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Boncz v. State Appellant's Brief Dckt. 41597

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK BONGZ,)
) NO. 41597
 Petitioner-Appellant,)
) BONNER COUNTY NO. CV 2012-297
 v.)
)
 STATE OF IDAHO,) APPELLANT'S BRIEF
)
 Respondent.)
_____)

BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNER

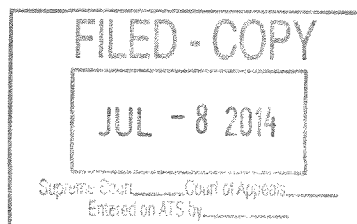
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STATEMENT OF THE CASE

Nature of the Case

Mark Boncz appeals from the district court's order and judgment summarily dismissing his Second Amended Petition for Post Conviction Relief. On appeal, he asserts that the district court erred when it concluded, against the uncontradicted evidence, that summary dismissal was appropriate because Mr. Boncz failed to demonstrate prejudice as to two claims concerning his attorney's refusal to permit him to testify at trial. Because the evidence in support of his claims was uncontradicted, the district court erred when it summarily dismissed his claims that he was deprived of his right to testify on his own behalf at trial and received ineffective assistance of counsel when his attorney did not permit him to testify.

Statement of the Facts and Course of Proceedings

After counsel was appointed to assist Mr. Boncz in pursuing post-conviction relief (R., p.47), post-conviction counsel, with leave of the district court (R., p.105), filed a verified Second Amended Petition for Post Conviction Relief (*hereinafter*, Second Amended Petition), in which Mr. Boncz asserted, *inter alia*, that he received "Ineffective Assistance of Trial Counsel in violation of the Sixth Amendment to the United States Constitution, specifically I should have been permitted to testify," and in a separate but related claim, that his attorney's refusal to allow him to testify violated "defendant's [sic] 5th, 6th, and 14th Amendment rights to a fair trial and due process of law, specifically I should have been permitted to testify." (R., p.108.) Mr. Boncz supported these claims with an affidavit in which he asserted, *inter alia*,

I was not afforded the opportunity to testify at the trial of this matter. My attorney and I discussed me testifying at the jury trial, and I was going to testify. When the trial was changed to a court trial, my attorney did not call me to the stand to testify. Had I testified I would have testified as follows:

- a. I did not commit this crime.
- b. I did not bungy [sic] cord [the victim] to the bed. The bed was not even made out. All my stuff was on it. No handles to tie her down.
- c. I did not leave her there, walk to the house to go to the bathroom, and then return only to molest her again.
- d. I did not do any of the awful things Dr. Gilbert testified [the victim] said happened. She only went by what [the victim] said, no proof.
- e. The area of the trailer where [the victim] described where my bed was is not true. My bed was in the front.
- f. The area of the trailer where [the victim] described the bed's location was for a different renter, not me.
- g. I started locking the door three months after I moved in there when Daniel had a sleepover and he and his buddies came out to put shaving cream in my hand and then tickle my nose.

(R., pp.102-03.) The trial transcript¹ reflects no discussion of Mr. Boncz's right to testify, let alone whether he understood and waived that right. (Trial Tr., p.263, L.13 – p.264, L.25.)

Prior to the filing of Mr. Boncz's Second Amended Petition, the State filed a Motion for Summary Disposition and a Brief in Support of Motion for Summary Disposition, which did not address the claims that he was deprived of his right to testify

¹ The State requested that the district court take judicial notice of, *inter alia*, the trial transcript from the underlying criminal case. (R., p.82.) Under I.R.E. 201(d), the district court was required to take judicial notice upon the request of any party. I.R.E. 201(d). Additionally, in its order summarily dismissing the Second Amended Petition, the district court referred to the trial transcript, implying that it had taken judicial notice of it. (R., p.133.)

on his own behalf and received ineffective assistance of counsel when his attorney did not permit him to testify.² (R., pp.75-81.) After Mr. Boncz filed his Second Amended Petition, the State simply filed a Renewed Motion for Summary Disposition and Request for Hearing, incorporating by reference its original motion and brief in support, adding no additional argument or grounds for summary dismissal. (R., p.115.)

Following a hearing at which the State made no argument concerning the claims that Mr. Boncz was deprived of his right to testify at trial and received ineffective assistance of counsel when his attorney did not permit him to testify (Tr., p.12, L.11 – p.14, L.7), the district court issued an order summarily dismissing Mr. Boncz's Second Amended Petition in its entirety.³ (R., pp.129-36.)

Mr. Boncz filed a premature, but ultimately timely, Notice of Appeal. (R., p.140.)

² This is not surprising, as these claims were raised for the first time in the Second Amended Petition.

³ Because, as will be seen in the argument section, the district court erred in summarily dismissing on the merits and this matter should be remanded for an evidentiary hearing, Mr. Boncz does not deem it necessary to seek remand for the district court to provide the twenty days' notice required under *Saykhamchone v. State*, 127 Idaho 319 (1995), prior to reissuing an order and judgment summarily dismissing these claims.

ISSUE

Did the district court err when it concluded, against the uncontradicted evidence, that summary dismissal was appropriate as to the claims that Mr. Boncz was deprived of his constitutional right to testify at trial and received ineffective assistance of counsel when his attorney did not permit him to testify?

ARGUMENT

The District Court Erred When It Concluded, Against The Uncontradicted Evidence, That Summary Dismissal Was Appropriate As To The Claims That Mr. Boncz Was Deprived Of His Constitutional Right To Testify At Trial And Received Ineffective Assistance Of Counsel When His Attorney Did Not Permit Him To Testify

A. Introduction

In summarily dismissing Mr. Boncz's claims that he was deprived of his right to testify in violation of the Fifth, Sixth, and Fourteenth Amendments when his attorney did not permit him to testify and received ineffective assistance of counsel, under the Sixth Amendment, when his attorney did not permit him to testify, the district court concluded that Mr. Boncz had failed to establish, as a disputed issue of material fact, that he was prejudiced. The key problem with the district court's analysis is that it incorrectly failed to perceive Mr. Boncz's claim that he was deprived of his constitutional right to testify as separate and distinct from his claim of ineffective assistance of counsel with respect to his attorney's refusal to call him to testify. Regardless of whether Mr. Boncz's claim is considered one of ineffective assistance of trial counsel for not calling him to testify or a standalone claim that he was deprived of his right to testify at trial, the district court erred when it concluded, against the uncontradicted evidence, that summary dismissal was appropriate.

B. Relevant Jurisprudence

An application for post-conviction relief is civil in nature. *Gilpin-Grubb v. State*, 138 Idaho 76, 79-80 (2002). An application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C. § 19-4903.

The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.*

The court may summarily dismiss a petition for post-conviction relief when the court is satisfied the applicant is not entitled to relief and no purpose would be served by further proceedings. I.C. § 19-4906(b). In considering summary dismissal in a case where evidentiary facts are not disputed, summary dismissal may be appropriate, despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between the inferences. See *State v. Yakovac*, 145 Idaho 437, 444 (2008) (addressing case where State did not file a response to petition). However, where the facts are disputed, a court is required to accept the petitioner's un rebutted factual allegations as true, but it need not accept the petitioner's conclusions. *Charboneau v. State*, 144 Idaho 900, 903 (2007).

Summary disposition on the pleadings and record is not proper if a material issue of fact exists. I.C. § 19-4906. When genuine issues of material fact exist that, if resolved in the applicant's favor, would entitle the applicant to relief, summary disposition is improper and an evidentiary hearing must be held. *Baldwin v. State*, 145 Idaho 148, 153 (2008).

When reviewing a district court's order of summary dismissal in a post-conviction relief proceeding, the reviewing court applies the same standard as that applied by the district court. *Ridgley v. State*, 148 Idaho 671, 675 (2010). Therefore, on review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and liberally construes the facts and

reasonable inferences in favor of the non-moving party. *Charboneau*, 144 Idaho at 903 (citation omitted). The lower court's legal conclusions are reviewed *de novo*. *Owen v. State*, 130 Idaho 715, 716 (1997).

C. The District Court Erred When It Concluded, Against The Uncontradicted Evidence, That Summary Dismissal Was Appropriate As To The Claims That Mr. Boncz Was Deprived Of His Constitutional Right To Testify At Trial And Received Ineffective Assistance Of Counsel When His Attorney Did Not Permit Him To Testify

In summarily dismissing Mr. Boncz's claims that he was deprived of his constitutional right to testify at trial and received ineffective assistance of counsel when his attorney did not permit him to testify, the district court reasoned,

In order to survive the State's Motion for Summary Dismissal, Petitioner Boncz must show the existence of material issues of fact as to whether: (1) counsel's performance was deficient, and (2) that deficiency prejudiced appellant's case. Petitioner claims he wanted to testify but was prevented from doing so by his counsel, which is a material issue of fact as to whether trial counsel's representation was deficient.^[4] However, Petitioner has failed to meet the second prong of the *Strickland* test, which is to show the existence of material issues of fact that he was prejudiced by not being allowed to testify. During his statement to the court at sentencing, Petitioner Boncz provided the court with no exculpatory facts or evidence not produced at trial.^[5] The same is true of his Petition, as Boncz offers the Court no exculpatory facts not already presented at trial.

(R., pp.133-34.)

⁴ This finding is supported by Mr. Boncz's uncontradicted statement in his affidavit that he was "not afforded the opportunity to testify at the trial of this matter" through the actions of his attorney (R., p.102), and the district court's review of the trial transcript, summarized by the district court as follows, "The Court, after reviewing a transcript of the trial, notes that at the time defense counsel informed the court it was resting, the court made no inquiry of Boncz to insure he understood he had the right to testify, but was not required to testify." (R., p.133.)

⁵ It is unclear why the district court focused on Mr. Boncz's allocution, as he had already been found guilty, and nothing he said at sentencing could have changed the verdict already rendered.

A claim that a petitioner was deprived of his right to testify at trial can be considered as either one of ineffective assistance of counsel under *Strickland*⁶ or as a deprivation of a fundamental constitutional right. This distinction was explored at length by the Court of Appeals in *Rossignol v. State*, 152 Idaho 700 (Ct. App. 2012), in which the Court explained that the “distinction is significant because it determines which party bears the burden of persuasion on appeal to show whether the alleged deprivation was prejudicial or harmless.” *Rossignol*, 152 Idaho at 703. The Court of Appeals explained that determining which type of claim has been raised “requires an analysis of how [the petitioner’s] claim was pled and argued before the district court.” *Id.* at 706. A petitioner benefits from pleading the claim as being a deprivation of a constitutional right because, once a petitioner establishes a deprivation of the constitutional right to testify at trial, the burden shifts to the State to prove that the deprivation was harmless beyond a reasonable doubt. *Id.* at 704 (citing *State v. Darbin*, 109 Idaho 516, 522 (Ct. App. 1985)).

Mr. Boncz pled two separate claims relating to his attorney’s refusal to allow him to testify at trial, namely,

- a) Ineffective Assistance of Trial Counsel in violation of the Sixth Amendment to the United States Constitution, specifically . . . I should have been permitted to testify.
- b) Violation of defendant’s [sic] 5th, 6th, and 14th Amendment rights to a fair trial and due process of law, specifically . . . I should have been permitted to testify.

⁶ See *Strickland v. Washington*, 466 U.S. 668 (1984).

(R., p.108.⁷) In its order summarily dismissing his Second Amended Petition, the district court began its analysis by recognizing that Mr. Boncz raised “claims of ineffective assistance of counsel *and* violations of his 5th, 6th, and 14th Amendment rights to a fair trial and due process of law,” noting, “Petitioner contends trial counsel did not allow him to testify in his own defense at trial *and* trial counsel was ineffective by failing to hire an expert to tesify [sic] on his behalf.” (R., p.132 (emphases added).) Inexplicably, the district court then proceeded to analyze the claims solely as ineffective assistance claims under *Strickland*. (R., pp.133-34.)

1. Mr. Boncz Was Deprived Of His Constitutional Right To Testify At Trial

Mr. Boncz provided sufficient evidence to raise a genuine issue of material fact as to whether he was deprived of his constitutional right to testify at trial. Because Mr. Boncz is not required to establish prejudice or harm from this deprivation, the State must establish that the deprivation was harmless beyond a reasonable doubt. In this case, the State presented no evidence of any kind to dispute Mr. Boncz’s claim that he was deprived of his constitutional right to testify. Even assuming that summary dismissal could ever be possible on such a claim when the State actually does present evidence in support of a motion for summary dismissal (as it would inevitably involve a factual determination of an issue in dispute), there was no basis upon which the district court could have found that Mr. Boncz did not raise a genuine issue of material fact as to this claim because all of the evidence presented in support was uncontradicted. As

⁷ The material omitted by ellipses concern claims regarding the lack of a defense expert witness. Mr. Boncz does not challenge the summary dismissal of those claims.

such, the district court erred when it summarily dismissed Mr. Boncz's claim that he was deprived of his constitutional right to testify at trial.

2. Mr. Boncz Received Ineffective Assistance Of Counsel

As found by the district court, Mr. Boncz presented sufficient evidence to raise a genuine issue of material fact as to whether his attorney performed deficiently in refusing to permit him to testify at trial. (R., p.133.) As such, the only remaining issue is whether the evidence presented in support of the prejudice prong raised a sufficient issue of material fact. Given the fact that, at summary dismissal, all evidence must be viewed in the light most favorable to Mr. Boncz, it is easy to conclude that a genuine issue of material fact exists on the prejudice prong. At trial, the State presented testimony from a number of witnesses, including the alleged victim, S.M. and Dr. Joyce Gilbert, a pediatrician who specializes in evaluating children for abuse.

S.M. testified that "a long time ago," when she was younger (she couldn't remember what age she was),⁸ Mr. Boncz lived in a trailer behind her parents' house. (Trial Tr., p.90, L.15 – p.91, L.23.) One day her mother sent her to tell Mr. Boncz that lunch was ready in the house. (Trial Tr., p.95, Ls.5-9.) She knocked on the door, Mr. Boncz told her to enter, and she went inside. (Trial Tr., p.95, Ls.12-13.) Mr. Boncz, who was sitting on his bed, told her he couldn't see her, and she went over to his bed and sat down. (Trial Tr., p.95, Ls.14-24.) He then removed her pants and underwear, left her shirt on, took off his underwear and inserted his penis into her vagina. (Trial Tr., p.96, L.3 – p.98, L.20.) During the encounter, S.M. told him to stop, and used her

⁸ S.M. was probably five or six years old at the time. (Trial Tr., p.192, Ls.1-4.) She was ten years old at the time of trial. (Trial Tr., p.87, Ls.24-25.)

arms to try to push him off of her. (Trial Tr., p.99, Ls.5-13.) She didn't remember much else, except that Mr. Boncz put her underwear and pants back on, at which point she went back to the house alone. (Trial Tr., p.99, L.17 – p.100, L.11.) "Probably an hour afterwards," Mr. Boncz entered the house and ate lunch. (Trial Tr., p.100, Ls.21-22.)

Dr. Gilbert testified that she had evaluated S.M. for suspected sexual abuse approximately one year before trial. (Trial Tr., p.176, Ls.8-14.) In recounting the alleged incident, S.M. described the event to Dr. Gilbert as follows:

She said that she went to the trailer and when she walked into the trailer that Mark was in the bed covered with a blanket and she said that he had boxers on under the blanket. She said that he got up out of bed and started talking with [S.M.] and then he went into the back room and got some bungie cords. She said then that he took off all of her clothes and layed [sic] her on the bed and wrapped a bungie cord around each one of her arms and each one of her legs and hooked it to the end of the bed.

At this time I'm taking the history. She has her clothes on but she demonstrated for me on the exam table exactly what happened and she layed [sic] on the exam table and put her arms above her head and her feet spread wide and said that that's how she was tied to the bed. She said then that Mark took off his boxers and got on top of her.

... [9]

She then told me that she – that Mark put his ding-dong in her tah-tah area for a few minutes and then he got off of her, left her laying on the bed and went into the house to go to the bathroom.

She said she watched him put his boxers and his jeans back on to go into the house and then just left her lying in the trailer. She then said that she knew – what I write here is apparently she knows but I don't know exactly how she knows that her mom asked Mark where [S.M.] was and Mark said [S.M.] was out playing in the sand box and would be in in a few minutes.

Mark used the restroom in the house and then came back to the trailer, took off his jeans and his boxers again. She again insisted that he had a

⁹ The omitted passage concerns the names that S.M. uses for male and female genitalia and her knowledge of condoms. She calls the penis a "ding-dong" and the vagina a "tah-tah." (Trial Tr., p.194, L.25 – p.196, L.24.)

condom on when he was doing this. And I don't know exactly how she knows that because she told me she did not see him put one on. But she does know exactly what a condom is and she described it completely to me that it's something that you put on your ding-dong when it is hard.

She then went on to say that his ding-dong went into her tah-tah again and that this time he was humping her. I asked her to explain exactly what humping meant and she said it's when you put your ding-dong in a tah-tah and then you move up and down and up and down really fast. She said that it hurt and that when he was all done, and she thinks this took a few minutes, that he unhooked her from the bungie cords, she put on her clothes really fast and ran back into the house and was crying.

(Trial Tr., p.194, L.5 – p.198, L.5.)

As can be seen from comparing the two versions told just a year apart, there are significant differences. In the one testified to at trial by S.M., Mr. Boncz did not get out of bed, did not bind her to the bed with bungie cords, and she was able to resist with her unbound arms. Further, Mr. Boncz did not leave and return to commit the act again. In the version told to Dr. Gilbert, Mr. Boncz got up from the bed, bound her arms and legs with bungie cords, and after the initial act, went to the house to use the restroom before returning to commit the act again. These differences are significant, and the inconsistency with respect to the bungie cord was concerning to Dr. Gilbert.

Dr. Gilbert testified that, in her experience, it is not unusual for a child to have "some" "minor inconsistencies" when telling and retelling an incident of abuse. (Trial Tr., p.208, Ls.9-17.) What is most important is "consistencies in the major part of the stories." (Trial Tr., p.208, Ls.18-22.) Asked by the district court to testify concerning her classification of inconsistencies as minor or major, Dr. Gilbert replied,

If I can speak specifics about this case. Minor inconsistency might be the difference between breakfast and lunch time. A major inconsistency would be if when [S.M.] told one of the entities who was questioning her that one time she had bungie cords tying her up arms and legs and another time she didn't . . . But if she said it happened in different rooms

or if she, you know, again one time it happened with a bungie cord and the next time it didn't, those would be things that would lead me to believe that maybe this episode didn't happen or it happened in different ways than she's telling me.

(Trial Tr., p.237, L.17 – p.238, L.12.)

Mr. Boncz presented evidence that, had his attorney allowed him to exercise his constitutional right to testify at trial, he would have testified as follows:

- a. I did not commit this crime.
- b. I did not bungy [sic] cord [the victim] to the bed. The bed was not even made out. All my stuff was on it. No handles to tie her down.
- c. I did not leave her there, walk to the house to go to the bathroom, and then return only to molest her again.
- d. I did not do any of the awful things Dr. Gilbert testified [the victim] said happened. She only went by what [the victim] said, no proof.
- e. The area of the trailer where [the victim] described where my bed was is not true. My bed was in the front.
- f. The area of the trailer where [the victim] described the bed's location was for a different renter, not me.
- g. I started locking the door three months after I moved in there when Daniel [S.M.'s older brother] had a sleepover and he and his buddies came out to put shaving cream in my hand and then tickle my nose.

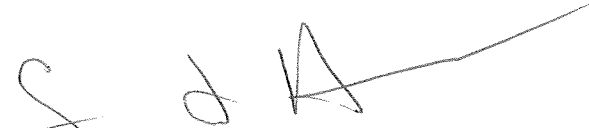
(R., pp.102-03.) Mr. Boncz's anticipated testimony was much more than a mere assertion of innocence. It included detailed refutations of aspects of S.M.'s story that were not otherwise presented to the district court during trial. In light of the major inconsistencies in S.M.'s versions of events and the fact that the matter was at the summary dismissal stage, Mr. Boncz asserts that the district court erred when it summarily dismissed his claim that he received ineffective assistance of counsel when his attorney refused to permit him to testify at trial.

In light of the foregoing, Mr. Boncz asserts that the district court erred when it summarily dismissed his claims that he was deprived of his constitutional right to testify when his attorney refused to permit him to testify at trial and received ineffective assistance of counsel when his attorney refused to permit him to testify at trial. As such, he respectfully requests that this Court vacate the judgment summarily dismissing his Second Amended Petition as to these claims, and remand this matter for an evidentiary hearing on both claims.

CONCLUSION

For the reasons set forth herein, Mr. Boncz respectfully requests that this Court vacate the judgment summarily dismissing his two claims concerning his attorney's refusal to allow him to testify, and remand this matter for an evidentiary hearing on both claims.

DATED this 8th day of July, 2014.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MARK R BONCZ
INMATE # 27051
ISCC
PO BOX 70010
BOISE ID 83707

JEFF M BRUDIE
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
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EVAN A. SMITH
Administrative Assistant

SJH/eas