6-6-2013

Berner v. State Appellant's Brief Dckt. 40726

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Appellant

IN THE SUPREME COURT OF THE STATE OF IDAHO

James Harold Berner,
Appellant,
vs.
State of Idaho,
Respondent.

Case No. 40726-2013

APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District
for Idaho County.
The Honorable Michael Griffin, District Judge presiding.

Introduction Letter to the Readers of this Brief:

I have been forced to file this Brief Pro-se. I did not file a motion to file this Brief Pro-se and I am Pro-se under protest.

I requested an attorney to help me do this by filing a Motion for Appointed Counsel on Feb 1, 2013. It was denied Feb 6, although I am under indigent status.

I am a professional Log Home Builder and Search and Rescue Selmon River Diver in Riggins Idaho, not a professional competent attorney.

I was found guilty by means of an incompetent attorney, a lying alleged victim and a court that encouraged such acts as I hope I can prove to you.

Please excuse my unprofessionalism but I am in prison because of a serious injustice and so far, the system is unfair.

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Abbreviations:

P.C.P. Post Conviction Petition
pg(s). Page or Pages
para. Paragraph

Corrections:

Affidavit of David W. Dean and Affidavit of James Harold Berner are labled the same in P.C.P as Exhibit 11. The correct names are used to avoid confusion as Exhibit 11.

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Statement of Case

This petitioner, James Harold Berner, was charged and arrested with the crime of domestic battery on June 30, 2009, in Valley county, Cascade, Idaho by an Idaho County, Second Judicial District Court Warrent of Arrest, Case No. CR-42138, by officer Corporal Jordan, Valley county sheriffs department. (P.C.P. pgs. 2, 3.)

Mr. Berner pled Not Guilty and claimed self defense for his actions of defense which led to injuries sustained by Debra A. Nevill. Mr. Berner wrote to the Idaho county prosecutor Kirk MacGregor in Demember of 2009 while incarcerated in Valley county jail describing his participation of the occurances of June 28, 2009. (P.C.P. Exhibit 34. Affidavit of James Berner Exhibit O.)

Because of Mr. Berner's being, not guilty of these charges, he refused the states offer of a 2 year fixed and 5 year indeterminate sentence recommendation.

On July 8TH and 9TH, 2010, Mr. Berner had a jury trial. On July 9, 2010 the jury

returned a guilty verdict.

Mr. Berner was sentenced on July 29, 2010, by Judge John Bradbury to a 9 year fixed and 1 year indeterminate sentence to the Idaho Department of Corrections.

Mr. Berner appealed to the Idaho Supreme Court which affirmed Judgement of Conviction July 18, 2011, Docket No. 37968. Supreme Court denied Petition for Review and issued a Remittitur on Aug 2, 2011.

Distrist court denied Motion for Reduction of Sentence May 23, 2011. Petition for Review denied Feb 15, 2012, Idaho Supreme Court Docket No. 38874.

Mr. Berner filed Petition and Affidavit For Post Conviction Relief July, 24, 2012.

Mr. Berner filed Motion and Affidavit in Support For Appointment of Counsel, July 24, 2012, Indigent Status.

Petition granted for appointment of counsel to represent Mr. Berner for his Petition for Postconviction Relief Aug 6, 2012. Appointed attorney, Deborah L. McCormick.

Attorney Deborah L. McCormick Files Motion for "Leave to Withdraw" Case No. 12-41919 Nov 20, 2012.

Judge Michael J. Griffin, Idaho County, Second Judicial District Court signs Order Granting, Appointed Attorney for Mr. Berner Leave To Withdraw From Case No. 12-41919 Dec 10, 2012.

Idaho County District Court files [redacted] 2012 Notice of Intent To Dismiss. Dec 10, 2012.

State files "Order Dismissing Petition for Post Conviction Relief" Case No. 12-41919, Jan 9, 2013.

Mr. Berner files another Motion and Affidavit in Support for Appointment of Counsel because of being handicapped in competing with trained professional and competent counsel of the state on Feb 1, 2013.

District Judge Griffin Denies Motion for Appointment of Counsel Feb 6, 2013, although Mr. Berner is indigent. So here I am, Pro-Se under protest.

ISSUES

1. That the Second Judicial Distrist Court of Idaho County erred by allowing a mockery of judicial display to be tolerated in a trial court of law under Judge John Bradbury.

2. That the Second Judicial Distrist Court of Idaho County erred by not granted this petitioner Post Conviction Relief under yet another judge, Michael J. Griffin.

Arguement

In the following Brief, I, James H. Berner will attempt to the best of my abilities to prove Mr. Dickison, my court appointed attorney, Ineffective under Strickland v. Washington, 466 U.S. 668, 80 L. Ed 2d 674, 104 S. Ct. 2052. (1984) and...

U.S. v. Cronic, 466 U.S. 648, 80 L. Ed 2d 657, 104 S. Ct. 2039 (1984)

In a case where proving Mr. Berner's credibility is crucial, Mr. Dickison, Mr. Berner's appointed counsel, chose not to call upon or even take the time to interview David W. Dean, the most important witness to Mr. Berner's case. (P.C.P. Affidavit of David Dean(11) and Exhibit(11).) (P.C.P. Exhibit 12.) At a bare minimum, a lawyer must "Interview potential witnesses and ... make an independant investigation of the facts and circumstances of the case." Bryant v. Scott, 28 F.3d 1411, 1415 (5TH CIR 1994).

Mr. Berner, convicted of domestic violence, felony, and sentenced to a 9 year fixed, 1 year indeterminate, while never ever before been involved with any violent charge what-so-ever and pled Not Guilty, jury trial (P.C.P. pgs. 1, 2, para. 1, 2.) argues that Mr. Dickison failed to investigate and call witnesses whom the defendant informed Mr. Dickison about months earilier and whom counsel had led Mr. Berner believeing will be at his trial clear up to the day before trial. (P.C.P. Affidavit of James Berner(11) Exhibit 11.) With No witnesses at his defense, Mr. Berner felt he had absolutly no choice but to testify on his own behalf. Ramonez v. Berghuis, 490 F.3d 482 (2007).

Mr. Dickison failed completely to investigate facts received from Mr. Berner, failed to interview or attempt to interview key witnesses in Mr. Berner's behalf, failed to include medical records as exhibits which were aquired by the prosecutor on June 11, 2010 and received by Mr. Dickison that same day. These "medical records" to be known as "the second set" were not the medical records included with the police report from Valley county police, McCall, Idaho, these medical records, 28 of 28 pages, not even known to exsist by Mr. Berner until Mr. Dickison mailed them to him 267 days after the trial, and were never known to exsist by the jury. (P.C.P. Exhibits 4, 3, 5, 21, 22, 23, 24; para 25. pg. 11.)(U.S. v Cronic, 466 U.S. 648, 80 L. Ed 2d 657, 104 S. Ct. 2039 (1984)

Mr. Dickison failed to file as exhibits and read to the jury this second set of medical records from Dr. Curtain, McCall Memorial Hospital, would have discredited expert witness testimony of ringing the bell to the jury of Strangulation and neck injuries not included in "Information". U.S. v. Myers, 892 F. 2d 642 (CA 7 1990)(P.C.P. Exhibits 13, 15, 16. Clerks reading to the jury, Exhibit 15. Strangulation, Exhibit 17).

Mr. Berner argues that admissibility of Expert Witness Testimony went unchallenged by Mr. Dickison at all, not even once, when trial judge John Bradbury openly admitted and stated to both the defense attorney and the prosecutor in chambers concerning the actual charges in the Information by saying..." I think it can be any of the ones that are charged, but it is limited to the ones that are charged. See, my concern is if they came in, for instance, and the Doctor said — came up — the Doctor Surprised to say and said, well the really serious injury was to her neck. It Wasn't Charged. I don't think they would be permitted to find him guilty based on an injured neck that wasn't charged." (P.C.P. Exhibits 19, 20.) (P.C.P. Exhibit 17.) Now, Dr. Curtain rung the bell to the jury about Strangulation and neck injuries. Mr. Berner argues that not only did his attorney not object to expert witness testimony, but also the judge erred in not setting forth the trial judges general "Gate Keeping" obligations. Kumho Tire Co., LTD v. Carmichael, 526 US 137, 143 L. Ed 2nd 238, 119 S.Ct. 1167 (1999) General Elec. Co. v Joiner,

522 U.S. 136, 139 L. Ed 2d 508, 118 S.Ct. 512 (1997) Breech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988). (P.C.P. Exhibits 16, 17, 18, 19, 20, para. 21, 22, 23, 24, 25.)

Mr. Dickison failed to object or cross examine to states witness, Dr. Curtain concerning Dr. Sarah Curtain's damaging testimony to the jury of Prior Abuse, (P.C.P. Exhibit 18.) Neck injuries, injuries at base of brain, (P.C.P. Exhibit 17, 18.) when in fact Dickison had been made aware of the "second set" of undisclosed medical records to the jury that were supplied to him almost a month before the trial by the prosecutor. Lindstadt v. Keane, 239 F. 3d 191 (CA 2 2001) (P.C.P. Exhibit 27.) In fact, the "second set" of medical records from McCall Memorial Hospital and are in fact, Dr. Curtains own records and reports that were not filed as exhibits by Mr. Berner's attorney, nor were the jury intrusted to this knowledge which includes no such injuries filed by Dr. Sarah Curtain herself as to, prior injuries, black eyes, neck injuries,

signs of Strangulation, (Not even Neuill herself claimed this) memory loss, unconsciousness, concussion, basal ganglia hemorrhage. All this was implanted to be true in the juries minds by Dr. Curtain when in fact every single injury implied either were not in the medical records or were favored by two doctors, Dr. Curtain and Dr. Merandi, to be in favor of "Dystrophic Calcifications", this information is Absolutly Critical to Mr. Berner's defense and none of these medical records were made available to the jury. Mr. Dickison's failure to object, produce records or argue in Mr. Berner's defense was a major dereliction. U.S. v. Myers, 892 F.2d 642 (CA 7 1990) Clark v. Blackburn, 619 F.2d 431 (CA 5 1980)(P.C.P. Exhibits 17, 18, 26; Exhibits 21, 22, 23, 24.)

Mr. Berner argues that his counsel accepted the states version of the facts considering that Mr. Dickison prepared no defense, conducted no investigation, subpoena no witnesses, did not surpress evidence, failed to filed the "second set" of medical records 28 of 28 pages,

disclosed to him by the prosecution on June 11, 2010. Mr. Dickison has a duty to reveal potentially exculpatory materials as to raise sufficient doubt as to question the confindence in the verdict must render deficient performance and is not a sound strategic decision. U.S. v. Matos, 905 F.2d 30 (CA 7 1990) Hart v. Gomez, 174 F.3d 1067 (CA 9 1999) (P.C.P. pgs. 11, 12. para. 25, 26. Exhibits 18, 25.)

Mr. Dickison failed to object to Judge Bradbury's bad behavior of improper actions and communications with alleged victim while on the witness stand in front of the entire jury when Bradbury says to Nevill..." Would you like some water? Nevill answers; yes. Bradbury: I'll get you some. Nevill: Very much. Bradbury: I'll get you some and just take a deep breath. It will be O.K. If you need a break, let me know and we'll give you a break. (Then Bradbury pours Nevill a glass of water and hands it to her.) Bradbury: Here you go. Nevill: Thank you." Then Bradbury and Nevill smile at one another. Then, a few minutes later... Bradbury says

to Nevill again in front of the jury..." Theres more water in that carafe right there. Nevill; Uh-huh." And for a second time Bradbury and Nevill exchange smiles. Porcaro v. United States, 784 F. 2d 38 (CA 1 1986) Idaho Rules of Court, Canon 3.(6) (P.C.P. Exhibits 28, 29. pgs. 15, 16. para. 32, 33, 34.)

Mr. Berner filed a Motion for Access to In Court Camera Recording, July 24, 2012. Motion was denied ... no In Court Camera Available. (Motion filed with P.C.P. July 24, 2012.)

Mr. Dickison failed to present any meaningful defense there by depriving the jury of an explanation of what the defense would be by No opening statement at all, no witnesses in Mr. Berner's behalf, did not bring to the jurys attention the facts of Nevill willingness to provide false statements to investigator Michael Maini about being "Life Flighted" to the hospital, no statements from Mr. Dickison about Nevills drug use and her lying to doctors about it, Nevills repeatly

lying to doctors and investigators about the occurances of the night of June 28, 2009. Jones v. Jones, 988 F. Supp. 1000 (E.D. La 1997) (P.C.P. Exhibits 1, 3, 4, 5, 6, 7, 8. pg. 5. para. 12, 13. pg. 3, 4. para. 7, 8, 9.) Nor was the jury introduced about Nevill's past violent behavior towards Mr. Berner by testimony of David Dean. (P.C.P. Affidavit of David W. Dean (11) Exhibit 11, Exhibit 12. para. 15.)

Mr. Dickison refused to defend Mr. Berner again by failure to Cross Examine in any way what so ever the testimony of alleged victim, Debra Nevill, thus depriving Mr Berner the right which has been reconized essential to Due Process to cross examine his accuser or call to Mr. Berners defense the aid of witnesses in which Mr. Dickison had told Mr. Berner that will be there clear up to the day before the trial. Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed 2d 297, 93 S. Ct. 1038 (1973). (P.C.P. Affidavit of James Berner(11))

Mr. Dickison failed his client and the jury by Giving the Case Away with counsels closing statement. Mr. Dickison began by saying... "The testimony was pretty clear and straight forward. I'm not going to spend a lot of time giving you attorney Blah, Blah, Blah, especially when the judge has essentially told you nothing I say is anything you can take with you as evidence anyway. U.S. v. Swanson, 943 F.2d 1070 (CA 9 1991) Also see Cronic, 466 U.S. at 659. (P.C.P. Exhibit 41. pgs. 25, 26. para. 52.)

Mr. Bemer's counsel, Mr. Dickison failed to object to the prosecutions closing statements of... vouching for States Witness and Expert Witness Dr. Curtain, U.S. v. Bass, 712 F. Supp. 2d 931 (D. Neb. 2010) when prosecution said to the jury... "Why would she lie? She's not going to lie. Shes a professional." (P.C.P. Exhibit 41. pg. 23. para. 43.) also charges not included in the Information when prosecution stated to the jury..." Injuries on her neck. She said the injuries on her neck were

consistant with choking, not from falling, not from the blocking of blows, consistant with choking". Then the prosecutor stood in front of the jury with his hands around his throat choking himself. Mr. Dickison did not object to any of this. And in fact, even the Doctor (Curtain) did not ever state "Choking", she said Strangled or Strangulation. Dubria v. Smith, 197 F. 3d 390 (CA 9 1999) Mr. Dickison failed to object to the prosecutions entire closing statements. (Strickland, 466 U.S. at 687-88.)(P.C.P. Exhibit 41.)

The jury instructions were Bungled in a self defense case where "Battery" is a crime and the Instructions to the jury, (Battery Definition No. 11. P.C.P. Exhibit 43.) state it is a crime as such... "A Battery" is committed when a person; (1) will-fully and Unlawfully uses force or violence upon a person of another; or (2) actually intentionally and unlawfully touches or strikes another person against the will of the other; or (3) Unlawfully and intentionally causes bodily harm to an individual." So, battery, in a domestic violence case, is unlawful.

This instruction was read to the jury. (P.C.P. Exhibit 44.) The next thing the judge tells the jury is... "A battery is justifiable if Mr. Berner was acting in self defense". (P.C.P. Exhibit 44.) This can not be correct, for a battery to be justifiable if an act of self defense occures, because what has occured is a "Defense" not a battery. And this is what Mr. Berner has said happened since the very beginning of this case, that he Defended himself. Next, judge Bradbury gives further instruction to the jury... (P.C.P. Exhibit 44.) saying... "A bare fear of bodily injury is not sufficient to justify a battery". But, it is, according to "Self Defense Definition", §19-201 NOTE(1) is sufficient to justify a Defense. Thus, the jury could have very easily misinterpedated this instruction and was more favorfull for the prosecution. (P.C.P. pgs. 24,25. para. 47, 48, 49, 50, 51.)

Mr. Dickison failed by not calling or interviewing Mr. Berner's witnesses whom Mr. Berner related the urgency to his case for Mr. Berner's

witness, David W. Dean, personally had information of Nevills violent behavior towards Mr. Berner even in Mr. Deans own home. Pavel v. Hollins, 261 F.3d 210 (CA 2 2001) (P.C.P. Exhibit 12. And Affidavit of David W. Dean Exhibit(11))

Mr. Berner argues that Mr. Dickisons continuous lack of a defense and performance was deficient under Strickland guidelines which in turn produces the prejudice component of the Strickland test. Blackburn v. Foltz, 828 F. 2d 1177 (CA 6 1987) Mr. Dickisons multiple errors had cumulative effect. U.S. v. Tory, 52 F.3d 207 (CA 9 1995)

Mr. Dickisons failures demostrated thur his no real defense towards his client who counted on Mr. Dickisons professional duties to represent him had made multiple errors and the cumulative effect should consider prejudice. Washington v. Smith, 219 F.3d 620 634-35 (7TH Cir 2000)

Mr. Dickison failed to investigate all reasonable lines of defense, or make reasonable determinations that such investigation is not necessary. (Strickland). A decision not to investigate cannot be deemed reasonable if it is uninformed. Mr. Dickison in his defense in Mr. Berner's domestic battery case had "No" strategy of pointing holes at all in the evidence or tring to create a reasonable doubt in the jurors minds. Mr. Dickison made no attempts what-so-ever to draw the jury's attention to "any" gaps to expert testimony, alleged victims testimony or prior statements, prosecutors inaccurate statements, non disclosed of medical records or any states evidence and never even tried to articulate a reasonable doubt theory to the jury. This is not a "strategic choice". A reckless cross examination and no cross examination cannot be called a "choice" at all. Fisher v. Gibson, 282 F.3d 1283 (CA 10 2002) See Strickland, 466 U.S. at 691.

CONCLUSION

Therefore, appellant respectfully requests that this court [what court should do].

Grant me a new trial so I may face my accuser on fair grounds.

Vacate the Conviction, or any appropreate remedy that the court deems appropreate.

Respectfully submitted this 4 day of June, 2013

Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 4 day of June, 2013, I mailed a true and correct copy of the APPELLANT'S BRIEF via prison mail system for processing to the United States mail system, postage prepaid, addressed to:

Deputy Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010

Appellant