2-17-2015

State v. Anderson Respondent's Brief Dckt. 42027

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. ARNOLD DEAN ANDERSON, Defendant-Appellant.	)	No. 42027 Twin Falls Co. Case No. CR-2013-7911

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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STATEMENT OF THE CASE

Nature Of The Case

Arnold Dean Anderson appeals from his conviction for possession of methamphetamine with a persistent violator enhancement.

Statement Of The Facts And Course Of The Proceedings

The state filed a complaint charging Anderson with possession of methamphetamine. (R., pp. 8-9.[1]) The court appointed the public defender's office to represent Anderson. (R., p. 19.) Public Defender Marilyn B. Paul filed a discovery request on Anderson's behalf. (R., pp. 20-23.) Deputy Public Defender Trevor Misseldine represented Anderson at the preliminary hearing and at the arraignment, filed a motion for preparation of a transcript on Anderson's behalf, and moved to continue the trial. (R., pp. 29, 53, 70-71, 75-76.) At the hearing on the motion to continue the trial Anderson filed a *pro se* request for substitution of counsel, which the district court granted. (R., pp. 77-79; 9/16/13 Tr.)

Thereafter Chief Deputy Public Defender Benjamin P. Andersen filed a motion for bond reduction on Anderson's behalf and represented him at the hearing on that motion. (R., pp. 84, 86.) He also filed an objection to the state's proposed I.R.E. 404(b) evidence and represented Anderson at hearings on that topic. (R., pp. 88, 90-92, 96.) At a hearing held October 21, 2013, the state

[1] The state ultimately charged Anderson with possession of methamphetamine with a persistent violator enhancement. (R., pp. 32-34.)

withdrew its notice of intent to introduce I.R.E. 404(b) evidence. (10/21/13 Tr., p. 3, L. 23 – p. 4, L. 1.) Benjamin Andersen then stated:

> I am having difficulties with Mr. Anderson with wanting to speak with me. He keeps telling me he wants to represent himself. I told him he'd be able to address that today.[2] I did speak with Mr. Fuller, Greg Fuller, who was looking at substituting in, so there may be a resolution to that. But I bring that to the Court's attention because it is causing some difficulty preparing for trial.

(10/21/13 Tr., p. 4, L. 20 – p. 5, L. 2.) The court responded by suggesting that the matter be addressed during "Friday's 11:00 docket." (10/21/13 Tr., p. 5, Ls. 11-15.) Benjamin Andersen stated he would "try to figure out what's going on" regarding Anderson's representation before that time. (10/21/13 Tr., p. 5, Ls. 16-17.) The district court then stated that it wanted to "get that issue addressed" because "[i]f he wants to represent himself, that's his choice." (10/21/13 Tr., p. 5, Ls. 18-20.)

The case was not taken up that Friday as discussed, but was taken up the next Monday, October 28, 2013. (R., p. 98; 10/28/13 Tr.[3]) At that time Anderson told the district court that he had asked Douglas Nelson to represent him, and Mr. Nelson had informed Anderson he could take the case if Anderson could get the trial postponed. (10/28/13 Tr., p. 7, L. 25 – p. 8, L. 4.) The district court, in deference to the defendant's right to be represented by counsel of his own

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[2] Anderson was not present at the hearing. (10/21/13 Tr., p. 4, Ls. 12-14.)

[3] Although the record does not reflect why the case was not taken up on Friday, October 25, 2013, the state notes that a pre-trial conference had previously been scheduled for October 28, 2013. (R., p. 95.) The inference is that the district court elected to hear the concerns raised at the October 21, 2013 hearing at the already scheduled October 28 pre-trial conference rather than on October 25.

choice, stated, "If I receive appearance from Mr. Nelson, if I receive a motion to vacate this trial, and if I receive a speedy trial waiver, I will vacate [the trial]." (10/28/13 Tr., p. 8, L. 20 – p. 9, L. 16.) Anderson agreed to proceeding on this basis. (10/28/13 Tr. p. 9, L. 17 - p. 10, L. 1.) Shortly thereafter Anderson filed a waiver of speedy trial, a substitution of Douglas Nelson for Benjamin Andersen as Anderson's attorney, and a motion to continue the trial. (R., pp. 99, 102, 108.) The district court granted the motion to continue the trial. (R., p. 110.)

The matter proceeded to jury trial, where Anderson was represented by Mr. Nelson. (R., pp. 134-38.) The jury found Anderson guilty. (R., p. 167.)

The court scheduled the sentencing hearing for March 24, 2014. (R., p. 171.) On March 17, 2014, Anderson filed *pro se* a document entitled "On I.C.R. 35 Motion correction or reduction of sentence oral argument," wherein Anderson claimed multiple errors in the case, but did not claim ineffective assistance of trial counsel, Mr. Nelson. (R., pp. 189-231.[4]) The matter proceeded to the scheduled sentencing hearing. (R., p. 275; 3/24/14 Tr.) After receiving the evidence but before argument the court pointed out that it had received Anderson's *pro se* Rule 35 motion. (3/24/14 Tr., p. 9, Ls. 9-19.) Mr. Nelson asked for a continuance of the rest of the sentencing hearing to consult with Anderson about the issues he had raised or may have wanted to raise with that motion. (3/24/14 Tr., p. 10, Ls. 3-25.) The court granted the continuance and set the rest of the

[4] Anderson did claim errors by attorney Benjamin Andersen, who represented him before the trial. (R., pp. 190-91.)

sentencing hearing four days later. (3/24/14 Tr., p. 14, L. 5 – p. 15, L. 6; R., p. 276.)

Two days before the sentencing resumed Anderson filed a *pro se* motion to dismiss Mr. Nelson, claiming he was ineffective at trial. (R., pp. 277-80.) Counsel then filed a motion to withdraw and requested the motion be heard at the sentencing scheduled the next day. (R., pp. 282, 284.) At the sentencing hearing the court engaged in a lengthy colloquy with Anderson regarding what he wished to do at the sentencing hearing. (3/28/14 Tr., p. 7, L. 1 – p. 11, L. 7.) Anderson ultimately stated he did not wish to represent himself but wanted to be represented by "the public defender ... or conflict attorney." (3/28/14 Tr., p. 11, Ls. 2-7.) The district court denied that request. (3/28/14 Tr., p. 11, L. 22 – p. 13, L. 6.)

The district court sentenced Anderson to 12 years with four years fixed. (R., pp. 288-91.) Anderson filed a timely notice of appeal. (R., pp. 299-300.)

ISSUES

Anderson states the issues on appeal as:

1. Did the district court violate Mr. Anderson's rights under the Sixth Amendment to the United States Constitution, Article I, § 13 of the Idaho Constitution, and Idaho Code §§ 19-106 and 19-857, when it ignored his request to be heard regarding his desire to represent himself at trial?

2. Did the district court err when it failed to conduct a sufficient inquiry of Mr. Anderson and his trial counsel upon Mr. Anderson's request for substitute counsel, and when it failed to appoint substitute counsel for Mr. Anderson?

3. Did the district court abuse its discretion by imposing an excessive sentence upon Mr. Anderson in light of the mitigating factors that exist in this case?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Is Anderson's claim that the district court should have inquired of him about his desires regarding counsel at the October 21, 2013 pre-trial conference frivolous because he was not present at that pre-trial conference?

2. Has Anderson failed to show that the record establishes a conflict of interests sufficient to trigger the district court's duty of inquiry?

3. Has Anderson failed to show the district court abused its sentencing discretion?

ARGUMENT

I.
Anderson's Claim That The District Court Should Have Inquired Of Him At The October 21, 2013 Pre-Trial Conference Is Frivolous Because He Was Not Present

The appellant "bears the burden of demonstrating error through the record." State v. Willoughby, 147 Idaho 482, 488, 211 P.3d 91, 97 (2009); see also Bach v. Miller, 144 Idaho 142, 145, 158 P.3d 305, 308 (2007) ("On appeal, the party challenging the decision below has the burden of showing error in the record."). A claim on appeal based on a misrepresentation of the record is frivolous. Read v. Harvey, 147 Idaho 364, 371, 209 P.3d 661, 668 (2009) (imposing sanctions for basing claim on misrepresentation of the record). Anderson claims that he made a request for self-representation that the district court simply ignored. (Appellant's brief, pp. 6-9.) Anderson's claim the district court erred by not inquiring of him is frivolous because it is premised entirely upon a misrepresentation of the record.

The record shows that, at the October 21, 2013 pre-trial conference *at which Anderson was not present* (10/21/13 Tr., p. 4, Ls. 12-14), Anderson's counsel informed the court that Anderson may desire to either represent himself or be represented by substitute counsel (10/21/13 Tr., p. 4, L. 20 – p. 5, L. 17). The district court decided to take that matter up with Anderson present. (10/21/13 Tr., p. 5, Ls. 11-17.) The district court specifically stated that Anderson could represent himself if he wished. (10/21/13 Tr., p. 5, Ls. 18-20.)

At the next hearing, on October 28, 2013, Anderson, who was present, stated that he wished to be represented by Douglas Nelson, and the district court granted that motion. (10/28/13 Tr., p. 6, L. 10 – p. 10, L. 1.)

Anderson's claim that he made a request to the district court to represent himself is false. His counsel informed the court that Anderson had so told him, but when Anderson was physically brought before the court he requested to be represented by a certain attorney, and the court granted his request. Anderson's claim of error is based on a misrepresentation of the record and is thus frivolous.

II.
The District Court Was Not Required To Conduct Further Inquiry Because The Record Does Not Show The Court Knew Or Should Have Known Of Any Conflict

A. Introduction

After the start of the sentencing hearing the district court granted Mr. Nelson's request to set over the remainder of the hearing so he could consult with Anderson regarding a *pro se* filing by Anderson that counsel had not seen. (3/24/14 Tr., p. 10, Ls. 3-25; p. 14, L. 4 – p. 15, L. 6.) Before the sentencing resumed Anderson filed a motion for new counsel claiming Mr. Nelson had been ineffective at the trial. (R., pp 277-80.) The district court denied that request, finding that the only remaining task in the case was a sentencing argument and that Anderson's repeated complaints about multiple attorneys in multiple cases resulting in significant delays showed that Anderson was merely manipulating the system. (3/28/14 Tr., p. 11, L. 22 – p. 13, L. 6.)

On appeal Anderson asserts the trial court should have conducted further inquiry into why he wished to substitute counsel and should have granted the

request for substitute counsel based on the information provided. (Appellant's brief, pp. 9-19.) Review of the record shows that Anderson's complaints about Mr. Nelson were presented most fully, and application of the correct legal standards shows that Anderson's claims of ineffective assistance of counsel by Mr. Nelson at trial were rightly rejected as grounds for substitution of counsel in the middle of sentencing.

B. Anderson's Claims Were Fully Developed Below And Were Legally Inadequate To Show Counsel Was Actually Affected By A Conflict Of Interests Or Was Otherwise Constitutionally Ineffective

"In order to ensure that a defendant receives conflict-free counsel, a trial court has an affirmative duty to inquire into a potential conflict whenever it knows or reasonably should know that a particular conflict may exist." State v. Skunkcap, 157 Idaho 221, ___, 335 P.3d 561, 577 (2014) (quotations omitted). An actual conflict of interest exists only where conflicting interests "actually affected the adequacy of [counsel's] representation." Mickens v. Taylor, 535 U.S. 162, 171-72 (2001) (citing Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Holloway v. Arkansas, 435 U.S. 475, 481-82 (1978)). Thus far the Supreme Court of the United States has not required inquiry into potential conflicts outside the context of "multiple concurrent representation." Mickens, 535 U.S. at 175-76 (whether requirement for judicial inquiry into potential conflicts applies outside context of multiple concurrent representation is an "open question" in Supreme Court jurisprudence).

The record shows that Anderson set forth his grounds for wanting substitute counsel in great detail. He asserted his trial counsel, Mr. Nelson, was

ineffective for failing to interview certain witnesses, call certain witnesses, use certain photos as exhibits, conduct certain discovery, demonstrate that the state's evidence had been fabricated or altered, object to testimony, obtain evidence from prior counsel, and conduct certain cross-examination. (R., pp. 277-280.) At the hearing Anderson also stated several complaints about his prior counsel, Benjamin Andersen. (3/28/14 Tr., p. 7, L. 1 – p. 11, L. 7.) It is plain on this record that Anderson was dissatisfied with the way current counsel conducted the trial and with how prior counsel had conducted the case before trial. Further inquiry into the grounds for Anderson's request for substitute counsel was not required, and would have been pointless.

Furthermore, Anderson's clearly stated dissatisfaction with the way Mr. Nelson had handled the trial did not demonstrate or raise even the possibility that Mr. Nelson was actively representing conflicting interests at sentencing. "The mere lack of confidence in an otherwise competent counsel is not grounds for the appointment of substitute counsel." Skunkcap, 157 Idaho at ___, 335 P.3d at 577. The evidence for sentencing had been presented and the only thing left to do was present recommendations and argument. (3/28/14 Tr., p. 12, Ls. 3-16.) Counsel represented on the record that he was ready to proceed with the rest of the sentencing. (3/28/14 Tr., p. 11, L. 22 – p. 12, L. 2.) Anderson's expressed dissatisfaction with the way counsel conducted the trial did not create any conflict of interests or other constitutional deficiency by counsel during sentencing.

In claiming error, Anderson cites several cases for the proposition that an indigent defendant with appointed counsel may make a motion for substitute

counsel and must be adequately heard on that motion, and that substitute counsel may be appointed upon a showing of "good cause." (Appellant's brief, pp. 12-19.[5]) Those cases, however, and the "good cause" standard they apply, arise from I.C. § 19-856 (2004). See State v. Clayton, 100 Idaho 896, 897, 606 P.2d 1000, 1001 (1980); State v. Lippert, 145 Idaho 586, 594, 181 P.3d 512, 520 (Ct. App. 2007); State v. Peck, 130 Idaho 711, 713, 946 P.2d 1351, 1353 (Ct. App. 1997); see also State v. Nath, 137 Idaho 712, 714-15, 52 P.3d 857, 859-60 (2002) (relying on Clayton and Peck). That statute, however, was repealed by the legislature, effective July 1, 2013. I.C. § 19-856 (2014 cumulative supp.) It thus has no application to Anderson's March 26, 2014 motion. (R., p. 277.)

Because there is no statutory basis for his arguments, Anderson must assert and demonstrate a constitutional one. "Good cause" as established by repealed I.C. § 19-856 is not a constitutional standard. See United States v. Gonzalez, 548 U.S. 140, 151 (2006) ("the right to counsel of choice does not extend to defendants who require counsel to be appointed for them"). As noted above, the constitution guarantees the right to effective assistance of counsel, including the right to counsel that is not actively pursuing conflicting interests in a way that "*actually affected the adequacy of his representation*" or "*influenced ... his basic strategic decisions.*" Mickens, 535 U.S. at 171-72 (emphasis original, quotes omitted). Anderson's claims of dissatisfaction are simply not constitutionally significant.

[5] Anderson cites cases generally regarding his constitutional right to counsel, but cites no relevant constitutional standards applicable to the proceedings in this case. (Appellant's brief, p. 12.)

Because Anderson has failed to show any constitutional claim, and because his statutory claim is based on a repealed statute, he has failed to show error by the district court.

III.
The District Court Did Not Abuse Its Sentencing Discretion

The district court sentenced Anderson to 12 years with four years fixed for possession of methamphetamine with a persistent violator enhancement, concurrent with a prior sentence. (R., pp. 288-91.) The judge's stated goal was to add one year fixed and one year indeterminate to the time Anderson was already required to serve on the prior sentence. (3/28/14 Tr., p. 22, L. 16 – p. 23, L. 22.)

Anderson argues the court erred by not finding him amenable to rehabilitation in the community and not giving more weight to what he deems to be mitigating factors. (Appellant's brief, pp. 19-20.) At sentencing the district court specifically rejected the claim that Anderson had rehabilitation potential, because this is his eighth felony; he has "a ton of misdemeanor offenses"; his criminal history "goes back well over 20 years"; and Anderson committed this offense while felony drug charges in another case were pending. (3/28/14 Tr., p. 18, L. 25 – p. 19, L. 15.) Furthermore, the district court concluded that the evidence showed that Anderson was not only a drug user, but was distributing drugs in the community and was "not accepting responsibility for wanting to change his life." (3/28/14 Tr., p. 19, Ls. 16-23.) Anderson has failed to show any abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 17th day of February, 2015.

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of February, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/vr