5-27-2014

Salinas v. State Respondent's Brief Dckt. 40902

IN THE SUPREME COURT OF THE STATE OF IDAHO

ARTURO SALINAS,	)	
	)	No. 40902
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2012-18119
	)	
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 ADA

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Arturo Salinas appeals from the judgment of dismissal entered upon the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The district court summarized the facts of Salinas' underlying criminal conviction as follows:

> The Petitioner pled guilty [to] Count I, Aggravated Battery, Felony, and Count II, Use of a Deadly Weapon in the Commission of a Crime, Felony, on September 15, 2011. The Petitioner entered into a plea agreement with the State to limit its sentencing recommendation to ten years determinate and ten years indeterminate for a total unified sentence of twenty years. The Petitioner was sentenced on November 10, 2011 for Count I as enhanced by Count II to five years determinate and fifteen years indeterminate for a total unified sentence of twenty years. Also, as part of the plea agreement, another felony case, CR-FE-2011-10039, was dismissed and no Persistent Violator enhancement was filed. The Petitioner swore to and signed a Written Plea of Guilty as part of the plea proceeding and the court has taken judicial notice of the written Guilty Plea Advisory filed in Ada County Case No. CR-FE-2011-11897. The Judgment and Commitment was filed November 15, 2011.
>
> The Petitioner moved for reduction of his sentence pursuant to Idaho Criminal Rule 35 which was denied on December 7, 2011.

(R., pp.128-129 (capitalization original).)

Salinas filed a *pro se* petition for post-conviction relief alleging (1) the court lacked subject matter jurisdiction to sentence him "in violation of the double jeopardy clause"; (2) his sentence "violates double jeopardy"; (3) ineffective assistance of counsel; and (4) a due process violation resulting from the state's dismissal of certain charges "after seeking a third extension of time for a

preliminary hearing" and then "refil[ing] those charges at a later time." (R., pp.4-5.) Salinas also filed a memorandum in support of his petition (R., pp.8-21) and a request for counsel (R., pp.37-39).

The court granted Salina's request for counsel "as to allegation 8(d) of the Petition," which allegation alleged counsel was ineffective for failing to "file an appeal of the sentence imposed" and failing to "even speak to [Salinas] regarding the possibility of filing an appeal of the sentence imposed." (R., pp.6-7, 43 (emphasis omitted).) The court entered a notice of intent to dismiss ("Notice") Salinas' remaining claims. (R., pp.45-56.) The state filed an answer and also filed a motion for summary dismissal, including dismissal of allegation 8(d). (R., pp.58-66, 70-72.) In addition, the state asked the court to "take judicial notice of the written guilty plea form and the plea colloquy from September 15, 2012 in case number CR-FE-2011-0011897, as well as the presentence report."[1] (R., p.68 (footnote omitted).) Regarding Salinas' claim relating to counsel's failure to file an appeal, the state asserted: (1) he "was advised by the Court at the time of sentencing about his right to appeal" and, "[t]herefore, he was aware of the possibility"; (2) Salinas "does not allege that he requested an appeal" but instead claims "his attorney never spoke on the subject"; and (3) "[i]n the absence of a request by the petitioner, the State is unaware of any obligation for trial counsel. This is particularly true, when the

[1] The court later took judicial notice of "the audio transcript of the September 15, 2011 plea hearing; audio transcript of the November 10, 2011 sentencing hearing; the Guilty Plea Advisory form filed September 15, 2011 in CR-FE 11-11897; and the presentence report" and ordered preparation of a transcript of the guilty plea hearing. (R., pp.94, 97.)

petitioner was advised by the Court of his right to appeal and informed that counsel would be appointed if he wished to pursue an appeal." (R., pp.64-65.)

Salinas filed a *pro se* response to the court's Notice (R., pp.75-82) and the state's motion (R., pp.86-93). Addressing the state's argument regarding counsel's failure to file an appeal, Salinas "point[ed] the Court and the State of Idaho" to several cases regarding counsel's obligation to consult with his client regarding an appeal and to file an appeal if requested. (R., pp.90-91.) Salinas then reasserted his allegation that counsel did not "speak to [him] about filing an appeal." (R., p.91.) Salinas' response included an "Oath of Petitioner" stating his belief that the contents of the response were "true and correct." (R., p.93.)

The court granted partial summary dismissal, dismissing all allegations with the exception of 8(d). (R., pp.99-109.) Following the court's order of partial summary dismissal, Salinas, through counsel, filed an "Affidavit in Support of Petitioner's Objection to Respondent's Motion to Dismiss Allegation Regarding Appeal" (hereafter "Affidavit") that reads:

> I, Arturo Salinas, (hereinafter Petitioner) being first duly sworn on oath, deposes and states:
>
> 1. I was represented by the Public Defender's Office at the District Court Level;
>
> 2. Immediately after my sentencing hearing I asked my attorney to appeal and file a motion to reduce my sentences.

(R., p.116 (capitalization original).) The Affidavit is signed by Salinas and notarized. (Id.)

Two weeks after Salinas filed his Affidavit, the state filed a "Supplemental Motion for Summary Dismissal" (hereafter "Supplemental Motion"). (R., pp.122-

124.) The state also filed an affidavit from Craig Steveley, who represented Salinas in his underlying criminal case. (R., p.126.) According to Steveley's affidavit, "four days after his sentencing, [Salinas] contacted the Public Defender's officer [sic] and wanted Mr. Steveley to file a motion pursuant to Rule 35" and "Mr. Stevely did so." (R., p.126.) Steveley's affidavit further avers Salinas "never contacted Mr. Steveley again and never requested an appeal." (R., p.126.) The affidavit does not address whether Steveley consulted with Salinas regarding an appeal. (See R., p.126.)

In its Supplemental Motion, the state argued that "counsel had no affirmative obligation to raise the issue of an appeal with [Salinas]," and noted the terms of the plea agreement, the sentence imposed, and the fact that the court advised Salinas of his right to appeal. (R., p.123.) The state cited the following examples from Roe v. Flores-Ortega, 528 U.S. 470 (2000), in support of its position:

> We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense. For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is "professionally unreasonable," as a constitutional matter, in not consulting with such a defendant regarding an appeal. Or, for example, suppose a sentencing court's instructions to a defendant about his appeal rights in a particular case are so clear and informative as to substitute for counsel's duty to consult. In some cases, counsel might then

> reasonably decide that he need not repeat that information. We therefore reject a bright-line rule that counsel must always consult with the defendant regarding an appeal.

(R., p.123 (quoting Flores-Ortega, 528 U.S. at 479-480 (emphasis original, internal citations omitted).)

Addressing Salinas' Affidavit, the state asserted that Salinas' claim, that "[i]mmediately after [his] sentencing hearing [he] asked [his] attorney to appeal and file a motion to reduce [his] sentence" (R., p.116), "if true, would have been present in the initial pleadings on this matter" (R., p.124). The state further argued:

> Their conspicuous absence from [Salinas'] initial filings is noteworthy. So too is the fact that this statement is in direct contrast to his claim that counsel simply never spoke to the issue of an appeal. It is counter-intuitive to believe that Mr. Salinas would not have included reference to his request for an appeal in the petition. Therefore, the new affidavit by Mr. Salinas should be given no weight.
>
> Further, Mr. Salinas's first comment on the issue is much more in keeping with Mr. Steveley's sworn affidavit . . .. Mr. Stevely [sic] indicates that Mr. Saliinas never asked for an appeal. Mr. Salinas did reach out to the PD's office and requested a Motion pursuant to Rule 35, which was filed on his behalf.
>
> . . . When taken together with all of the other materials, Mr. Salinas's second affidavit can be seen to be disingenuous. Thus, dismissal is appropriate and the State requests the same.

(R., p.124.)

At the hearing on the state's request for summary dismissal, the court inquired whether post-conviction counsel wanted the court to consider Salinas' Affidavit "for purposes of th[e] hearing." (Tr., p.5, Ls.20-25.) Counsel responded, "Most certainly I do." (Tr., p.8, L.1.) The court also inquired whether

the prosecutor wanted the court to consider the state's Supplemental Motion and Steveley's Affidavit, and the prosecutor said she did. (Tr., p.8, Ls.2-7.) The court heard argument and took the matter under advisement. (See generally Tr., pp.9-15.)

The district court issued a Memorandum Decision and Order Granting Respondent's Motion for Summary Dismissal (hereafter "Decision") and entered a separate Judgment dismissing Salinas' petition with prejudice. (R., pp.128-136.) Salinas filed a timely notice of appeal. (R., pp.138-139.) On appeal, the state filed a motion to remand, which the Court denied in an order directing the state to "address the issue in its briefing." (Motion for Remand and Statement in Support Thereof, filed April 8, 2014; Order Denying Motion for Remand, filed May 12, 2014.)

ISSUES

Salinas states the issue on appeal as:

1) Did the district court err in dismissing Mr. Salinas' petition for post-conviction relief without conducting an evidentiary hearing on his claim that he received ineffective assistance of counsel when his attorney failed to file an appeal on his behalf and failed to consult with him about an appeal?

2) Did the district court err when it failed to find that Mr. Salinas submitted admissible evidence for consideration of his claims?

3) Did the district court err in summarily dismissing Mr. Salinas' post-conviction claims on grounds for he was given no prior notice?

(Appellant's Brief, p.5.)

ARGUMENT

A. Introduction

Salinas contends (1) "the district court erred when it summarily dismissed his claims that he received ineffective assistance of counsel when his attorney failed to file an appeal on his behalf and failed to consult with him about an appeal" since the competing affidavits created a genuine issue of material fact, and (2) he did not receive the requisite notice that his claim could be dismissed because his affidavit was not properly notarized. (Appellant's Brief, pp.6-24.)

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. Summary Dismissal Standards

"To withstand summary dismissal, a post-conviction applicant must present evidence establishing a prima facie case as to each element of the claims upon which the applicant bears the burden of proof." State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581,

583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman 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. Conflicting statements in affidavits submitted by the parties are generally sufficient to create a genuine issue of material fact. See Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 127, 206 P.3d 481, 491 (2009).

In order to establish a prima facie claim of ineffective assistance of counsel, a post-conviction petitioner must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). A claim that trial counsel failed to file a direct appeal despite explicit instructions by the defendant that he or she do so is a cognizable ineffective assistance of counsel claim: "Where a criminal defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage in the proceedings." Beasley v. State, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994); see also Hoffman v. State, ___ Idaho ___, 277 P.3d 1050, 1060 (Ct. App. 2012) (citing Roe v. Flores-Ortega, 528 U.S. 470, 478 (2000)) ("If counsel has consulted with the defendant, then counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express

instructions with regard to an appeal."). To withstand summary dismissal of a claim that counsel was ineffective for failing to follow instructions to file a notice of appeal, a post-conviction petitioner must allege facts that, if true, show the request was made within the requisite time for filing a notice of appeal. Hoffman, ___ Idaho at ___, 277 P.3d at 1060 (summarily dismissing claim that counsel was ineffective for failing to file notice of appeal where none of the evidence presented by Hoffman demonstrated that he requested his attorney "to file an appeal within the requisite time period").

"[W]here a trial court dismisses a claim based upon grounds other than those offered—by the State's motion for summary dismissal, and accompanying memoranda—the defendant seeking post-conviction relief must be provided with a 20–day notice period." Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). If "the dismissal is based upon the grounds offered by the State, additional notice is unnecessary." Id.

D. Legal Standards Relevant To Claim 8(d) And The Court's Decision

When a defendant asks his attorney to file an appeal and his attorney fails to do so, the attorney is deficient and prejudice will be presumed. Flores-Ortega, 528 U.S. at 484; Gosch v. State, 154 Idaho 71, 294 P.3d 197 (Ct. App. 2012). Absent a specific instruction to appeal (or not appeal), counsel may still have a duty to consult with his client about the right to appeal. Flores-Ortega, 528 U.S. at 478. The term "consult," in this context, means "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." Id. Counsel has a duty to

consult in two circumstances: (1) if a "rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal)," or (2) the defendant "reasonably demonstrated to counsel that he was interested in appealing." Id. at 480. "In making this determination, courts must take into account all the information counsel knew or should have known." Id. Whether the defendant pled guilty, which limits the number of appealable issues and may reflect a defendant's desire to conclude the proceedings, is "highly relevant" but "not determinative." Id. However, even where a defendant pleads guilty, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

To show prejudice in relation to a claim that counsel was deficient for failing to consult with the defendant regarding an appeal, the defendant must demonstrate that, had counsel consulted with him, he would have appealed. Flores-Ortega, 528 U.S. at 485. The existence of nonfrivolous grounds for an appeal informs this inquiry but "a defendant's inability to specify the points he would raise were his right to appeal reinstated will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed." Id. (quotations and citation omitted).

In its Decision, the district court stated:

> Petitioner claims in his *pro se* petition in allegation 8(d) that trial counsel was ineffective because counsel "did not seek to file an appeal of the sentenced [sic] imposed; nor did he even speak to [the Petitioner] regarding the possibility of filing an appeal of the

sentence imposed." The Petitioner did not file an affidavit with his petition to support his conclusory allegation. However, with the assistance of counsel, the Petitioner filed a document titled an affidavit that alleged the Petitioner spoke with trial counsel and requested he file an appeal. However, again that document was not sworn as affirmatively true and correct. Although it says it was sworn, there was no oath or affirmative statement before the notary . . . just a notary's signature. Therefore, this statement also does not constitute an affidavit in Idaho and is not considered as admissible evidence.

Taking the pleadings as true for purposes of this summary disposition motion, the Petitioner never spoke with his counsel and requested he file an appeal. The affidavit filed by the State confirms that the Petitioner did not request his counsel file an appeal. Petitioner presents no admissible evidence to establish that he tried to speak with counsel about an appeal, whether he directed counsel to appeal, or on what grounds he wanted counsel to file an appeal. Moreover, Petitioner does not offer evidence that counsel knew Petitioner would want to appeal or that Petitioner "reasonab[y] demonstrated to counsel that he was interested in appealing." *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 120 S.Ct. 1029, 1036, 145 L.Ed. 2d 985 (2000). This Court will not accept Petitioner's conclusory allegation without admissible evidence. *Roman*, *supra*. Petitioner has failed to create a genuine issue of material fact that his counsel was ineffective by not filing an appeal.

(R., p.133 (brackets original, ellipse original, footnotes omitted).)

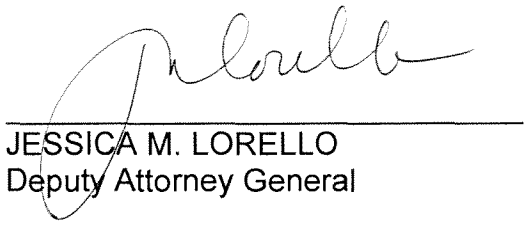
As an alternative, the court concluded:

Even if the document filed by Petitioner on February 7, 2013 was sworn as affirmatively true and correct, the court will have sworn statements by the Petitioner that are inapposite of whether or not the Petitioner requested an appeal of his trial counsel. The Petitioner still has not met his burden of establishing: (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 deficiency prejudiced petitioner's case. The court has not presumed error in this case because the Petitioner has not met his burden of showing that Petitioner requested an appeal and that counsel refused to file an appeal or that the appeal would not have been frivolous.

(R., p.134 (citations omitted).)

The state submits this case for decision on the record.

DATED this 27th day of May 2014.



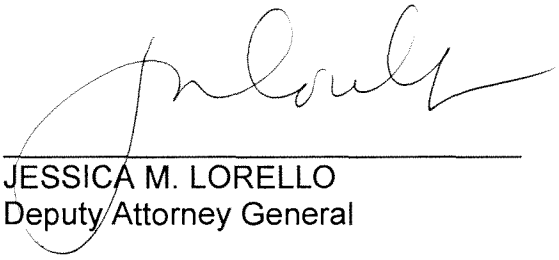
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 27th day of May 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE M. WALKER
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.



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