3-31-2014

Severson v. State Respondent's Brief 1 Dckt. 40769

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY SEVERSON,	)	
	)	No. 40769
Petitioner-Appellant,	)	
	)	Elmore Co. Case No.
vs.	)	CV-2009-1408
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ELMORE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature Of The Case

Larry Severson appeals from the judgment denying his petition for post-conviction relief. Severson contends the district court erred in summarily dismissing his claim that counsel was ineffective for failing to object to the prosecutor's closing argument.

Statement Of The Facts And Course Of The Proceedings

In 2004, a jury convicted Severson of the first-degree murder of his wife, Mary, and of poisoning her food and/or medicine. State v. Severson, 147 Idaho 694, 700-701, 215 P.3d 414, 420-421 (2009). The court imposed a fixed life sentence for murder and five years for poisoning. Id., 147 Idaho at 701, 215 P.3d at 421. The Idaho Supreme Court affirmed Severson's convictions. Id., 147 Idaho at 723, 215 P.3d at 443.

Severson filed a timely petition for post-conviction relief. (R., pp.4-9.) The court entered a notice of intent to summarily dismiss some of Severson's claims and appointed counsel to represent Severson. (R., pp.19-27, 34-37.) Severson, with the assistance of counsel, subsequently filed an amended petition and the state filed an answer. (R., pp.52-62, 67-85.) The state also filed two motions for partial summary

dismissal.[1] (R., p.112; Motion for Order Granting Partial Summary Dismissal, filed February 13, 2012 ("First Motion") (Augmentation).) The district court summarily dismissed all claims raised by Severson with the exception of his claim that counsel was ineffective for failing or refusing to have Severson testify at trial, which claim the court dismissed after an evidentiary hearing. (R., pp.114-147, 151-159, 211-235.) The court entered Judgment, from which Severson filed a timely notice of appeal. (R., pp.237-241.)

[1] It appears the state had to file two motions for summary dismissal because, after the state filed its first motion in response to Severson's amended petition, Severson advised the court that the claims in his amended petition were "in addition to the claims in the original petition." (R., pp.112, 114.) Thus, the state's second motion sought dismissal "of the claims raised in Severson's initial petition with the exception of Severson's claim that trial counsel provided ineffective assistance by failing or refusing to permit Severson to testify in his own defense at trial" (R., p.112) whereas the state's first motion sought dismissal of all claims "raised in Severson's amended petition" with the same exception (First Motion (Augmentation).)

ISSUES

Severson states the issues on appeal as:

> 1. Did the district court err in summarily denying the claim of ineffective assistance of counsel in not objecting to prosecutorial misconduct at trial based upon the doctrine of *res judicata* when the issue before the Idaho Supreme Court in direct appeal was whether the prosecutorial misconduct was fundamental error and the claim in post-conviction was ineffective assistance of counsel which is controlled by the *Strickland* analysis of whether defense counsel's performance was deficient and if so whether the deficiency was prejudicial?
>
> 2. Did Mr. Severson raise a genuine issue of material fact as to whether he was denied effective assistance of counsel by counsels' failure to object to prosecutorial misconduct in the State's closing arguments?

(Opening Brief of Appellant ("Appellant's Brief"), pp.4-5.)

The state rephrases the issue as:

Has Severson failed to show the district court erred in summarily dismissing his claim that counsel was ineffective for failing to object to the prosecutor's closing argument?

ARGUMENT

Severson Has Failed To Show Error In The Summary Dismissal Of His Claim That Counsel Was Ineffective For Failing To Object To The Prosecutor's Closing Argument

A. Introduction

Severson raises two arguments in relation to the district court's summary dismissal of his claim that counsel was ineffective for failing to object to the prosecutor's closing argument. First, Severson asserts the district court erred in dismissing this claim as *res judicata*. (Appellant's Brief, pp.6-7.) Second, Severson contends he raised a genuine issue of material fact entitling him to an evidentiary hearing on this claim. (Appellant's Brief, pp.16-17.) Both of Severson's arguments fail. Review of the applicable legal standards shows the district court correctly dismissed Severson's claim that counsel was ineffective for failing to object to the prosecutor's closing argument.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. The District Court Correctly Concluded Severson Was Not Entitled To An Evidentiary Hearing On His Claim That Counsel Was Ineffective For Failing To Object To The Prosecutor's Closing Argument

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 pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. When a post-conviction petitioner alleges ineffective assistance of counsel, in order to survive summary dismissal of his petition, he must specifically allege that "(1) a material issue of fact exists as to whether counsel's performance was deficient, and (2) a material issue of fact exists as to whether the deficiency prejudiced the applicant's case." Baldwin v. State, 145 Idaho 148, 153-54, 177 P.3d 362, 367-68 (2008) (internal citations omitted). "To establish deficient assistance, the burden is on the petitioner to show that his attorney's conduct fell below an objective standard of reasonableness. This objective standard embraces a strong presumption that trial counsel was competent and diligent." Id. "[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 claimant must show a reasonable probability that but for his attorney's deficient performance the outcome of the proceeding would have been different." Id.

While a court must accept a petitioner's unrebutted 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)). If the alleged facts, even if true, would not entitle the petitioner to relief, the trial court is not required to conduct an evidentiary hearing prior to dismissing the petition. 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. A review of the record shows Severson failed to allege a genuine issue of material fact entitling him to an evidentiary hearing on his claim that counsel was ineffective for failing to object to the prosecutor's closing argument.

On direct appeal, Severson asserted, *inter alia*, that the prosecutor engaged in misconduct during closing argument. Severson, 147 Idaho at 715, 215 P.3d at 435. In considering this assertion, the Idaho Supreme Court noted "the standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." Id. Where there is an objection, the appellate court "use[s] a two-part test to determine whether the misconduct requires reversal." Id. at 716, 215 P.3d at 436. "First, [the Court] ask[s] whether the

prosecutor's challenged action was improper." Id. (citation omitted). "If the conduct was improper, [the Court] then consider[s] whether the misconduct prejudiced the defendant's right to a fair trial or whether it was harmless." Id. (quotations and citation omitted). If the defendant cannot establish prejudice, "the misconduct will be regarded as harmless error." Id. (citation omitted).

Where there is no objection, the claim is reviewed for fundamental error. Severson, 147 Idaho at 716, 215 P.3d at 436. When the Idaho Supreme Court issued the opinion in Severson, misconduct would be considered fundamental error if it went "to the foundation of the case or [took] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive."[2] Id. (quotations and citations omitted). Further, even if the misconduct resulted in fundamental error, the conviction will remain intact unless the Court is "convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred." Severson, 147 Idaho at 716, 215 P.3d at 436.

[2] The year after it issued Severson, the Idaho Supreme Court restated the fundamental error standard of review applicable to unobjected to claims of error and "expressly disavowed [the] definition of 'fundamental error'" that was recited in Severson. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). The test for unobjected to fundamental error the Court adopted in Perry requires (1) the defendant to "demonstrate that one or more of [his] unwaived constitutional rights were violated"; (2) "the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision"; and (3) "the defendant must demonstrate that the error affected [his] substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings." 150 Idaho at 226, 245 P.3d at 978.

With respect to the prosecutor's closing argument, Severson specifically complained that the prosecutor "improperly commented on his failure to testify, about Mary speaking from her grave, and about Mary's family." Severson, 147 Idaho at 718, 215 P.3d at 438. Because Severson did not object to any of these arguments, the Idaho Supreme Court analyzed his claim under the foregoing fundamental error standard, addressing each complaint separately.

First, the Court considered Severson's argument that he suffered a Fifth Amendment violation as a result of the "prosecutor's statement that '[t]his is a circumstantial case, because nobody was in that house that night but Mary and Larry. Nobody knows, *that has testified*, what happened between them." Severson, 147 Idaho at 718, 215 P.3d at 438 (quotations, brackets and emphasis original).) The Court rejected Severson's argument, concluding he "failed to prove the prosecutor's statement was an impermissible comment on his silence that constituted fundamental error." Id., 147 Idaho at 719, 215 P.3d at 439.

Next the Court considered Severson's complaint about the "prosecutor's statements regarding Mary speaking from her grave." Severson, 147 Idaho at 719, 215 P.3d at 439. The Court found that although the "statements that Mary was speaking from her grave were somewhat inflammatory because they were likely designed to appeal to the sympathies and passions of the jury," the comments did not "rise to the level of fundamental error." Id. The Court also noted the "statements were simply referring to Mary's body providing evidence about the circumstances surrounding her death, not to her calling out for Severson's conviction" and concluded that "[b]ecause the statements did not result in an unfair trial or deprive

Severson of due process, they were not fundamental error." Id., 147 Idaho at 720, 215 P.3d at 440.

Finally, the Court considered Severson's unpreserved claim related to the "prosecutor's references to Mary's family." Severson, 147 Idaho at 720, 215 P.3d at 440. With respect to this claim, the Court held:

> The prosecutor's references to Mary's family, while arguably improper, did not constitute fundamental error. The statements were not dwelled upon or made in support of an argument that Severson receive a harsher punishment. Instead, the statements merely reiterated evidence that had been produced at trial. Moreover, the trial court instructed the jury on several occasions that the prosecutor's arguments were not to be regarded as evidence. The statements did not impact the fairness of Severson's trial or deprive him of due process and, therefore, were not fundamental error.

Severson, 147 Idaho at 720, 215 P.3d at 440.

Two Justices dissented from the majority opinion in Severson. The author of the dissent, Justice Warren Jones (who was joined by Justice Pro Tem Kidwell), "limited [his] dissent to comments made by the prosecutor during closing arguments and whether the accumulation of any alleged errors warrant reversal pursuant to the cumulative error doctrine." Severson, 147 Idaho at 723-724, 215 P.3d at 443-444. Justice Jones did "not find any one statement, in and of itself, sufficient to warrant reversal" but did "find a pattern of conduct where the prosecutor continually made arguments for the sole purpose of appealing to the passions and prejudices of the jury." Id., 147 Idaho at 724, 215 P.3d at 444. Justice Jones then quoted all statements from the closing argument he found "offensive" including statements "not specifically cited to by [Severson] in his brief." Id. Justice Jones then stated: "I find the prosecutor's comment on Severson's right to remain silent the most egregious

and offensive of all comments made during closing arguments" and disagreed with the majority's view of the challenged statement. Id. at 726, 215 P.3d at 446. Regarding the prosecutor's references to Mary's family, Justice Jones again expressed disagreement with the majority, stating: "The prosecutor's conduct used Mary's family as a means to convict Severson by appealing to the jury's passions and infringed on Severson's right to a fair trial." Id., 147 Idaho at 727, 215 P.3d at 447. Justice Jones concluded that, "[c]umulatively," the "errors taken as a whole were not harmless" even though, in his opinion, there was "substantial evidence supporting the guilty verdict." Id., 147 Idaho at 728-729, 215 P.3d at 448-449.

In his post-conviction petition, Severson latched on to the dissenting opinion from his direct appeal and claimed that opinion "establish[es] that [he] received ineffective assistance of counsel due to counsel's failure to object in the state's closing arguments." (R., p.61.) The state sought summary dismissal of this claim, asserting Severson "failed to meet his burden of establishing a *prima facie* case of deficient performance, much less prejudice." (Brief in Support of Respondent's Motion for Partial Summary Dismissal ("Brief"), p.41 (Augmentation).) With respect to the prejudice prong, the state also asserted that because Severson "failed to allege any prejudice relating to the prosecutor's closing argument beyond that identified by the dissent on direct appeal, the majority's contrary opinion finding no prejudice is dispositive of and is, in fact, *res judicata* as to the prejudice prong." (Brief, p.43.) In dismissing this claim, the district court stated: "The Supreme Court's finding that there was no fundamental error in the comments will not be relitigated here. When legal issues are decided in a criminal action on direct appeal,

the defendant is barred by the doctrine of *res judicata* from raising them again in a post-conviction relief proceeding." (R., p.144.)

On appeal, Severson first contends the district court's *res judicata* finding was erroneous, arguing *res judicata* "does not apply because the issue before the appellate court was not the issue in post-conviction." (Appellant's Brief, p.6.) More specifically, Severson contends that because "the issue decided in the direct appeal is not identical to the issue in post-conviction, issue preclusion cannot apply" and "as the claim in direct appeal, prosecutorial misconduct, is not the same as the claim in post-conviction, ineffective assistance of counsel, claim preclusion cannot apply." (Appellant's Brief, p.7.) Thus, Severson concludes, "summary dismissal on the grounds of *res judicata* was erroneous." (Appellant's Brief, p.7.) Severson is incorrect.

The state acknowledges that a substantive prosecutorial misconduct claim, such as the one Severson raised on direct appeal, is a different claim than a claim that counsel was ineffective for failing to object to the closing argument. However, both the substantive claim and the ineffective assistance of counsel claim involve resolution of the issue of prejudice. "[W]hen legal issues are decided in a criminal action on direct appeal, the defendant is barred by the doctrine of res judicata from raising them again in a post-conviction relief proceeding." State v. Creech, 132 Idaho 1, 10 n.1, 966 P.2d 10 n.1 (1998) (citing State v. Beam, 115 Idaho 208, 210, 766 P.2d 678, 680 (1988), and State v. Fetterly, 115 Idaho 231, 233, 766 P.2d 701, 703 (1998)). As noted, with respect to the substantive claim, the prejudice analysis was based on the harmless error doctrine, which allowed the Court to affirm

Severson's convictions "if the Court [was] convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred." Severson, 147 Idaho at 716, 215 P.3d at 436. To demonstrate prejudice on his ineffective assistance of counsel claim, Severson "must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." Murray v. State, 2014 WL 1053308 *4 (Idaho 2014) (quotations and citation omitted). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011)). "To undermine confidence in the outcome requires a substantial, not just conceivable, likelihood of a different result." Murray at *4 (quotations and citation omitted). A review of the two standards reveals that the prejudice standard already applied by the Idaho Supreme Court on direct appeal is more stringent than the prejudice standard Severson would be required to prove his ineffective assistance of counsel claim. Since the Idaho Supreme Court already concluded beyond a reasonable doubt that any misconduct that occurred did not deprive Severson of a fair trial and that the jury would have still convicted Severson even absent any misconduct, Severson necessarily cannot meet his burden of showing a "reasonable probability" otherwise. The district court properly dismissed Severson's ineffective assistance of counsel claim on this basis.

Severson also argues there was a genuine issue of material fact entitling him to an evidentiary hearing on his claim that counsel was ineffective for failing to object to the prosecutor's closing arguments. Again, Severson is incorrect. To survive summary dismissal, Severson was required to allege a *prima facie* case of both

deficient performance and prejudice. For the reasons already stated, Severson failed to do so with respect to the prejudice prong. He likewise failed to allege any facts sufficient to overcome the presumption that counsel's decision not to object was anything but a reasonable, tactical decision. Indeed, he alleged no facts whatsoever in this regard, instead resting his entire claim on his belief that the dissenting opinion on direct appeal "establish[es] that [he] received ineffective assistance of counsel due to counsel's failure to object in the state's closing arguments."[3] (R., p.61.) That two dissenting Justices thought certain comments were objectionable does not, however, mean that counsel's decision not to object was anything but strategic, nor does it mean the comments were objectionable especially since the majority did not entirely agree.

"The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Premo v. Moore, 131 S.Ct. 733, 740 (2011) (citing Strickland v. Washington, 466 U.S. 668, 690 (1984)). "From a strategic perspective . . ., many trial lawyers refrain from objecting during closing argument to all but the most egregious misstatements by opposing counsel on the theory that the jury may construe their objections to be a sign of desperation or hyper-technicality." United States v. Molina, 934 F.2d 1440, 1448 (9th Cir. 1991). A defense attorney may also decide not object because he believes the prosecutor's argument is helpful to his case or believes he can capitalize on the prosecutor's statements during his

[3] That Severson relies on the dissenting opinion as proof of his claim also makes his anti-*res judicata* argument seem somewhat ironic.

own closing argument. Id.; see also Lambert v. McBride, 365 F.3d 557, 564 (7th Cir. 2004) ("Under *Strickland*, we must note that there may very well be strategic reasons for counsel not to object during closing arguments. Counsel may have been trying to avoid calling attention to the statements and thus giving them more force."); United States v. Daas, 198 F.3d 1167, 1179 (9th Cir. 1999) (counsel's decision not to object to the prosecutor's closing argument "falls within the range of permissible conduct of trial counsel"). "Whatever the actual explanation, *Strickland* requires [the Court] to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Molina, 934 F.2d at 1448 (quoting Strickland, 466 U.S. at 689). "This presumption especially applies to silence in the face of allegedly improper arguments." Vicory v. State, 81 S.W.3d 725, 731 (Mo. App. 2002) (citation omitted).

Applying the foregoing standards to the question of whether Severson alleged a *prima facie* case of deficient performance in relation to the prosecutor's statements to which counsel did not object,[4] it is clear he did not. First, as to the Fifth Amendment statement, the Idaho Supreme Court's conclusion that the statement did not violate Severson's Fifth Amendment right, although not made in the context of an ineffective assistance of counsel claim, supports the conclusion that counsel was not deficient for failing to object to the statement. If the statement did not violate

[4] Obviously, Severson's claim cannot encompass statements made by the prosecutor to which counsel did, in fact, object. On this point, it is notable that the dissent's conclusion that Severson was entitled to a new trial included such statements. Specifically, the statements about Severson having an affair and "screwing some 21-year-old tramp" were part of Severson's request for a new trial. (#32128 R., Vol. X, p.1802.)

Severson's rights – a finding that is also *res judicata* - there was nothing for counsel to object to and he was not deficient for failing to do so.

Severson also failed to allege a *prima facie* case of deficient performance related to counsel's failure to object to the prosecutor's statement that "Mary still speaks to us today. She is telling us what happened that night and why she is dead . . . . Mary tells us, she speaks to us from her grave as to who killed her and why she died." Severson, 147 Idaho at 719, 215 P.3d at 413. As noted by the Idaho Supreme Court, although the statements were "somewhat inflammatory," "the statements were simply referring to Mary's body providing evidence about the circumstances surrounding her death, not to her calling out for Severson's conviction." Id., 147 Idaho at 720, 215 P.3d at 440. Viewed this way, it was not objectively unreasonable for counsel not to object to this statement. This is especially true given the well-accepted principle that "both parties are [generally] given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom." Id.

Finally, Severson failed to allege a *prima facie* case that defense counsel was deficient for failing to object to the prosecutor's references to Mary's family. It would certainly be a reasonable tactical decision not to object to a prosecutor's efforts to humanize a victim by identifying her as a mother, daughter, and sister. Such an objection could easily alienate a jury especially if it appears that, by objecting, counsel is attempting to marginalize the victim. See Vicory, 81 S.W.3d at 731 ("It has long been recognized that trial counsel will often forego an objection in order to, among other things, avoid antagonizing the jury.").

The fact that counsel sought a new trial based on the prosecutor's closing comments relating to Severson's affair, and specifically the prosecutor's statement that Severson "was screwing a 21 year old tramp" (#32128 R., Vol. X, p.1802), demonstrates counsel believed the statement was improper but chose to wait until after the jury returned its verdict before raising it as an issue. Severson was not awarded a new trial on this (or any other basis) (#32128 R., Vol. X, pp.1821-1831), nor is there any basis for concluding that, had counsel objected at the time the statement was made, the court would have declared a mistrial nor is there a "reasonable probability that the jury could have acquitted if an objection had stopped the misconduct" (Appellant's Brief, pp.16-18). At best, the district court *may* have sustained an objection and reminded the jury, as it did on "several occasions that statements made by counsel were not to be regarded as evidence." Severson, 147 Idaho at 721 n.35, 215 P.3d at 441 n.35.

Because Severson failed to allege a genuine issue of material fact that counsel's failure to object to certain statements in the prosecutor's closing argument was anything but a presumptively reasonable tactical decision that properly weighed the potential benefits of objecting, the possible consequences of objecting, and the likelihood of "success" in making the objection (*i.e.*, something more than another admonishment that counsel's arguments were not evidence and/or a directive to "disregard" the statement), and because he failed to allege a genuine issue of material fact that he was prejudiced by counsel's failure to do so, particularly in light of the Idaho Supreme Court's decision on direct appeal, he has failed to show error in the summary dismissal of this claim.

CONCLUSION

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

DATED this 31st day of March, 2014.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 31st day of March, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

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