1-30-2014

Benavente v. State Respondent's Brief Dckt. 41390

IN THE SUPREME COURT OF THE STATE OF IDAHO

VICTOR PAUL BENAVENTE, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	No. 41390 Canyon Co. Case No. CV-2013-513

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 MOLLY J. HUSKEY
District Judge

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

STATEMENT OF THE CASE

Nature of the Case

Victor Paul Benavente appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of the Proceedings

In late 2010 and early 2011, confidential informants purchased a total of $9,970 worth of cocaine from Benavente. (PSI, p.2.) This was part of a larger drug dealing operation involving several individuals. (See PSI, p.2; see generally PSI attachments.) The state charged Benavente with eleven felony drug charges. (See R., p.50; PSI attachments, Indictment.) Pursuant to a plea agreement, Benavente pled guilty to conspiracy to traffic in cocaine, aiding and abetting in the trafficking of cocaine, and two counts of trafficking in cocaine. (R., pp.50-54); see also State v. Benavente, 2012 Unpublished Opinion No. 562, Docket No. 39268, p.1 (Idaho App., July 25, 2012). There was no agreement pertaining to sentencing recommendations. (R., p.50.) The district court imposed three concurrent unified 25-year sentences, each with ten years fixed. (R., p.62.) The court denied Benavente's subsequent I.C.R. 35 motion for reduction of sentence. (R., pp.107-110.) The Idaho Court of Appeals affirmed the district court's sentencing determination and denial of Benavente's I.C.R. 35 motion. Benavente, 2012 Unpublished Opinion No. 562.

Benavente then filed a *pro se* petition for post-conviction relief. (R., pp.3-14.) Benavente asserted his trial counsel was ineffective for: (1) failing to dispute certain statements made by the prosecutor during the sentencing hearing: (2)

failing to review his I.C.R. 35 motion; and (3) "fail[ing] to investigate." (Id.) The district court appointed counsel to represent Benavente on the petition. (R., pp.73-74.) After providing notice (R., pp.157-168, 183-194), the district court granted the state's motion for summary dismissal (R., pp.198-211). The district court concluded that Benavente failed to assert facts that would, if true, entitle him to relief as to any of his claims. (Id.) Benavente timely appealed. (R., pp.212-215.)[1]

[1] The State Appellate Public Defender ("SAPD") was originally appointed to represent Benavente in his appeal. (R., pp.218-219.) However, the Idaho Supreme Court granted the SAPD's motion to withdraw from the case. (4/21/14 Order.) Benavente proceeded *pro se*.

ISSUE

Benavente states the issue on appeal as:

> Whether the district court abused it[]s discretion when it imposed an aggregate sentence of [25 years] with ten years fixed, upon Mr. Benavente.

(Appellant's brief, p.2.)

The state rephrases the issue as follows:

Has Benavente failed to show error in the district court's summary dismissal of his petition for post-conviction relief?

ARGUMENT

Benavente Has Failed To Establish That The District Court Erred In Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

Benavente appeals from the district court's summary dismissal of his post-conviction petition. (R., pp.212-215.) However, in his Appellant's brief, Benavente challenges only the district court's original sentencing determination. (See generally Appellant's brief.) This claim is waived because Benavente failed to attempt to raise it in his post-conviction petition. In any event, this claim is barred by the doctrine of *res judicata*, because the Idaho Court of Appeals previously affirmed the district court's sentencing determination on direct appeal. Finally, even if Benavente's Appellant's brief could be liberally construed as challenging the district's court's summary dismissal of his ineffective assistance of counsel claims, he has failed to demonstrate error.

B. Benavente Has Waived Consideration Of Claims Not Raised In His Petition For Post-Conviction Relief

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing 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).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, in response to a party's motion or on the court's own initiative, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

In this case, Benavente did not reference his post-conviction proceedings or ineffective assistance of counsel claims anywhere in his Appellant's brief. (See generally Appellant's brief.) Rather than expressly challenging the district court's summary dismissal of his ineffective assistance of counsel claims, Benavente instead attempts to re-litigate an issue he raised on direct appeal – whether the district court abused its discretion in making its sentencing determination. (See generally id.) Benavente did not attempt to raise this claim in his post-conviction petition. (See R., pp.3-14.) It is a fundamental tenet of appellate law that a claim not raised before the district court will not be considered on appeal. State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct.

App. 2000). Because this issue was not asserted in Benavente's petition for post-conviction relief, it is not properly before this Court.

Further, even had Benavente attempted to raise this issue in his post-conviction petition, consideration of the claim would be barred by the doctrine of *res judicata*. The doctrine of *res judicata* prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000). "The principles of res judicata apply when an applicant attempts to raise the same issues previously ruled upon on direct appeal in a subsequent application for post-conviction relief." Knutsen v. State, 144 Idaho 433, 439, 163 P.3d 222, 228 (Ct. App. 2007); see also State v. Beam, 115 Idaho 208, 210–11, 766 P.2d 678, 680–681 (1988) (holding that the district court "correctly refused to relitigate" issues that had "previously been decided on direct appeal and thus were *res judicata*").

Finally, even if Benavente's Appellant's brief could be liberally construed as challenging the district court's summary dismissal of his ineffective assistance of counsel claims, he has still failed to demonstrate error. First, Benavente has failed to assign any specific error to the district court. It is 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); see also State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (a party waives an issue on appeal if either authority or argument is lacking). Second, Benavente cannot

demonstrate that the district court erred in concluding that he failed to allege facts which, if true, demonstrated he was entitled to relief as to any of his claims. For this latter proposition, the state adopts the reasoning set forth by the district court in its order summarily dismissing Benavente's post-conviction petition. (See R., pp.198-210).[2]

Benavente waived his challenge to the district court's sentencing determination by failing to attempt to raise it in his post-conviction petition. The claim is further precluded by the doctrine of *res judicata*. In any event, Benavente has failed to demonstrate that the district court erred in summarily dismissing his post-conviction petition.

CONCLUSION

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

DATED this 30th day of December 2014.

MARK W. OLSON
Deputy Attorney General

[2] The state has attached this order as "Appendix A."

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of December 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:

VICTOR PAUL BENAVENTE
Inmate #94774
ICC
PO Box 70010
Boise, ID 83707

MARK W. OLSON
Deputy Attorney General

MWO/pm

APPENDIX A

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

VICTOR PAUL BENAVENTE, **Petitioner,** vs. STATE OF IDAHO, **Respondent.**	CASE NO. CV13-513 ORDER DISMISSING UNIFORM POST-CONVICTION PETITION

In Canyon County case CR-2011-12865, pursuant to a plea agreement, Petitioner agreed to plead guilty to one count of conspiracy to traffic in cocaine, and three counts of trafficking in cocaine. The state agreed to dismiss one count of possession of a controlled substance with the intent to deliver, and six counts of trafficking in cocaine. The defendant further agreed to pay restitution all on charged counts, obtain a presentence investigation report, a substance abuse evaluation and a mental health evaluation. There was no agreement as to the underlying sentence. Following his plea, Petitioner was sentenced to a unified term of twenty-five (25) years, with ten (10) years fixed, on each count, with all counts running concurrently. The Judgment of Conviction was entered September 13, 2011. The Petitioner filed an Idaho

Criminal Rule 35 (Rule 35) motion which was denied by the district court. Thereafter, both the Judgment of Conviction and the denial of the Rule 35 were appealed. While the appeal was pending, the Petitioner filed a second Idaho Criminal Rule 35 motion, which was also denied by the district court. The Idaho Court of Appeals affirmed the district court's sentence as well as the denial of the first Idaho Criminal Rule 35 motion. The Remittitur was issued September 13, 2012.

The Petitioner filed the current Petition on January 17, 2013. The Petition is verified and includes an affidavit filed with the petition, as well as a supplemental affidavit filed May 13, 2013. Petitioner was appointed counsel, and counsel has indicated an amended petition will not be filed. The claim in the petition is that his attorney was ineffective because:

1. At sentencing, trial counsel failed to challenge or contradict several opinion statements made by the prosecutor. The statements were:
    a. "He had shipped via FedEx in packages up to a quarter pound to his mother's address and to several other addresses in the valley from gentlemen that he met in Oregon over in Portland who were sending him three to four ounces of cocaine regularly." (Sent. Tr., 9/12/11, p.28, Ls. 19-25);
    b. "He's the pusher. He's not a dealer. He's the proverbial pusher, making the phone calls, enlisting the other people to come in and buy more and more and more so that he could make more money. One of the phone calls we intercepted from Mr. Benavente was a gentleman

about the truck we seized from him that was his, quote "work truck," titled in someone else's name." (Sent. Tr., 9/12/11, p.30, Ls. 15-22.);

c. "He keeps on insisting that he has a legitimate job working with a body shop. However, when the officer set surveillance on the body shop, they would see him come and go, but never stay and work." (Sent. Tr., 9/12/11, p.32, Ls. 10-13.)

d. "His charges in Oregon a number of years ago were drug related." (Sent. Tr., 9/12/11, p.93, Ls. 3-4).

2. At sentencing, trial counsel failed to include remarks demonstrating Petitioner's earlier success on parole, specifically that during parole, the Petitioner:

   a. Had a job;

   b. Had paid his cost of supervision;

   c. Was attending required classes and treatment; and,

   d. Had received no parole violations until the charges in the underlying criminal case were filed;

3. Trial counsel failed to review the Idaho Criminal Rule 35 motion until after the motion was denied and had his trial attorney contacted him, he would have included additional information such as:

   a. He had been successful during a previous period of parole;

   b. He completed CORE, parenting and pre-release classes while in custody;

c. He has been a model prisoner as demonstrated by his ability to work as a barber while in custody;

d. He has a supportive family and became a parent while the underlying criminal case was pending; and,

e. He cannot complete the Therapeutic Community program until the last nine months of the fixed portion of his prison sentence.

4. Trial counsel failed to investigate.

The Respondent then filed an Answer with Exhibits from the underlying criminal case, as well as a motion for summary dismissal. This Court issued a Notice of Intent to Dismiss and subsequent filed an Amended Notice of Intent to Dismiss on July 18, 2013 indicating that unless the deficiencies noted were addressed, the Petition would be dismissed on August 16, 2013.

Petitioner filed an Objection to that dismissal on the grounds that trial counsel never reviewed the second Rule 35 motion prior to its dismissal by the district court. This response does not sufficiently allege any deficient performance or resultant prejudice as articulated below. As such, for the reasons stated below, the Petition is dismissed.

Failure to Allege Sufficient Admissible Evidence In Support of His Claims

In order to establish that his attorney rendered ineffective assistance of counsel, the Petitioner must show:

> That counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Workman v. State, 144 Idaho 518, 525, 164 P.3d 798, 805 (2007). Additionally, Idaho Code § 19-4902 requires that, "Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct." Thus, the Petitioner has the burden of producing relevant factual support for his claims in his Petition. Here, the defendant has failed to support his claims of ineffective assistance of counsel with admissible evidence.

At sentencing, the district court asked defense counsel if there were any changes or corrections to be made to the Pre-sentence Investigation Report and trial counsel indicated that no changes or corrections needed to be made; Petitioner did not indicate there were any changes or corrections that needed to be made. (Sent. Tr., 9/12/11, p.23, L.25 – p.24, L.5.) In the Pre-Sentence Investigation Report, the Petitioner indicated that the drugs he sold were to support his personal drug habit. (PSI, p.2, "Defendant's Version.") The PSI further stated that the attached substance abuse evaluation indicated Petitioner was an addict and recommended Level III intensive residential treatment. (PSI, pp. 6-7.) In the police reports attached to the PSI, Petitioner stated he had a fake job and false pay stubs, drove vehicles registered to others so they couldn't be seized, and that he belonged to a gang but it was more of a business organization that trafficked drugs. (PSI, police reports, stamped pages 152-153.)

These statements in the PSI are sufficient to provide a justification for the statements alleged to be erroneous in 1(b) and 1(c) above. Because there was no challenge to any of the factual allegations or statements in the PSI, including those in the police reports, there is more than a sufficient basis for the Prosecutor's statements.

Additionally, given the information in the PSI, the Petitioner has failed to include admissible evidence that the statements made by the Prosecutor and reflected in the PSI were inaccurate or incorrect; therefore, Petitioner has failed to establish that his attorney's performance was deficient for failing to object to the statements. Therefore, the Court hereby provides notice to dismiss the Claim on these grounds.

Statement 1(d) was not made by the prosecutor, but rather, was made by defense counsel and attributed to a statement made by the Petitioner to defense counsel. (Sent. Tr., 9/12/11, p.39, Ls. 3-9). Petitioner has not alleged that he did not make the statement or that the statement is not accurate; therefore, he has failed to establish by way of admissible evidence, any deficient performance on the part of his attorney for making the statement and the Court gives notice of intent to dismiss on that ground.

The Court can find no basis in the PSI or any of the attached police reports to support or substantiate statement 1(a) above. However, even if failing to challenge that statement was deficient performance, Petitioner has failed to establish prejudice resulting from this, or any other of his allegations in Claim 1, above. At sentencing, the district court reviewed the large scale drug distribution in which the Petitioner was engaged and the entrenched criminal conduct and thinking of the Petitioner. (Sent. Tr., 9/12/11, p. 48, Ls. 14-22). The Court specifically noted that the Petitioner was a "pretty sophisticated criminal (Sent. Tr. 9/12/11. p. 46, Ls. 7-8), the extent to which Petitioner was hiding his criminal conduct behind the façade of being a successful businessman (Sent. Tr., 9/12/11, p.47, Ls. 13-24), and the "bold, sophisticated and clearly deliberate" criminal conduct of the Petitioner as a basis for the sentence imposed. (Sent. Tr.,

9/12/11, Ls. 20-23). The court further noted that in light of the fact that each count to which the Petitioner pleaded guilty was subject to a maximum life sentence, the sentence was on the lenient side. (Sent. Tr., 9/12/11, p.52, Ls. 5-22).

It does not appear that the Court mentioned or even considered the information regarding the interstate shipping of drugs, but rather, focused on the Petitioner's behaviors as a drug dealer, behaviors which were reflected in the police reports and statements made by the Petitioner. Petitioner has provided no evidence, nor even alleged, that his sentence would have been different had trial counsel challenged the above statements. Because the Petitioner has not sufficiently alleged deficient performance or any resulting prejudice, the Court gives notice of its intent to dismiss Petitioner's Claim 1.

At sentencing, Petitioner's mother testified she was supportive of her son and that she was seeing a change in him. (Sent. Tr., 9/12/11, p. 25, L.13 – p.26, L.20.) Also at sentencing, the Petitioner, through a letter to the court, indicated that he wished to support his new child. (Sent. Tr., 9/12/11, p. 30, Ls. 6-11.) Although trial counsel did not mention Petitioner's previous performance on parole, trial counsel for Petitioner argued that all of the money seized or referenced by the state was a result of legitimate business receipts, (Sent. Tr., 9/12/11, p.38, Ls. 17-23), the sale of drugs was to support Petitioner's own habit, (Sent. Tr., 9/12/11, p.39, Ls. 14-25). Petitioner had familial support, (Sent. Tr., 9/12/11, p. 40, Ls. 1-10), and Petitioner had completed an available class while locally incarcerated. (Sent. Tr., 9/12/11, p. 40, Ls. 17-18).

Petitioner has not alleged how it could be deficient performance to fail mention that Petitioner performed well on some aspects of probation when it was clear that he

was engaging in on-going criminal conduct while on parole. For example, although Petitioner claims his trial attorney should have pointed out he had a job, Petitioner, in the police reports, indicated he did not have a job, but instead, had falsified employment documents so it would like he had legitimate employment. (PSI, police reports, stamped pages 152-153.) Because he did not have significant legitimate employment, any discussion of his payment of the cost of supervision would inexorably lead to the conclusion that his cost of supervision was being paid by the proceeds of his drug dealing, which would not have been a mitigating factor. Further, mentioning the fact that there were no allegations of a parole violation until he was indicted criminally would not have been helpful to the Petitioner, as it would only have bolstered the district court's conclusion that the Petitioner was a sophisticated criminal who had gone to great lengths to conceal his criminal behavior. Any mention that Petitioner was in treatment classes would have highlighted the failure of those classes either to address Petitioner's substance abuse or his criminal behavior. In light of this, the Petitioner has failed to support his claim of ineffective assistance of counsel because his attorney failed to discuss the above factors at sentencing. As such, the Court gives notice to dismiss the claim on the above grounds.

Additionally, Petitioner has failed to establish how he was prejudiced – he has provided no admissible evidence that he would have received a different or lesser sentence had trial counsel made these arguments. As such, the Court gives notice of its intent to dismiss the Petitioner's second claim.

As to Claim 3, Petitioner has failed to support by admissible evidence that his attorney rendered deficient performance by failing to review the Rule 35 motion filed in

February 2012 prior to its filing, as he has not established any prejudice related to that failure. The Rule 35 filed in 2012 was the Petitioner's second Rule 35 motion and as such, the court had no jurisdiction to hear the motion. *State v. Wersland*, 125 Idaho 499 (1994). Thus, there was nothing trial counsel could have done that would have given the district court the jurisdiction to consider the Rule 35 motion or any information submitted with the Rule 35 motion; as such, the Petitioner has not established any prejudice.

Additionally, the information he asserts should have been included in the Rule 35 was new or additional information[1]. Even if the information should have been included, Petitioner fails to allege or support with admissible evidence how he was prejudiced as a result of the above-listed information not being included in the Rule 35.

The initial Rule 35 was filed November 8, 2011, approximately two months after sentence had been pronounced and was denied December 27, 2011. At sentencing, the district court considered the familial support (Sent. Tr., 9/12/11. p.44, L. 18 – p.45, L. 1), and the Petitioner's desire to be a more appropriate parent to his unborn child. (Sent. Tr., /12/11, p.45, Ls. 6-8). Therefore, that information was not new or additional information and had already been considered by the district court. As such, its exclusion would not have impacted the Court's decision on the Rule 35. Therefore, Petitioner has not established by admissible evidence his attorney was deficient for failing to include such grounds and the Court gives notice of intent to dismiss this claim on this ground.

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[1] When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion. *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).

As to Petitioner's claim that the Rule 35 should have contained information that he had been successful during a previous term of parole, such a statement would not have been correct and therefore, there can be no deficient performance for failure to make such a statement. The underlying criminal case upon which this Petition is premised occurred while Petitioner was on parole; therefore, he was not successful on parole, but rather continued to engage in criminal conduct. Failure to make this argument was not deficient performance and as such, this Court gives notice of its intent to dismiss the claim on this ground.

Petitioner has included no admissible evidence that at the time the initial Rule 35 was denied, he was working as a barber or included what classes, other than the one mentioned at sentencing, he had taken. In fact, the initial Rule 35 motion indicated that although the Petitioner had requested placement in classes, he would not be eligible for classes or treatment for "many" years. (Rule 35). While he may have been enrolled in classes subsequent to the initial Rule 35, as noted above, the district court had no jurisdiction to review the second Rule 35 motion. Thus, he cannot establish his attorney's performance was deficient for failing to argue a basis directly refuted by the Petitioner's own statements. However, even if such information had been included in the Petition, Petitioner has not included any admissible evidence to establish his sentence would have been reduced. As such, Petitioner has failed to establish by admissible evidence neither deficient performance nor prejudice as to this claim and the Court gives notice of its intent to dismiss this claim for failing to support the claim with admissible evidence.

Petitioner's claim that because of the length of his sentence, he cannot access the Therapeutic Community was a reason he requested that his sentence be reduced in his original Rule 35. Because that information was presented to the district court and the district court still denied the Rule 35, Petitioner has not established any deficient performance for the attorney to fail to include that information. Additionally, the Petitioner has also failed to establish, and cannot establish, any prejudice because despite that information, the Rule 35 was denied. Therefore, the Court gives notice of intent to dismiss the claim on the above grounds.

As to Petitioner's fourth claim, that his attorney failed to investigate, Petitioner has not alleged sufficient facts to support a claim of deficient performance. He has not indicated what investigation needed to be done that was not done. Additionally, Petitioner has failed to allege any prejudice, i.e., that he would not have pleaded guilty or that the outcome would have otherwise been different. As such, the Court gives notice of its intent to dismiss the petition on the above grounds.

IT IS THEREFORE ORDERED, that the Petition be DISMISSED.

Dated this 16th day of August, 2013.

Molly J. Huskey
District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19 day of August, 2013, s/he served a true and correct copy of the original of the foregoing ORDER DISMISSING UNIFORM POST-CONVICTION PETITION on the following individuals in the manner described:

- upon counsel for petitioner:

  Elizabeth Allen
  PO Box 3842
  Nampa, Idaho 83653

- upon counsel for Respondent:

  Gregory Swanson
  1115 Albany Street
  Caldwell ID 83605

- upon Petitioner:

  Victor Paul Benavente, #94774
  Idaho Correctional Center, Unit H
  PO Box 70010
  Boise, Idaho 83707

and/or when s/he deposited each a copy of the foregoing ORDER in the U.S. Mail with sufficient postage to individuals at the addresses listed above.

CHRIS YAMAMOTO,
Clerk of the Court

By: B/Rayne
Deputy Clerk of the Court