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Gomez v. State Respondent's Brief Dckt. 41344

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

OSCAR ISMAEL GOMEZ,
Petitioner-Appellant,
vs.
STATE OF IDAHO,
Respondent.

No. 41344
Canyon Co. Case No.
CV-2008-5680

BRIEF OF RESPONDENT

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

HONORABLE JUNEAL KERRICK,
District Judge

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Supreme Court _____ Court of Appeals _____
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ATTORNEYS FOR
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PRO SE
PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature of the Case

Oscar Ismael Gomez appeals from the district court's order summarily dismissing his post-conviction claim that his trial counsel was ineffective for failing to pursue a self-defense theory, and from its order denying, after an evidentiary hearing, his post-conviction claim that his trial counsel was ineffective for failing to file a motion to suppress statements made to police.

Statement of Facts and Course of Proceedings

In 2006, Cruz Esquivel was found shot to death on a Canyon County road. (PSI, p.2.¹) A subsequent police investigation identified Oscar Gomez as a suspect. (PSI, pp.2-3.) Upon arrest and interrogation, Gomez told police that he "wasn't thinking clearly" the night of the shooting, and that he shot Cruz in his vehicle because he thought Cruz was going to "do something bad to him." (PSI, p.4.)

The state charged Gomez with second-degree murder. (Id.) Pursuant to plea agreement, Gomez pled guilty to second-degree murder, and the state agreed to limit its sentencing recommendation to no more than 25 years fixed. (R., pp.113-114.) The district court imposed a unified life sentence with 25 years fixed. (R., pp.105-108.) The Idaho Court of Appeals affirmed the district court's

¹ In Gomez's post-conviction case, the district court took judicial notice of the presentence investigation and transcripts associated with Gomez's underlying criminal case. (R., pp.97-98.) The presentence investigation report was included as an exhibit on appeal in this case.

sentence on direct appeal. State v. Gomez, 2007 Unpublished Opinion No. 661, Docket No. 33929 (Idaho App., November 15, 2007).

In 2008, Gomez filed a *pro se* post-conviction petition in which he raised the following claims: (1) the state breached the plea agreement by recommending a unified life sentence; (2) trial counsel was ineffective for failing to investigate and pursue a self-defense theory; (3) trial counsel was ineffective for failing to move to suppress Gomez's statements to police; (4) trial counsel was ineffective for failing to adequately argue for a lesser sentence; and (5) the district court erred by not adequately considering Gomez's methamphetamine use as a "key element of the case." (R., pp.5-17.) The district court appointed counsel to represent Gomez on the petition. (R., p.29.)

In 2011, after several years of various delays and an attorney substitution, the parties entered into a stipulation in which Gomez abandoned all of his post-conviction claims except two – his ineffective assistance of counsel claims regarding his trial counsel's failure to file a motion to suppress, and failure to pursue a self-defense theory. (R., pp.66-67, 72-73; 4/13/11 Tr., p.1, L.24 – p.2, L.23.) The district court summarily dismissed the self-defense claim after concluding that Gomez failed to allege facts which, if true, demonstrated he was entitled to relief on this claim. (R., pp.76-87.)

In June 2011, the district court held an evidentiary hearing on Gomez's remaining claim - that his trial counsel was ineffective for failing to file a motion to suppress his statements made to police. (See generally 6/17/11 Tr.) At the conclusion of the hearing, the parties requested a continuance so that they could

review audio recordings associated with the case. (6/17/11 Tr., p.45, L.15 – p.50, L.2.) It appears that no further hearings were conducted in this case until a February 2013 status conference. (R., pp.117-118.) At a continued evidentiary hearing held in May 2013, the parties presented argument, but no additional evidence. (See generally 5/29/13 Tr.) The district court concluded that Gomez failed to meet his burden to show he was entitled to relief on the remaining post-conviction claim. (R., pp.124-147.) Gomez timely appealed.² (R., pp.148-151.)

² The State Appellate Public Defender (“SAPD”) was originally appointed to represent Gomez in his appeal. (R., pp.154-155.) The Idaho Supreme Court subsequently permitted the SAPD to withdraw from the case after the SAPD failed to identify a meritorious issue for review. (Affidavit in Support of Motion For Leave to Withdraw And Motion to Suspend the Briefing Schedule, p. 2; 9/16/14 Order Granting Motion.)

ISSUES

Gomez states the issues on appeal as:

1. Whether the court [erred], when it dismissed Petitioner's post-conviction [petition], when evidence showed that petitioner was lied to, tricked and coerced, into pleading guilty.
2. Whether the court [erred], when it dismissed Petitioner's post-conviction [petition], when evidence showed that the state's prosecutor committed prosecutorial misconduct, when he "Bryan W. Knox" violated the plea agreement at the sentencing hearing.
3. Whether the court [erred] when it dismissed Petitioner's post-conviction [petition], when the evidence showed that Petitioner received ineffective assistance of counsel with regard to [his] guilty plea.

(Appellant's brief, p.5.)

The state rephrases the issue on appeal as:

Did Gomez fail to preserve the post-conviction claims he raises on appeal?

ARGUMENT

Gomez Failed To Preserve The Post-Conviction Claims He Raises On Appeal

A. Introduction

Gomez contends that the district court erred by dismissing his post-conviction petition. (See generally Appellant's brief.) Gomez's argument fails because he failed to preserve the post-conviction claims he raises on appeal.

B. Gomez Failed To Preserve The Post-Conviction Claims He Raises on Appeal

It is well settled that issues not raised below will generally not be considered for the first time on appeal. State v. Averett, 142 Idaho 879, 888-89, 136 P.3d 350, 359-60 (Ct. App. 2006); State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). It is also well settled "that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." State v. Huntsman, 146 Idaho 580, 585, 199 P.3d 155, 160 (Ct. App. 2008); State v. Grube, 126 Idaho 377, 387, 883 P.2d 1069, 1079 (1994) (citing State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942, 946 (1993); Dunlick, Inc. v. Utah-Idaho Concrete Pipe Co., 77 Idaho 499, 502, 295 P.2d 700, 702 (1956)).

On appeal, Gomez raises three post-conviction claims: (1) he was "lied to, tricked and coerced" into pleading guilty; (2) the state breached the plea agreement during its sentencing argument; and (3) his trial counsel was ineffective with regard to his guilty plea, in that counsel failed to put the agreement in writing, provided deficient advice regarding the plea negotiations,

and failed to object to the prosecutor's sentencing argument. (Appellant's brief, pp.5-13.) Gomez raised similar claims regarding his guilty plea and sentence in his post-conviction petition. (R., pp.5-17.) However, these claims were never considered by the district court because Gomez abandoned them in a stipulation entered with the state. (R., pp.66-67, 72-73; 4/13/11 Tr., p.1, L.24 – p.2, L.23.) The district court expressly confirmed the terms of this stipulation with Gomez's counsel at an April 2011 status hearing:

THE COURT: And so Mr. Neville and Mr. Ericson had initially presented to the court an agreement that the defendant would withdraw all of his allegations except for the allegation concerning the counsel's failure to file a motion to suppress and the failure to assert a claim of self-defense.

...

So I want to clarify, Mr. Neville, that he has abandoned all of the allegations except for the two that are articulated.

[GOMEZ'S COUNSEL]: That's correct, Your Honor.

THE COURT: Okay.

[GOMEZ'S COUNSEL]: I had a lengthy conversation with him at the penitentiary about this. We went through line by line. And those are the two claims he's wishing to go forward on and have an evidentiary hearing.

(4/13/11 Tr., p.1, L.24 – p.2, L.23.)

Gomez did not subsequently attempt to amend his petition or otherwise present these abandoned claims to the district court. Correspondingly, the district court did not consider these abandoned claims in either its order summarily dismissing Gomez's suppression motion claim, or in its order denying

Gomez's self-defense claim after an evidentiary hearing. (See R., pp.76-87; 124-147.)

It was Gomez's burden to adequately raise these claims before the district court and to obtain an adverse ruling. Huntsman, 146 Idaho at 586, 199 P.3d at 161; State v. Barnes, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting Fisher, 123 Idaho at 485, 849, P.2d at 946); State v. Hester, 114 Idaho 688, 760 P.2d 27 (1988); State v. Amerson, 129 Idaho 395, 401, 925 P.2d 399, 405 (Ct. App. 1996). Because the district court never addressed the post-conviction claims Gomez now attempts to raise on appeal, and because these claims were never properly before the district court to address, Gomez failed to preserve these claims for consideration on appeal. This Court must therefore affirm the district court.

CONCLUSION

The state respectfully requests that this Court affirm the district court's orders dismissing Gomez's post-conviction ineffective assistance of counsel claims.

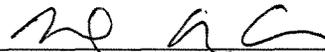
DATED this 4th day of February 2015.


MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February 2015 I caused two true and correct copies of the foregoing RESPONDENT'S BRIEF to be placed in the United States mail, postage prepaid, addressed to:

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