a district court to deprive another court's judgment of its normal force and effect, in a proceeding that had an independent purpose, as it considered Fourteenth Amendment due process requirements. Just as a defendant has no right to collaterally challenge the validity of contractual findings of guilt, because they are final, the state should also be prohibited in permeating the finality of judgments to constitutional conclusions by retroactive application of law, as in this case.

"Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures." United States v. Addonizio, 442 U.S. 178, 184, n.11 (1979). That was dicta by the high court in unfolding the interest of promoting the finality of judgments.

I.C. § 73-106, directs that no right accrued is affected by new law, and proceedings must conform to the requirements

of compiled laws. How many times can a statute of limitations expire, and how many times can legislature revive dead evidence in the so called orderly administration of justice by the judiciary? You can have life extended, but you can't bring back the dead over and over. The United States Supreme Court and the Idaho courts have accepted the interest that finality has served on limitations of defendants attacking collaterally guilty pleas. Why not then when retroactive application of new laws permeate guilty pleas?

The foregoing principle bears weight on the issue at hand and the interest of finality. The conclusion Corwin urges is mandated by stare decisis, the substantive due process doctrine, and Idaho code.

G. The Ex Post Facto Connection.

Inadmissible evidence that is used to enhance a conviction should fall within the categorical descriptions of the ex post facto laws Justice Chase set forth in Calder v. Bull, 3 U.S. 386, 390, 3 Dall. 386, 390, 1 L.Ed. 648, 650 (1798); because no quantum of reasoning can revive evidence with a statutory limit once it has expired. Corwin is arguing the inadmissibility of evidence at a criminal proceeding.

I.C. § 18-8005 is not ex post facto; but its retroactive application in this case, where evidence is "null and void", is ex post facto. The Idaho courts and numerous other state courts have fallen on the precept that the United States Supreme Court has consistently and routinely held that statutes that increase penalties for recidivism do not violate the ex post facto

clause. Parke v. Raley, 506 U.S. 20, 26, 27, 113 S.Ct. 517, 521, 522, 121 L.Ed.2d 391, 401, 402 (1992). The Idaho Supreme Court has done the same. Freeman v. State, 131 Idaho 722, 963 P.2d 1159 (1998).

Corwin asserts that recidivist statutes do not violate a defendant's rights, because a defendant doesn't have any rights that have been granted. With exception, recidivist statutes are enhancing penalties for crimes that permit an inquiry into evidence which does not have an expiration date. Corwin thus claims that where a statute of limitation exist on criminal evidence, that element has to be considered in the inquiry.

The legislature is presumed to have intended an expiration of its deterrent purpose, otherwise why would they have placed an amnesty on such criminal evidence. This statute is substantive law and not procedural law. Litigants have rights in substantive law.

Instructive in this claim is State v. Currington, 108 Idaho 539, 541, 700 P.2d 942, 944 (1985), in its analysis the court incorporated the following statement of the distinction between substantive law and procedural law:

"Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." (quoted by the court from State v. Smith, 84 Wash.2d 498, 527 P.2d 674, 677 (1974)(en banc).

State v. Beam, 121, Idaho 862, 863, 864, 826 P.2d 891, 892, 893 (1992); see also Allen v. Fisher, 118 Ariz. 95, 96, 574 P.2d 1314, 1315 (Ariz.App.Div.1977).

In this case the DUI statute prescribes norms for societal conduct and punishment by its deterrent purpose. It does not seek to regulate the mechanical operations of the courts by which substantive law, rights and remedies are effectuated. It further prescribes a limit of time on criminal evidence that may be introduced.

Corwin contends that retroactive application of the amended DUI statute, took away and impaired rights acquired under the 1998 DUI statute and created a new obligation. See I.C. § 73-106, and Ohlinger v. United States, 135 F.Supp. 40 (D.Idaho 1955) (The court defined "a retroactive law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation,

imposes a new duty, or attaches a new disability in respect of transactions or considerations already past." Id. at 42.)

The United States Supreme Court in arguments about ex post facto laws reasoned that, after a certain time, no quantum of evidence is sufficient to convict. See United States v. Marion, 404 U.S. 307, 322 (1971). In this sense, a new law would "violate" previous evidence-related legal rules by authorizing the courts to receive evidence which the Courts of Justice would not previously have admitted as sufficient proof of a crime. Cf. Collins v. Youngblood, 497 U.S. 37, 46 (1990) ("subtle ex post facto violations are no more permissible than overt ones."); Cummings v. Missouri, 4 Wall. 227, 329 (1867) (The ex post facto clause cannot be evaded by the form in which the power of the State is exerted.)

Judgments typically rest in large part upon evidentiary concerns. For example, the passage of time that has eroded memories, made witnesses or other evidence unavailable. United States v. Kubrick, 444 U.S. 111, 117 (1979); 4 W. LaFare, J. Israel, and N. King, Criminal Procedure § 18.5(a), p. 718 (1999); Wharton, Criminal Pleading and Practice § 316, at 210. The high court once described statutes of limitations as creating "a presumption which renders proof unnecessary." Wood v. Carpenter, 101 U.S. 135, 139 (1879).

Similarly in this case, to resurrect evidence after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding admissibility, and thereby to permit aggravation of a crime on a quantum of evidence where that quantum, at the time the new law was enacted, would have been legally inadmissible. In that sense, the new law "violates" previous evidence related legal rules by authorizing the court to receive evidence which a court of justice would not previously have admitted as sufficient proof for aggravating a conviction.

Corwin asserts that the ex post facto clause, the substantive due process doctrine protected him from cruel and unusual punishments prohibited by the Eighth Amendment, by preventing governments from applying enacted statutes with manifestly unjust and oppressive retroactive effects.

Alternatively, extension of statutes of limitations before their expiration dates are not violative of ex post facto law. Cf. Commonwealth v. Duffy, 96 Pa. 506, 514 (1880)("[I]n any case

where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws.")

Similarly, if criminal evidence has a statute of limitations that has not expired, they can be lawfully extended. Alternatively, if criminal evidence has an expired limitation, the retroactive application, as in this case, by the use of the increased "look back" period is a form of ex post facto law. As was said in Cummings v. Missouri, supra, the ex post facto clause cannot be evaded by the form in which the power of the state is exerted. Therefore, the substantive due process doctrine and the ex post facto clause prohibit unreasonable application of law to aggravate penalties.

The United States Constitution's two ex post facto clauses, Art. I, § 9, cl.3, Art. I, § 10, cl.1, the Idaho Constitution's ex post facto clause, Art. I, § 16, the substantive due process doctrine, I.C. §§ 73-101, 73-106, and the finality of judgment doctrine of guilty pleas prohibit retroactive application of the 2006 amendment to the DUI statute in this case.

II

Should the district court have resolved a conflict of interest issue, and substituted counsel before claims on their merits.

H. The Abuse of Discretion Argument.

Idaho Courts have held that a post-conviction court that is presented with a request for appointed counsel must address that request before ruling on the substantive issue in the case.

I.C. § 19-4904 annotation, Hust v. State, 147 Idaho 682, 214 P.3d 668 (2009), reviewed denied. Where counsel has been appointed, a district court appoints counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. I.C. § 19-4904 annotation, Gonzales v. State, 151 Idaho 168, 254 P.3d 69 (2011), review denied.

More, I.C. § 19-4908 permits successive petitions for post-conviction relief, if for "sufficient reason" an issue was inadequately raised. Ineffective assistance of post-conviction counsel has been held to be sufficient reason. Hernandez v. Idaho, 133 Idaho 794, 992 P.2d 789 (Ct.App.1999)(An allegation of ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting newly asserted allegations to be raised in a subsequent post-conviction application.)(citing, Palmer v. Dermitt, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981).

Corwin avers that post-conviction counsel denied him effective assistance of counsel due to a conflict of interest he had in his representation, but kept silent. Corwin reserves this claim for successive collateral review, if it becomes necessary. He raise ineffective assistance facts as part of the question leading to the court's discretion to appoint substitute counsel. Corwin contends the judiciary had a duty to resolve the conflict that existed, in order to not delay and impair the orderly administration of justice. Now this Court of Appeals is involved, and will a successive petition have to follow?

Corwin asserts that the initial-review collateral proceeding in this case was the first designated proceeding for Corwin to raise a claim of ineffective assistance of trial counsel, and as such this post-conviction proceeding is equivalent of prisoner's direct appeal, as to the denial of a constitutional right. An attorney on a direct appeal with a conflict of interest knows he has duty to give notice by motion to the court, before the claims are resolved on their merits. Otherwise a prisoner may be denied a fair process and the opportunity to comply with state procedures.

Corwin contends that the underlying ineffective assistance of trial counsel claim is a substantial one and had merit. Post-conviction counsel failed to file a notice akin to an Anders brief with the court. In effect conceding that he could not represent Corwin in his petition for post-conviction. The record reflects Corwin's complaints and desire to substitute counsel.

Did the court abused its discretion in ignoring the conflict and to take adequate steps to ascertain whether there was a risk of an actual conflict of interest to warrant substituting counsel. The record identifies that a plausible defense was foreclosed because of this conflict. The District Court acknowledge that Corwin's assertion of trial counsel's failure to contact him, and investigate his case, taken as true, suggests that counsel may have been deficient for failing to diligently pursue his case. "R", p. 169. Now the system is beginning to clog up a valid and meritorious claim of neglect by a trial counsel, that reaches complete denial of counsel. See "R", p. 6.

Trial counsel had a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. In an ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness under all the circumstances. See Wiggins v. Smith, 539 U.S. 510, 521-22 (2003)(citing, Strickland v. Washington, 466 U.S. 668, 690-91 (1984)).

Trial counsel at the evidentiary hearing testified that when his client and himself do not see eye to eye on the theory of the defense, he will switch the client with somebody else. Tr., p. 92, Ls. 16-19. Counsel further asserted that since the theory of was that Corwin was not the driver, he had to assume Corwin told him he was not driving. Tr., p. 96, ls. 10-17.

Corwin was claiming counsel never had any communication with him to make a decision on how to defend him. He testified at the hearing that on October 15, one week before trial, and in open court, counsel admitted he had not talked to any witnesses or to Corwin. Tr., p. 18, ls 4-5. Corwin further stated counsel came to the jail to visit him only once, and that was the night before the trial. Tr., pp 17 and 18. Corwin's wife was one of those witnesses, and the trial transcripts reveal Corwin was the driver.


This case was tried on a lie, which was recorded on a police report. Furthermore, counsel revealed that of about 89 cases he defended by jury trial, a substantial number of those cases were tried with post-conviction. Tr., p. 88, ls. 19-22. More, post-conviction counsel failed to discover the county jail logbook

on attorney visits, or Corwin's criminal file of the criminal diary. He also failed to submit the transcripts of the trial.

Post-conviction counsel was having to accuse a friend, ex-associate and now judge. He therefore ignored Corwin's pleas and his case. Examples of his neglect are found in a letter and the notice of appeal he filed. "R", pp. 141 and 174. Counsel was defending a non-existing motion to withdraw a guilty plea. Post-conviction counsel like trial counsel neglected and ignored his client. Was it counsel's obligation as an officer of the court to bring this conflict to the court, or was it the court's duty to inquire into Corwin's Notice of Conflict and his motions.

CONCLUSION

Corwin therefore prays this court reaches the conclusions urged herein and vacates the felony conviction; or in the alternative remand this case for the court to substitute counsel, and give new counsel time to prepare for an evidentiary hearing.


Larry Dean Corwin
Petitioner-Appellant