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Cobell v. State Respondent's Brief Dckt. 41108

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

EUGENE RAY COBELL,)	
)	No. 41108
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2011-14415
)	
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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FILED - COPY

APR 29 2014

Supreme Court _____ Court of Appeals _____
Entered on ATS by _____

ATTORNEYS FOR
RESPONDENT

PETITIONER-APPELLANT
Pro Se

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STATEMENT OF THE CASE

Nature of the Case

Eugene Ray Cobell, *pro se*¹, appeals from the district court's order summarily dismissing his successive petition for post-conviction relief upon remand of the matter for the issuance of a more informative notice of intent to dismiss.

Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts and the proceedings in Cobell's underlying criminal case, appeal and initial post-conviction action as follows:

A jury found Cobell guilty of rape and forcible sexual penetration by use of a foreign object. In July 2008, the district court entered a judgment of conviction and imposed concurrent, unified sentences of life, with ten years determinate, for each charge. Cobell directly appealed, making several claims: (1) violation of his Fifth Amendment right to remain silent when the prosecutor cross-examined him about his post-*Miranda* silence; (2) prosecutorial misconduct during closing argument where the State commented on Cobell's silence after receiving his *Miranda* rights and misstated evidence; (3) cumulative error; and (4) excessive sentences. This Court affirmed the judgment of conviction and sentences, finding the district court erred by allowing the prosecutor

¹ Although counsel was originally appointed to represent Cobell in this appeal, the Court granted the SAPD's motion to withdraw. (12/30/13 Order Granting Motion for Leave to Withdraw and to Suspend Briefing Schedule.) The SAPD's request to withdraw as counsel was made following "a thorough review" by three separate attorneys of the appellate record in this case who concluded "that the appeal failed to present any meritorious issues for review, rendering the appeal frivolous." (12/03/13 Affidavit in Support of Motion for Leave to Withdraw and Motion to Suspend the Briefing Schedule, p.2.) Additionally, the SAPD is of the opinion "that the district court's actions [in summarily dismissing Cobell's successive petition for post-conviction relief] were appropriate and that Eugene Ray Cobell's petition was properly dismissed." (Id.)

to question Cobell regarding his post-*Miranda* silence, but such error was harmless; the prosecutor did not commit misconduct; the misstatement of evidence did not rise to the level of fundamental error; the slight trial error did warrant the grant of a new trial under the cumulative error doctrine; and the sentences were not excessive. Thereafter, Cobell filed a petition for post-conviction relief. The district court dismissed the petition in June of 2010. A decision that Cobell did not appeal.

Cobell v. State, Docket No. 39321, 2013 Unpublished Opinion No. 401, pp.1-2

(Idaho App., March 14, 2013) (footnotes and case citation omitted).

Statement Of The Facts And Course Of Successive Post-Conviction Proceedings

The facts of the underlying successive petition for post-conviction relief and subsequent appeal are as follows:

On July 28, 2011, Cobell filed a successive pro se petition for post-conviction relief. In his successive petition, Cobell asserted the inadvertent omission of key claims and issues in his original post-conviction petition was to blame for its dismissal and he claimed ineffective assistance of his prior post-conviction counsel. Cobell claimed actual innocence due to a medical issue, which rendered him incapable of committing the crimes. Cobell further claimed ineffective assistance of trial counsel for failing to investigate the medical issue, prosecutorial misconduct at both the trial and sentencing, and other claims. Cobell concluded the successive petition was an attempt to raise issues that he was not given a fair opportunity to present in his original post-conviction petition.

The State moved to dismiss the petition, citing as a ground for dismissal Cobell's failure to allege any reason why Cobell's claims were not raised in the original petition. The district court issued a notice of intent to dismiss wherein it concluded a successive petition based on ineffective assistance of prior post-conviction counsel was without merit. Although Cobell responded to the notice of intent to dismiss, the district court issued an order summarily dismissing the petition for the reason stated within the notice and subsequently entered a judgment. Cobell timely appeal[ed].

Cobell, at p.2.

The Court of Appeals vacated the district court's judgment summarily dismissing Cobell's successive petition for post-conviction relief and remanded Cobell's case, finding:

the notice of intent to dismiss to Cobell was inadequate either due to an erroneous conclusion that ineffective assistance of post-conviction counsel could not provide a sufficient reason to file a successive post-conviction petition or due to the failure to identify why Cobell's allegations failed to state a sufficient reason to file a successive petition or state a claim for relief.

Cobell, at p.7. The Idaho Supreme court has since rejected this analysis. In Murphy v. State, ___ Idaho ___, ___ P.3d ___, 2014 WL 717695, *6 (Idaho 2014), the Idaho Supreme Court held that because there is "no statutory or constitutional right to effective assistance of post-conviction counsel" a claim of ineffective assistance of post-conviction counsel is not a "'sufficient reason' for filing a successive petition."

Upon remand, the district court appointed counsel to assist Cobell and issued a notice of its intent to dismiss Cobell's successive petition for post-conviction relief unless Cobell showed a sufficient reason why the claims contained in his successive petition were not raised in Cobell's initial petition. (R., p.14.) Cobell responded, arguing his own failure to raise issues in his original petition and the court's failure to appoint counsel on his original petition allowed him to file a successive petition. (See R., pp.16-21.)

The district court again dismissed Cobell's successive petition for post-conviction relief, finding "sufficient reason has not been provided to preserve the

claim(s) petitioner intends to raise in his successive petition.” (R., p.25.) Cobell timely appealed. (R., pp.27-30.)

ISSUE

Cobell's "Informal Brief" does not contain a statement of the issue(s) on appeal. The state phrases the issue as:

Has Cobell failed to carry his appellate burden of showing error in the summary dismissal of his successive petition for post-conviction relief?

ARGUMENT

Cobell Has Failed To Carry His Appellate Burden Of Showing Error In The Summary Dismissal Of His Successive Post-Conviction Petition

A. Introduction

Following remand, the district court summarily dismissed Cobell's successive petition for post-conviction relief after concluding Cobell failed to provide a sufficient reason that would allow him to file a successive petition. (R., pp.27-28.) On appeal, Cobell appears to challenge the summary dismissal of his petition, however, he has failed to provide any argument or relevant authority to support his claim. As a result, Cobell has waived any claim of error. Even if this Court reviews the merits of the district court's summary dismissal, there is no error.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Cobell Has Waived Appellate Consideration Of His Challenge To The District Court's Order Of Summary Dismissal Upon Remand Of His Successive Petition For Post-Conviction Relief

Cobell contends on appeal that he is being denied "full and fair access to full litigation of a Post Conviction" based on the "one bite of the apple" rationale and such denial is "a miscarriage of justice." (Appellant's brief, p.1.) Cobell does

not argue, however, that the district court erred in determining there was no sufficient reason provided to justify the filing of a successive petition for post-conviction relief. (See generally Appellant's brief.) Nor has Cobell supported his appellate claims with any relevant legal authority. (Id.) Cobell has therefore not offered any argument, cogent or otherwise, to challenge the district court's rulings. It is well settled that a party waives an issue on appeal if either authority or argument is lacking. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). It is also well settled that the appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for errors. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983).

Because Cobell has failed on appeal to identify any viable claim of error in the district court's actions and has otherwise failed to cite any relevant legal authority or make any cogent argument to support any claim of error, he has waived appellate review of any such claim and has thereby failed to show any error in the summary dismissal of his successive post-conviction petition.

D. Even If Considered, Cobell Has Failed To Show Error In The Summary Dismissal Of His Successive Petition

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction

relief differs from a complaint in an ordinary civil action. A petition must contain more than “a short and plain statement of the claim” that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant’s evidence has raised no genuine issue of material fact, which if resolved in the applicant’s favor, would entitle the applicant to the requested relief. Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it appears that the applicant is not entitled to relief. Specifically, I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Even if the Court considers the merits of the district court’s summary dismissal order, there is no error because the district court summarily dismissed

Cobell's petition as being improperly successive. Cobell's petition was correctly dismissed on the basis that it failed to satisfy the criteria for a permissible successive petition under the UPCPA. Idaho Code § 19-4908 governs the filing of successive petitions and provides:

Waiver of or failure to assert claims. – All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

I.C. § 19-4908.

In his successive petition, Cobell asserted he should have been able to make his new claim of ineffective assistance of trial counsel for the “‘sufficient reason’ that [the district court] erred in denying his motion for the appointment of counsel in his original petition.” (R., p.23.) Although Cobell asserts a lack of legal training and experience in addition to indigency, the court “did not deny the appointment of counsel for any reason relating to whether Mr. Cobell was trained in the law or ‘needy’,” but instead because his claims “were plainly frivolous and could not be developed into viability even with the assistance of counsel.” (Id.) Cobell does not contest this finding on appeal and more importantly, Cobell

fails to explain why, even assuming counsel should have been appointed to assist him in the prior proceeding, the absence of counsel prevented him from raising the claim in the present petition in his previous petition (that is, the claim that trial counsel was deficient in failing to raise an impotence defense to the underlying charge).

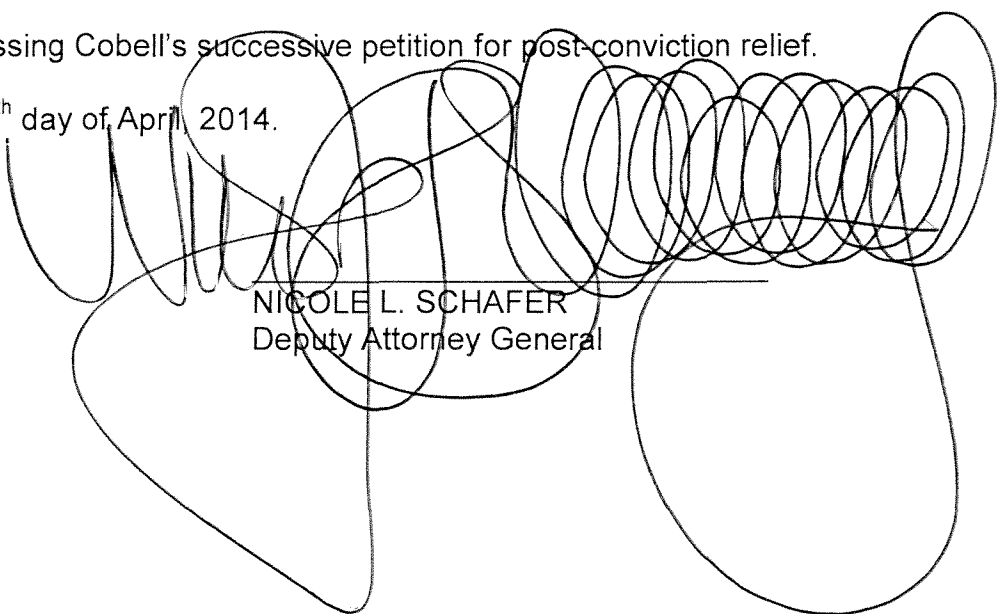
(R., p.24.)

The district court correctly dismissed Cobell's petition on the ground that it did not meet the statutory requirements for a permissible successive petition under I.C. § 19-4908 as the record supports the district court's finding that Cobell failed to provide a sufficient reason to file a successive petition for post-conviction relief.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Cobell's successive petition for post-conviction relief.

DATED this 29th day of April, 2014.

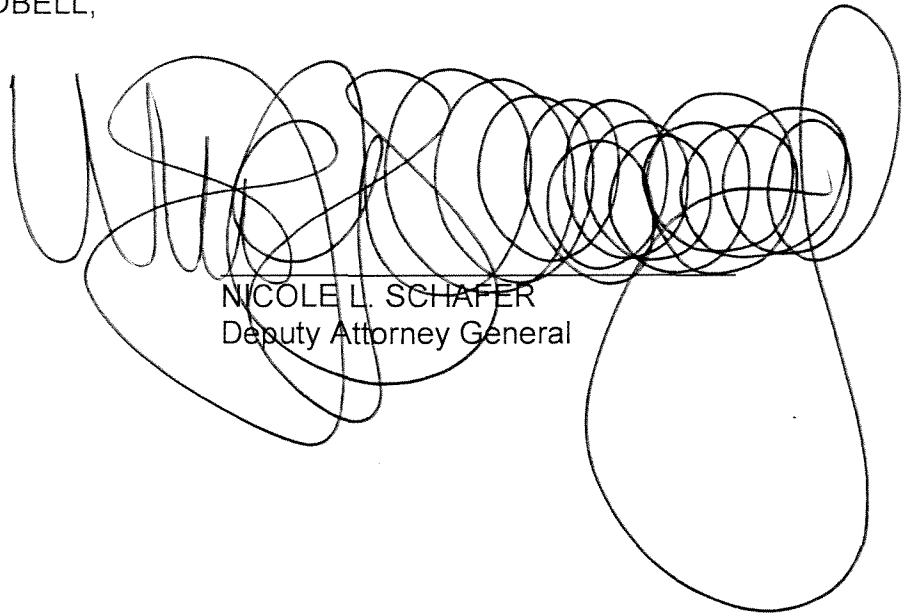


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of April, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

EUGENE RAY COBELL,
#84171
ISCI
PO Box 14
Boise, ID 83707

A large, complex handwritten signature in black ink, consisting of many overlapping loops and swirls, positioned over the name and title of the signatory.

NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm