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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRAVIS L. WARD,)	
)	
Petitioner-Appellant,)	S.Ct. No. 41331
)	D.Ct. No. 2012-21341
vs.)	(Ada County)
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE CHERI C. COPSEY
Presiding Judge

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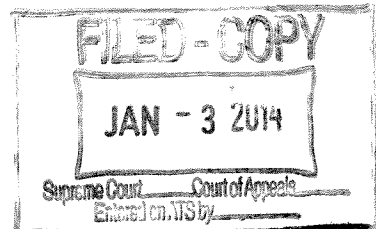


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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the summary dismissal of Appellant Travis Ward's petition for post-conviction relief. R 125-128. Relief should be granted because the district court summarily dismissed for reasons other than those argued by the state in its motion for summary dismissal without giving its own notice of intent to dismiss allowing Mr. Ward 20 days to respond, because the district court failed to rule upon Mr. Ward's stand alone Fifth and Fourteenth Amendment claims, and because the district court erroneously concluded that Mr. Ward was not entitled to an evidentiary hearing on his claim of ineffective assistance of counsel.

B. Procedural History and Statement of Facts

Mr. Ward pled guilty to failure to register as a sex offender in 2010 and was sentenced to a unified sentence of 10 years (2 fixed and 8 indeterminate). R 108.

Following his guilty plea and sentencing, Mr. Ward appealed, and the judgment and sentence were affirmed in an unpublished decision. The remittitur issued in February 2012. R 110.

Mr. Ward then filed a timely petition for post-conviction relief. R 5-11. Mr. Ward raised three claims: 1) ineffective assistance of counsel; 2) violation of the Fifth Amendment by not having counsel present during all phases of evaluation and interrogations; and 3) violation of the Fourteenth Amendment rights to due process and equal protection. R 6. With regard to the ineffective assistance of counsel claim, Mr. Ward asserted: 1) counsel failed to keep him apprised of all aspects of the case and failed to make himself available during critical evaluations; 2) appellate counsel failed to advise Mr. Ward of all conversations or

correspondence with opposing counsel so that he could make better, more informed, and intelligent decisions; and 3) counsel failed to inform him of his right to remain silent or avoid possible prejudice by agreeing to state requests for psychological or “social” sexual evaluations.

R 7.

In his affidavit, Mr. Ward stated that at sentencing he did not receive a psychiatric evaluation. He stated that he felt that if he had received an evaluation things could have come out differently, but his attorney did not push for one or seek admittance to mental health court. Mr. Ward also noted that he was on medication at the time of sentencing for mental health problems. R 10.

A few days after he filed his petition, Mr. Ward filed a premature *pro se* brief in response to motion to dismiss. (No motion to dismiss or answer had yet been filed.) R 22-29.

Thereafter, the district court granted Mr. Ward’s motion for appointment of counsel. R 33.

Mr. Ward’s counsel did not amend the petition, but did submit a memorandum in support of the *pro se* petition. R 43-48. In the memorandum, counsel reiterated the claims of the petition and argued that Mr. Ward had effectively alleged that he was denied effective assistance of counsel during the critical stage between entry of a plea and sentencing because his attorney did not inform him of the right to remain silent during interviews conducted at that stage. R 45.

Counsel argued that Mr. Ward had made a claim of prejudice because at sentencing the district court made the following comments:

I looked back through the psychological evaluations and they are very concerning. [Y]ou have poor impulse control and . . . significant anger issues . . . toward women, especially women who are much older.

Tr. p. 41, ln. 2-11, quoted at R 47.

. . . in looking at the psychological evaluations, it's very clear that you do have a number of problems . . . , that you're very angry especially toward women.

Tr. p. 39, ln. 7-10, quoted at R 47.¹

Thereafter, the state filed its answer. In its answer, the state raised six defenses including 1) failure to state a claim; 2) failure to raise a genuine issue of material fact; 3) failure to establish the allegation of ineffective assistance of counsel by a preponderance of the evidence; 4) the petition is untimely; 5) that the state denies every allegation not expressly admitted; and 6) a list of the paragraphs of the petition followed by admissions or denials. R 49-53.

The state next filed a motion for summary disposition. The motion stated that summary judgment was appropriate:

because the Petition, considered with the pleadings, answer, admissions and agreements of fact, together with the affidavit submitted raises no genuine issue of material fact. In addition, the Petitioner has failed to make a substantial factual showing supporting his allegations and the conclusions presented fail to provide a legal basis for relief. Therefore, Respondent is entitled to judgment as a matter of law.

R 65-75.

The state's argument in support of the motion was that Mr. Ward could not claim that he was unaware of the right to remain silent during pre-sentence evaluations on the failure to register offense because his written and oral responses at the time of the plea indicate the opposite. R 71. The state further argued that Mr. Ward did not allege that counsel's tactical decision to not seek an additional evaluation was based upon inadequate preparation, ignorance

¹ The sentencing transcripts are part of the record in this appeal. R 91-97. The court was relying upon an updated PSI which included the evaluations from prior offenses. No new evaluations were prepared for the updated PSI. R 88, Tr. 4/10/11, p. 16, ln. 12-13.

or relevant law and so could not state a basis for a claim of ineffective assistance. R 71-72. The state continued this argument stating that Mr. Ward had not asserted or provided evidence to support the conclusions that if a new evaluation had been ordered, the end result would have been different from the sentence he received. R 73. Next, the state argued that Mr. Ward's petition could be read to challenge the validity of past psychosexual evaluations for violating his *Estrada* rights. *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006). However, the state maintained that this claim would be an untimely attack on prior evaluations. R 73-74.

Mr. Ward filed a memorandum in opposition to the motion for summary disposition. Mr. Ward argued that his claim of ineffective assistance in failing to move to exclude the old psychosexual evaluation from consideration in this case because the older evaluation was obtained in violation of *Estrada* was not untimely because the ineffective assistance occurred at the sentencing in this case and this petition was filed within one year of the remittitur from the direct appeal in this case. R 102-106.

The district court, without holding a hearing, granted the state's motion for summary dismissal. R 107-120.

The district court order does not address any claim except ineffective assistance of trial counsel. R 107-120. With regard to that claim, the district court dismissed because it found that trial counsel's performance did not fall below an objective standard of reasonableness and was not outside the wide range of professionally competent assistance. R 114-116. The court concluded:

Thus, the failure to investigate a prior conviction for constitutional infirmity or to challenge its use in a subsequent case, *even to enhance the sentence*, is not outside the wide range of professionally competent assistance. *See e.g., Bartley v.*

Morgan, 80 Fed.Appx. at 555-57 (2003).

R 114.

The court next concluded that “any *Estrada* challenge to the use of his prior psychosexual examination would have been futile.” R 118. This was based upon the district court’s conclusion that Mr. Ward was time barred from collaterally attacking his earlier conviction and sentence. R 117.

The court further concluded that challenges to the original 1990 presentence report would have failed and thus failure to object was not deficient performance. The court stated:

At the time of sentencing in this case, the Court had no jurisdiction to strike any portion of a prior presentence report. [*State v. Person*, 145 Idaho 293, 296, 178 P.3d 658, 661 (Ct. App. 2007).] Any failure to move to strike the 1990 material is not deficient or outside the professional norms.

R 118.

Lastly, the court concluded that Mr. Ward could not show prejudice. The court stated that there is no evidence that it considered the risk assessment or statements Mr. Ward made in the 1990 psychosexual examination and therefore he could not prove prejudice. R 120.

A final judgment was entered. R 123. And, this appeal timely followed. R 125-128.

III. ISSUES PRESENTED ON APPEAL

1. Should the district court’s order of summary dismissal be reversed because the court dismissed on grounds other than those argued by the state in its motion?

2. Should the district court’s order of summary dismissal also be reversed because the order did not address Mr. Ward’s stand alone Fifth Amendment and Fourteenth Amendment claims?

3. Should the district court's order of summary dismissal as to the ineffective assistance of counsel claim also be reversed because Mr. Ward did raise a genuine issue of material fact both as to the deficient performance of trial counsel and as to prejudice?

IV. ARGUMENT

A. The District Court's Order of Summary Dismissal Should be Reversed Because the Court Dismissed on Grounds Other Than Those Argued by the State

The district court dismissed Mr. Ward's petition for post-conviction relief on grounds other than the grounds set out in the state's motion for summary disposition. Therefore, the dismissal was *sua sponte* and without proper notice. The appropriate remedy is reversal of the order of dismissal and remand for further proceedings.

The applicable law is set out in *Buss v. State*, 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009):

Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The reason that subsection (b), but not section (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.* Idaho Rules of Civil Procedure 7(b)(1) requires that the grounds of a motion be stated with 'particularity.' See *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009) (reiterating the requirement of reasonable particularity in post-conviction cases.) If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the ground therefore pursuant to I.C. § 19-4906(b). See *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798. Similarly, where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its

own initiative and the court must provide the twenty-day notice.

147 Idaho at 517, 211 P.3d at 126 (footnotes omitted). *See also, Kelly v. State*, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010) (“Thus, where a trial court dismissed 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.”)

In this case, the state’s motion and memorandum set out a variety of reasons for summary dismissal including that Mr. Ward could not claim that he was unaware of the right to remain silent in the failure to register case at issue here; that he failed to allege that the decision to not seek an additional evaluation was based upon inadequate preparation, or ignorance of the relevant law; that Mr. Ward had failed to show that if a new evaluation had been ordered the outcome would have been different; and that if the petition was an attack on the validity of the prior psychosexual evaluation, it was untimely.

The district court dismissed the petition for a different variety of reasons including that Mr. Ward had not established that counsel’s performance fell below an objective standard of reasonableness; that Mr. Ward was time barred from collaterally attacking his earlier conviction and sentence; that the court lacked jurisdiction to strike the prior psychosexual evaluation from the 1990 presentence report; and lastly, that the court had not considered the risk assessment or statements Mr. Ward made in the 1990 psychosexual examination in determining the sentence in this case and so prejudice could not be shown.

The court’s reasons for summary dismissal were not the reasons the state argued in support of its motion for summary dismissal. Therefore, the district court erred in summarily

dismissing without giving a 20 day notice and opportunity to respond. I.C. § 19-2906(c); *Buss, supra*. On this basis, this Court should reverse the order of summary dismissal and remand for further proceedings.

B. The District Court's Order of Summary Dismissal Should Also be Reversed Because the Order Did Not Address Mr. Ward's Stand Alone Fifth Amendment and Fourteenth Amendment Claims

A district court abuses its discretion and creates reversible error when it fails to issue a ruling on matters before it. *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 380, 234 P.3d 699, 704 (2010). Because the district court did not rule on all the claims before it, the order denying post-conviction relief must be reversed.

In his petition Mr. Ward raised an ineffective assistance of counsel claim. And, he raised a Fifth Amendment claim and a Fourteenth Amendment claim. R 6. At no time did he or counsel withdraw those claims. Yet, the district court did not reference those claims at all in the order of summary dismissal.

The failure to rule on matters presented to it is an abuse of a district court's discretion. *Dawson, supra* (holding that the trial court abused its discretion by failing to rule on the admissibility of certain evidence prior to granting summary judgment); *Miramar Hotel Corp. v. Frank B. Hall & Co. of California*, 163 Cal.App.3d 1126, 210 Cal.Rptr. 14, 115 (1985) (holding that "a trial court's failure to issue a [ruling] when there has been a timely request therefor is per se reversible error.").

Dawson further holds that even if the district court's silence is treated as a tacit denial of a litigant's request, the court's unsupported denial is still an abuse of discretion. *Dawson, supra*, citing *Gutierrez v. Mass. Bay Transp. Auth.*, 437 Mass. 396, 772 N.Ed.2d 552, 560 (2002). As

stated by the Idaho Supreme Court, “The district court’s failure to rule on the motion leaves this Court without an adequate basis upon which to understand the premise behind the district court’s determination, and thus the district court abused its discretion by failing to issue a ruling[.]”

Dawson, supra.

Because the district court abused its discretion, the order of summary dismissal should be reversed and the case remanded for further proceedings.

C. The Order of Summary Dismissal Should Also be Reversed Because Mr. Ward Did Raise a Genuine Issue of Material Fact Both as to the Deficient Performance of Trial Counsel and as to Prejudice

In addition, the order of summary dismissal of the ineffective assistance of counsel claim should be reversed because Mr. Ward did raise a genuine issue of material fact both as to deficient performance and as to prejudice.

The standard for review of an order of summary dismissal of a post-conviction petition is set out in *Schultz v. State*, 153 Idaho 791, 796-97, 291 P.3d 474, 479-80 (Ct. App. 2012):

A petition for post-conviction relief initiates a civil, rather than criminal, proceedings governing by the Idaho Rules of Civil Procedure. Like plaintiffs in other civil actions, the petitioner must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. A petition for post-conviction relief differs from a complaint in an ordinary civil action, however, in that it must contain more than ‘a short and plain statement of the claim’ that would suffice for a complain under IRCP 8(a)(1). The petition must be verified with respect to facts within the personal knowledge of the petitioner, and affidavits, records or other evidence supporting its allegations must be attached, or the petition must state why such supporting evidence is not included. In other words, the petition must present or be accompanied by admissible evidence supporting its allegations, or it will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative, if ‘it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of facts, 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.’ When considering summary dismissal, the district court must construe disputed facts in the petitioner’s favor, but the court is not required to accept either the petitioner’s mere conclusory allegations, unsupported by admissible evidence, or the petitioner’s conclusions of law. Moreover, because the district court rather than a jury will be the trier of fact in the event of an evidentiary hearing, the district court is not constrained to draw inferences in the petitioner’s favor, but is free to arrive at the most probable inferences to be drawn from the evidence. Such inferences will not be disturbed on appeal if the uncontroverted evidence is sufficient to justify them.

Claims may be summarily dismissed if the petitioner’s allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facies case as to each essential element of the claims, or if the petitioner’s allegations do not justify relief as a matter of law. Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner’s favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner’s evidence.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner’s admissible evidence asserts facts which, if true, would entitle the petitioner to relief.

To prevail on an ineffective assistance of counsel claim, the defendant must show that his attorney’s performance was deficient and that the defendant was prejudiced by the deficiency. To establish a deficiency, the applicant has the burden of showing that the attorney’s representation fell below an objective standard of reasonableness. To establish prejudice, the applicant must show a reasonable probability that, but for the attorney’s deficient performance, the outcome of the proceedings would have been different.

Id. (citations omitted).

In this case, the district court concluded that failure to investigate a prior conviction for constitutional infirmity or to challenge its use in a subsequent case, even to enhance the sentence,

is not outside the wide range of professionally competent assistance. R 114. However, that conclusion does not address the controlling question in this case - whether counsel renders deficient performance when he or she does not challenge consideration of a psychosexual report obtained in violation of the constitutional right to effective assistance of counsel. The district court erred in conflating a challenge to the constitutional validity of a prior conviction with a challenge to the use of a psychosexual evaluation from a prior case. While counsel may not have been able to collaterally attack the conviction itself, *see State v. Schwab*, 153 Idaho 325, 381 P.3d 1103 (Ct. App. 2012), counsel could certainly attack the use of information obtained in violation of the right to counsel and the right to self-incrimination regardless of whether that information had been improperly used in a prior case or not. Mr. Ward did raise a genuine issue of material fact as to whether counsel was deficient in not objecting to consideration of the prior psychosexual evaluation in sentencing in this case.

The district court also ruled that counsel could not have been deficient for not moving to strike the prior psychosexual evaluation from the PSI because the district court did not have jurisdiction to change the contents of the PSI prepared for the prior sentencing. R 118-119. However, again, the district court's conclusion regarding its jurisdiction to alter a PSI does not address the question relevant to this case. Whether or not the district court had the power to take the psychosexual evaluation out of the prior PSI does not control the question of whether counsel was deficient in not requesting that the prior psychosexual report not be considered in sentencing in the current case. Information seized in violation of the constitutional right against self-incrimination and the right to effective assistance of counsel should not be considered in sentencing, *Estrada*, and the fact that the information had been wrongly used in a prior case does

not somehow remove the constitutional barriers and allow free use of the information in all subsequent cases. Mr. Ward did raise a genuine issue of material fact as to the deficient performance of counsel.

Lastly, the district court held that Mr. Ward cannot establish prejudice because, according to the court, it did not consider the psychosexual examination or the risk assessment made by the evaluator in sentencing Mr. Ward. R 119-120. However, that conclusion is contrary to the record.

During sentencing, the district court stated:

And in looking at the psychological evaluations, it's very clear that you do have a number of problems in that area, that you're very angry especially toward women.
...

R 96, Tr. 5/10/11, p. 39, ln. 7-10.

In my view you present a serious problem for the community. And I looked back through the psychological evaluations and they are very concerning. Are there good reasons for the way in which you are – the way you are today? Yes. But it doesn't change the fact that you have poor impulse control and that you have significant anger issues and that those anger issues are directed toward women, especially women who are much older.

I looked at the psychiatric evaluation that was done at the Allumbaugh House. I looked back at the psychiatric evaluations that were done when you were a child and very little has actually changed during that period of time.

R 97, Tr. 5/10/11, p. 41, ln. 2-16.

The district court's conclusion that it did not consider the prior psychosexual evaluation is contrary to the record.² Mr. Ward did, in fact, raise a genuine issue of material fact as to

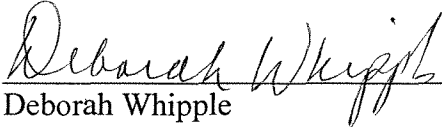
² See *State v. Izaguirre*, 145 Idaho 820, 825, 186 P.3d 676, 681 (Ct. App. 2008), another case involving the same district court judge wherein the Court of Appeals found that neither the district court's sentence nor the denial of Mr. Izaguirre's Rule 35 motion was predicated upon sound reasoning and that a new sentencing hearing was required before a new judge.

whether he was prejudiced by counsel's deficiency in failing to object to the use of unconstitutionally obtained information in sentencing him.

V. CONCLUSION

For all the reasons set forth above, Mr. Ward respectfully requests that the order of summary dismissal be reversed and the case remanded for further proceedings.

Submitted this 24th day of January, 2014.



Deborah Whipple
Attorney for Travis Ward

CERTIFICATE OF SERVICE

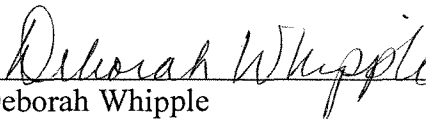
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