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Sarabia v. State Appellant's Brief 2 Dckt. 41066

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IN THE SUPREME COURT OF THE STATE OF IDAHO

HERIBERTO FERNANDEZ SARABIA,)	
)	S.Ct. No. 41066
Petitioner-Appellant,	)	D.Ct. No. CV-PC-2012-00303
	)	(Ada County)
vs.)	
	)	BRIEF IN SUPPORT
STATE OF IDAHO,	)	OF PETITION FOR
	)	REVIEW
Respondent.)	

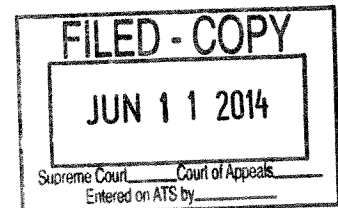
COMES NOW Appellant Heriberto Sarabia, through counsel of record Deborah Whipple, pursuant to Idaho Appellate Rule 118, and offers this brief in support of his petition for review.

Review should be granted in the interests of justice because the Court of Appeals' decision in this case denies Mr. Sarabia a decision on all of his claims in post-conviction.

History of the Case

Following a jury trial, Mr. Sarabia was convicted on one count of felony injury to a child and three counts of lewd conduct. R 5-6. He filed a direct appeal, wherein appellate counsel only challenged the length of his sentence. Relief was denied. R 10. Thereafter, Mr. Sarabia filed a timely petition for post-conviction relief. R 5-17.

Mr. Sarabia's *pro se* petition raised three broad claims with multiple subclaims. The



three broad claims were ineffective assistance of trial counsel; ineffective assistance of appellate counsel; and prosecutorial misconduct. R 5-17.

The state filed a motion for summary dismissal. However, that was not granted and an evidentiary hearing was held. R 74-81; Tr. 2/11/13, p. 7, ln. 2-15; Tr. 5/2/13.

At no time did Mr. Sarabia withdraw any of his claims. Tr. 5/2/13.

Following the hearing, the district court entered written findings of fact, conclusions of law and order denying post-conviction relief. R 132-140. The court's order holds that Mr. Sarabia did not establish ineffective assistance of trial counsel. R 140. However, the court did not address all the sub-allegations of Mr. Sarabia's trial counsel claim. Furthermore, the court did not address Mr. Sarabia's claim of ineffective assistance of appellate counsel or his claim of prosecutorial misconduct. R 132-140.

This appeal timely follows. R 141-145.

Decision in the Court of Appeals

On appeal, Mr. Sarabia presents the issue of whether reversal is required because the district court failed to rule on all of his claims in post-conviction. Appellant's Opening Brief, page 3. (Mr. Sarabia incorporates his Opening Brief in full herein.)

In an unpublished decision, the Court of Appeals held that the district court did address Mr. Sarabia's claims and sub-claims through a statement that "all other claims are dismissed." *Sarabia v. State*, S.Ct. No. 41066, Slip Op. p. 3, May 8, 2014. (A copy of the Court of Appeals Opinion is attached to this brief.)

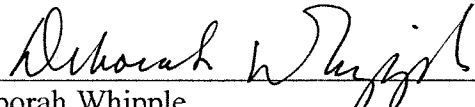
Reason Why Review Should Be Granted

Mr. Sarabia submits that the district court's order does not actually show that it did address all of his claims and sub-claims. Rather, the blanket statement fails to identify the specific claims being denied leaving uncertainty as to whether the court actually did consider all the claims and sub-claims. Mr. Sarabia therefore asks in the interests of justice that this Court accept review and issue an opinion remanding the case to the district court for a full consideration of his entire petition.

Conclusion

For the reasons set forth above and in his Opening Brief, Mr. Sarabia requests that this Court grant review, reverse the district court judgment denying him post-conviction relief, and remand with instructions to address specifically all of his claims and sub-claims.

Respectfully submitted this 11th day of June, 2014.



Deborah Whipple
Attorney for Heriberto Sarabia

CERTIFICATE OF SERVICE

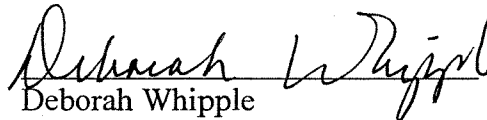
I CERTIFY that on June 11, 2014, I caused a true and correct copy of the foregoing document to be:

mailed

hand delivered

faxed

to: Mark W. Olson
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Deborah Whipple

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41066

HERIBERTO FERNANDEZ SARABIA,	)	2014 Unpublished Opinion No. 496
)	
Petitioner-Appellant,	)	Filed: May 8, 2014
)	
v.	)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Judgment denying post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP; Deborah Whipple, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Heriberto Fernandez Sarabia appeals from the district court's judgment denying post-conviction relief. We affirm.

I.

BACKGROUND

Sarabia was convicted of injury to a child, Idaho Code § 18-1501(1), and three counts of lewd conduct with a minor under sixteen years of age, I.C. § 18-1508. Sarabia appealed and in an unpublished decision, this Court affirmed the judgment of conviction and sentences. *State v. Sarabia*, Docket No. 37267 (Ct. App., Oct. 18, 2010).

Sarabia then filed a petition for post-conviction relief. The petition advanced three broad claims: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. Each of these claims contained numerous sub-claims. The State

moved for summary dismissal of each of the claims and sub-claims, but the district court ordered an evidentiary hearing.

At trial, Sarabia presented the testimony of three witnesses, including himself, and no other evidence. In a memorandum decision and order, the district court denied post-conviction relief. Sarabia appeals from the judgment.

II.

ANALYSIS

The district court's memorandum decision addressed and rejected, in some detail, three claims of ineffective assistance of trial counsel. On appeal, Sarabia posits no error with respect to the district court's disposition of these claims. Instead, Sarabia asserts that the district court erred by not, in its memorandum decision and order, ruling on *all* of the claims for relief contained in the petition. He identifies twenty-one claims and sub-claims that he contends the district court erred by not addressing, and he seeks a remand.

A petition for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell*, 118 Idaho at 67, 794 P.2d at 656. We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). At the evidentiary hearing, Sarabia was required to prove his claims by a preponderance of the evidence, and the standard for avoiding summary dismissal, in which the district court was required to accept his allegations as true, was no longer applicable. *Loveland v. State*, 141 Idaho 933, 935-36, 120 P.3d 751, 753-54 (Ct. App. 2005).

The record belies Sarabia's claims of error. At the close of the evidentiary hearing, the prosecutor stated that in light of the evidence presented by Sarabia that, "it seems to me that the allegations are now reduced to the issues of whether [trial] counsel was deficient in not calling Mr. Salazar to the stand and also not calling Elena Fernandez to the stand." Counsel for Sarabia

did not object to this characterization or attempt to clarify the scope of the claims presented for resolution at trial. Counsel made no closing argument, choosing instead to “submit.” Counsel did not file a post-hearing brief.

In accord, in its memorandum decision and order the district court resolved only the issues that had been supported by trial evidence. With respect to the remaining claims contained in the petition, the district court wrote:

When an evidentiary hearing is held, claims unsupported by any evidence are subject to dismissal. *Loveland v. State*, 141 Idaho 933, 120 P.3d 751 (Ct. App. 2005). The petitioner must establish his claims and the court is free to weigh all of the evidence submitted and assess the credibility of the witnesses. *Id.* In the instant case, the only issue that evidence was offered on was the failure to call two witnesses to offer impeachment evidence attacking the victim’s credibility and some error with respect to Count One. All other claims are dismissed.

Thus, contrary to Sarabia’s position, here the district court *did* rule on the remaining petition claims; it denied relief on all of them because of Sarabia’s failure to support those claims with admissible evidence. In this appeal, Sarabia makes no attempt to establish, through citation to the record and submission of argument and authority (or otherwise), that any of his remaining claims were supported by trial evidence and should have been addressed by the district court.

Sarabia has failed to show district court error. The district court’s judgment denying post-conviction relief is therefore affirmed.

Chief Judge GUTIERREZ and Judge GRATTON CONCUR.