

5-14-2014

Sanchez v. State Appellant's Brief Dckt. 41314

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEREMY FLORES SANCHEZ,)	
)	
Petitioner-Appellant,)	No. 41314
)	
v.)	Canyon Cty. Case No. CV-13-2653
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

HONORABLE MOLLY J. HUSKEY
District Judge

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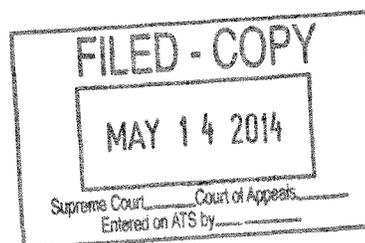


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I. STATEMENT OF THE CASE

A. Nature of the Case

Jerney Flores Sanchez appeals from the district court's Order Granting State's Motion for Summary Dismissal filed July 22, 2013, of his successive petition for post conviction, and the Order Denying Motion to Reconsider, and Final Judgement thereon. (R., pp. 204-211, 212-213). Mr. Sanchez further appeals the District Court's Order denying his Motion for Reconsider, said Order filed August 15, 2013 (R., pp. 231-233). Mr. Sanchez asserts that the district court erred by summarily dismissing his petition for post-conviction relief and by failing to reconsider its dismissal.

B. Statement of the Facts & Course of Proceedings

Mr. Sanchez was convicted originally in Canyon County Case CR-02-5737 of conspiracy to commit robbery, robbery, conspiracy to commit kidnapping, kidnapping, aggravated battery and aiding and abetting attempted murder. (R., p. 204). He was sentenced to a unified minimum term of life on each of the first four counts, in addition to a unified term of fifteen years fixed, with no years indeterminate, on each of the convictions for aggravated battery and aiding and abetting attempted murder. (R. p. 204). The district court ordered that all sentences were to run consecutively. (R., p. 204). Mr. Sanchez appealed, but his case was affirmed, including the length of his sentence. (R., p. 204). Mr. Sanchez filed a first petition for post-conviction relief in 2006. (R., p. 204). That petition was denied, and its denial was affirmed on appeal. (R., p. 204).

On March 14, 2013, the petitioner, Mr. Sanchez, filed the instant Petition and Affidavit for Successive Post-Conviction Relief. (R., pp. 4-7). The Petition was verified

(R., p. 7). The Petition was also supported by an Affidavit Of Facts filed March 14, 2013. (R., pp. 23-24). In addition, the affidavit of Dennis Benjamin, counsel on Mr. Sanchez's first appeal, was filed in support of Mr. Sanchez's petition on April 5, 2013. (R., pp. 21-32, 150-154).

In his petition, Mr. Sanchez claimed the following:

a) General Claims:

- a. Newly discovered evidence, including an affidavit from Kenneth Wurdemann in which Mr. Wurdemann testified that he perjured himself during Mr. Sanchez's trial.
 - b. Misconduct and/or witness tampering on the part of the prosecutor by using Mr. Wurdemann's perjured testimony.
 - c. The State used evidence it knew was false or misleading when it procured Mr. Wurdemann's testimony.
 - d. The State violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), by using said testimony.
- b). Ineffective assistance of appellate counsel because counsel did not raise the following issues on appeal.
- a. The trial court did not have subject matter jurisdiction to impose a 30 year consecutive sentence;
 - b. The fixed life term was unlawfully imposed and the trial court was

without subject matter to impose such sentences;

c. the substantive crimes merge, and therefore, the consecutive sentences for those crimes violate the Double Jeopardy clause of the US Constitution;

d. First post-conviction counsel was ineffective and said ineffective assistance of counsel was never addressed because the State Appellate Public Defender would not render ineffective assistance of counsel in a direct appeal, and because of the appellate representation, Mr. Sanchez could not file his own documents as pro se, thus denying counsel in his direct appellate review; and,

e. First post-conviction counsel failed to file an appeal.

(R., pp. 4-7).

On May 30, 2013, the state filed a motion for summary dismissal, alleging that the successive petition was untimely and therefore time barred, and that it did not raise a genuine issue of material fact. (R., pp. 177-202). The district court granted the state's motion via its Order filed July 22, 2013. (R., pp. 204-211). Mr. Sanchez filed a motion to reconsider on August 5, 2013 (R., 218-226). The district court denied Mr. Sanchez's motion via order filed August 15, 2013. (R., pp. 231-232). Mr. Sanchez timely appealed. (R., pp. 227-228, 234-235).

II. ISSUES PRESENTED ON APPEAL

- A. Did the district court err when it summarily dismissed Mr. Sanchez's Successive Petition for Post-Conviction Relief, and denied Mr. Sanchez's Motion to Reconsider?
- B. Did the district court err when it denied Mr. Sanchez's Motion to Reconsider?

III. ARGUMENT

A.

- A. The District Court Erred when it summarily dismissed Mr. Sanchez's Successive Petition for Post-Conviction Relief as untimely and as a successive petition, and denied Mr. Sanchez's Motion to Reconsider.

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

A claim for post-conviction relief must be raised in an original application. I.C. § 19-4908. That application must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever proceeding is later. I.C. § 19-4902. Successive petitions are impermissible "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.

Section 19-4908 sets forth no fixed time within which successive petitions may be

filed, however, the "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is considered by the courts on a case-by-case basis. *Id.*

An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. *See id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. *See Workman*, 144 Idaho at 522, 164 P.3d at 802.

Summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163

(Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

1. Mr. Sanchez's contends his Petition should have been allowed under I.C. 19-4901 and I.C. 19-408 and not been summarily dismissed due to the existence of a genuine issue of fact.

Mr. Sanchez's contends that the district court erred by failing to allow his petition under I.C. § 19-4901 and 19-4908, and *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). Mr. Sanchez argues that he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability the court process given the affidavits submitted in support of his petition, and the verified statements within his petition. Further, mindful of the fact that an earlier affidavit from Mr. Wurdemann existed concerning perjury, Mr. Sanchez contends that the differences between the two petitions, along with the issues involved including subject matter jurisdiction, work to allow a timely successive petition under I.C. § 19-4901 and 19-4908.

An "allegation that a claim was not adequately presented in the first post-conviction action . . . provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction

relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

Mr. Sanchez contends that he raised substantial facts in his verified petition, the affidavit of Mr. Wurdemann executed in 2011, and the affidavit of his former appellate counsel, Dennis Benjmin, concerning newly discovered evidence regarding perjured testimony at this trial, and the fact that his other underlying claims were not adequately presented previously, nor was his original appeal effective.

As a result, his claims were either due to new evidence, or were not adequately presented as discussed in *Charboneau* and *Baker*.

Further, Mr. Sanchez contends that he did not have access to legal resources nor assistance of counsel as he could not reach his attorney and did not receive communication from his attorney, and that for that additional reason, his arguments were not presented adequately previously. (R., p. 9-10).

Mr. Sanchez presented his affidavit of facts supporting his petition setting forth the facts regarding the newly discovered evidence in the form of the 2011 Affidavit of Mr. Wurdemann, which Mr. Sanchez received in February of 2013. (R., p. 23). Further, Mr. Dennis Benjamin provided an affidavit that in part notes the claims regarding perjured testimony and prosecutorial misconduct could not have been raised in the prior post-conviction because of the newly discovered evidence in the form of the Wurdemann affidavit that was not possessed or fully known at that time. (R., pp. 151-152). Moreover, the affidavit of Gerald Wolff disputes the facts as alleged in the Wurdemann affidavit, creating a materially disputed fact. ((R., pp. 117-119).

As stated above, summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Mr. Sanchez contends that he raised substantial facts in his pleadings as detailed above, requiring an evidentiary hearing on the merits of his claims. It is further Mr. Sanchez's contention that because he raised such claims, and supported them with the facts in his pleadings, that summary dismissal, and the failure to reconsider or alter said dismissal upon his motion, was error.

2. Mr. Sanchez contends that the district court erred by dismissing his claims regarding ineffective assistance of counsel and subject matter jurisdiction as untimely.

Mr. Sanchez contends that the district court erred when it dismissed his remaining ineffective assistance of counsel and subject matter jurisdiction claims as time barred.

Questions of subject matter jurisdiction can be raised for the first time on appeal. See *State v. Rogers*, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004). Further, lack of subject matter jurisdiction can be raised in a Criminal Rule 35(a) motion to correct an illegal sentence that can be raised at any time. See, *State v. Lute*, 150 Idaho 837, 840, 252 P.3d 1255, 1258 (2011). Mr. Sanchez also argues that the double jeopardy violation alleged could have been raised under the fundamental error in existence at the time of the direct appeal. In 2005, "fundamental error" included such error as would go to the foundation or basis of a defendant's rights or would go to the foundation of the case or takes from a defendant a right essential to his defense which no court ought to permit him to waive. *State v. Knowlton*, 123 Idaho 916, 918-19, 854 P.2d 259 (1993), *abrogated by State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010).

In addition, the *Brady* violations alleged and prosecutorial misconduct claim were not properly presented previously and therefore should be allowed in a successive petition. An "allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005); See *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 1316-18 (2012).

B. THE DISTRICT COURT ERRED WHEN IT DENIED MR. SANCHEZ'S MOTION TO RECONSIDER.

Mr. Sanchez filed a motion to reconsider the district court's order summarily dismissing his post-conviction claims, because he did not have effective access to counsel and because he filed his petition within a timely period after receiving the new affidavit, an affidavit that contained different facts from the original 2009 affidavit. The remaining arguments in favor of his contentions regarding the district court's erroneous failure to grant his motion to reconsider are set forth above and need not be repeated here. They are instead incorporated herein by this reference.

IV. CONCLUSION

Based on the above, Mr. Sanchez respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief, and denying his motion to reconsider, and remand the matter for further hearings.

DATED this 12 day of May, 2014.



STEPHEN D. THOMPSON
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12 day of May, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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