1-5-2015

Clapp v. State Respondent's Brief Dckt. 42258

IN THE SUPREME COURT OF THE STATE OF IDAHO

TYLER SHAWN CLAPP,	)	
	)	No. 42258
Petitioner-Appellant,	)	
	)	Ada Co. Case No.
vs.	)	CV-2013-15226
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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STATEMENT OF THE CASE

Nature Of The Case

Tyler Shawn Clapp appeals from the summary denial of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Clapp filed a petition for post-conviction relief challenging the revocation of his probation and execution of his sentence for felony DUI. (R., pp. 4-17.) The district court summarily dismissed the petition. (R., pp. 158-75.) Clapp filed a motion for relief from the judgment under I.R.C.P. 60(b). (R., pp. 186-90.) The court granted the motion and set aside the judgment and allowed Clapp to file an amended petition. (R., pp. 196-98.) Clapp filed an amended petition. (R., pp. 177-83.) Included in the amended petition, relevant to this appeal, were claims that trial counsel "did not provide effective assistance of counsel as guaranteed by the Sixth Amendment" by not obtaining "mental health treatment records from Nampa Medical, and an updated mental health evaluation" (R., pp. 178-79) and that appellate counsel rendered deficient performance by not "challeng[ing] evidence" that petitioner was "driving a lot," which "Petitioner deemed unreliable" (R., p. 182).

The State answered and moved for summary disposition. (R., pp. 219-21, 224-35.) Clapp responded to the motion. (R., pp. 268-72.) The district court granted the motion and dismissed the petition. (R., pp. 274-88.) Clapp timely appealed. (R., p. 290.)

ISSUES

Clapp states the issues on appeal as:

1. Did the district court err in dismissing the portion of Mr. Clapp's first cause of action, *i.e.*, that counsel was ineffective for not providing mental health records to the court, on a basis which was not raised in the state's motion for summary disposition without giving Mr. Clapp twenty-days notice of its intent to dismiss on that basis?

2. Did the district court also err by dismissing Mr. Clapp's fifth cause of action on an alternative basis which was not raised in the state's motion for summary disposition without giving Mr. Clapp twenty-days notice of its intent to dismiss on that basis?

3. Did the district court err in dismissing Mr. Clapp's fifth cause of action because the allegation that Mr. Clapp had been driving was not supported by sufficiently reliable evidence and thus should have been challenged on appeal?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Clapp failed to show that he was not put on notice that his claim of ineffective assistance of counsel for failing to present medical records at the probation disposition hearing was subject to dismissal because it was unsupported by evidence and disproven by the record?

2. Has Clapp failed to show error in the dismissal of his claim that appellate counsel was ineffective for failing to argue the district court violated his due process rights by considering hearsay information indicating he had driven without a license during probation?

ARGUMENT

I.
Clapp Has Failed To Show Error In The Summary Dismissal Of His Claim Of Ineffective Assistance Of Counsel For Not Submitting His Medical Records At The Disposition Hearing

A. Introduction

Clapp asserts that the district court granted dismissal on grounds other than articulated in the motion for summary disposition, thus depriving him of his statutory notice. (Appellant's brief, pp. 5-10.) Application of the relevant law to the record shows that the district court did not grant summary disposition on a ground unrequested by the state. Moreover, because dismissal was proper under the theories articulated by the state this Court may affirm on those theories on free review.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. 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).

C. The District Court Granted Summary Disposition On The Same Grounds As Raised By The State's Motion

Where a summary dismissal is based in whole or in part on grounds asserted by the state in its motion, a post-conviction petitioner is not entitled to claim that he lacked notice for the first time on appeal. Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). He may, however, make such a claim if the grounds for dismissal are other than those offered by the state in support of its motion. Id.; Baruth v. Gardner, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986) ("When the court dismisses a case upon the state's motion for dismissal, it must still provide twenty-days notice [as required by I.C. § 19-4906(b)] if the dismissal is based on grounds different from those presented in the motion for dismissal."). See also Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007); Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). Grounds for dismissal in a motion and in an order are different only if they are "different in kind," meaning they lack "substantial" overlap. Buss v. State, 147 Idaho 514, 517-18, 211 P.3d 123, 126-27 (Ct. App. 2009) (citing Workman, 144 Idaho at 524, 164 P.3d at 804). Review of the record shows that the dismissal by the district court was not on different grounds than requested by the state.

The state moved to dismiss because the "ineffective assistance of counsel claims fail to raise a genuine issue of material fact regarding both deficient performance and resulting prejudice." (R., p. 224.) In its brief in support of the motion the state asserted Clapp's "post-conviction allegations are bare and conclusory, are unsupported by admissible evidence, and fail to raise a genuine

issue of material fact." (R., p. 230.) Furthermore, the State argued the specific allegation of ineffective assistance of counsel for failing to present medical records was "disproven by the trial record," which the State supplied in support of its motion. (R., pp. 230, 237-67.)

Clapp contended that the state's argument was "not correct" because medical records had been supplied to the court. (R., pp. 268-69.[1]) He claimed that the evidence he submitted demonstrated that the information before the court in the probation violation disposition hearing "was outdated, erroneous, and did not contain accurate information as to whether or not the petitioner could be managed with medication." (R., p. 269.)

The district court concluded there was no material issue of fact, and the State was entitled to summary dismissal of this claim. (R., pp. 274-86.) As part of this analysis the court specifically reviewed the record of the probation proceedings as submitted by and relied on by the state. (R., p. 279.) The district court concluded that the record disproved Clapp's allegations of ineffective assistance of counsel. (R., pp. 279-80.)

The record demonstrates that the state requested dismissal for lack of sufficient supporting evidence and because the claim was disproven by the underlying record. The district court granted the motion, dismissing the claim because it was disproved by the underlying record. Any differences in the district court's articulation of why the underlying criminal record disproved the claim did

[1] The record contains no medical records supplied with the amended petition or the response to the motion for summary dismissal. Counsel is apparently referring to records supplied with the original petition. (R., pp. 38-43.)

not make the grounds for dismissal "different in kind" and did not deprive Clapp of notice that whether the record disproved his claim was at issue. A remand in this case would accomplish nothing because there is no reason to believe that Clapp withheld evidence believing he did not need to submit it in response to the State's motion. Clapp is not entitled to reversal on the theory that he did not have adequate opportunity to respond to the state's motion.

D. The Evidence Clapp Submitted Does Not Support A *Prima Facie* Claim

Even if the grounds for the district court's order of summarily dismissal were entirely different from those claimed in the State's motion, the order of summary dismissal may still be affirmed on the grounds asserted in the State's motion if no material issue of fact on those grounds is contained in the record. Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010); Baxter v. State, 149 Idaho 859, 243 P.3d 675 (Ct. App. 2010). Application of the correct legal standards to the evidence presented by Clapp shows that the State's motion for summary dismissal was well taken because the evidence does not support Clapp's claim.

The "right to be represented by appointed counsel" at probation revocation hearings is "a due process right." Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973). Because the right is not "the right of an accused to counsel in a criminal prosecution" but instead "the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime," the decision of whether counsel should be appointed is "made on a case-by-case basis in the exercise of sound discretion." Id. at 789-90. A probationer accused

of a probation violation is entitled to appointed counsel only if he makes "a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." Id. at 790.[2]

Clapp made no prima facie showing that the medical records "justified or mitigated the violation" to the point that revocation was "inappropriate." Even if he had a due process right to counsel the evidence does not raise a viable claim that his counsel was ineffective for not presenting medical records to the court at the disposition hearing.[3] The records in question show a single office visit on May 6, 2011 to "est[ablish] care" for "depression." (R., p. 38.) As a result of the office visit Clapp was prescribed Fluoxetine for his depression. (R., p. 42.) The probation violations arising from drinking in violation of the conditions of probation occurred over the course of several days about three months after the

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[2] This Court, citing Gagnon, has stated that this right to counsel on a case-by-case basis is a Sixth Amendment right. State v. Young, 122 Idaho 278, 282, 833 P.2d 911, 915 (1992). This statement is *dicta* because the issue in Young was decided on statutory grounds. The statement is also wrong, because Gagnon was clearly decided on due process grounds, and not the Sixth Amendment. Gagnon, 411 U.S. at 789-90.

[3] Because the right to counsel arises out of due process and not the Sixth Amendment, there is no reason to believe the Sixth Amendment guarantees of effective assistance of counsel apply in this case. Thus, even if due process required appointment of counsel, Clapp has cited no legal authority for the proposition that such counsel must meet standards of effectiveness. To meet the Sixth Amendment standards of ineffective assistance of counsel Clapp would have to prove deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668 (1984).

office visit. (R., p. 255.) The medical records ultimately undercut Clapp's claims at the disposition hearing that the Fluoxetine prescription had "mostly solved my self-medicating with alcohol" (R., p. 265 (Tr., p. 13, Ls. 13-18)) by showing that Clapp was drinking heavily (and violating his probation) after being given the prescription. The evidence presented by Clapp simply does not rise to the level of showing a due process right to counsel, much less that any constitutional right was infringed by counsel's conduct. The district court may be affirmed on this basis to the extent it is different from the actual grounds articulated by the district court below.

II.
Clapp Has Failed To Show Error In The Summary Dismissal Of His Claim Of Ineffective Assistance Of Appellate Counsel

One of the probation violations alleged in the criminal proceedings was that Clapp had violated the law. (R., p. 254.) This allegation was based on the probation officer's report that Clapp had admitted driving his father's truck "a lot" without a valid license. (Id.) At the probation violation disposition hearing the district court expressed concern that Clapp had been driving in the same general timeframe he was also drinking. (R., p. 265 (Tr., p. 15, L. 21 – p. 16, L. 6).)

In this post-conviction case Clapp asserted a claim of ineffective assistance of appellate counsel for failing to claim that the district court's reliance on the probation officer's report at the probation disposition hearing violated due process. (R., p. 205.) The state moved for summary dismissal on the basis that "the petition fails to raise a genuine issue of material fact" "in light of the pleadings, answers, admissions and the record of the underlying criminal case."

(R., p. 224.) The State argued the claims were "controverted [sic] by the record" and "fail to raise a genuine issue of material fact." (R., p. 230.) In regard to the claim of ineffective assistance of appellate counsel the State argued that this claim was "bare and conclusory without any demonstration of prejudice," not supported by any evidence, and contrary to law, and therefore "fails to raise a genuine issue of material fact regarding either deficient performance or resulting prejudice." (R., pp. 233-34.)

Clapp responded to the State's argument as follows:

> With regard to his appellate counsel, petitioner told his appellate counsel he wanted to challenge his conviction and sentence on due process grounds, but was advised by counsel that he [counsel] did not know too much about the "due process" grounds for relief. Nothing was done.

(R., p. 271.)

The district court granted the state's motion, concluding there was no evidence of prejudice because the State had preserved the right to argue the dismissed probation violation allegations in disposition and the statement of the probation officer that Clapp admitted driving was credible and substantial evidence. (R., pp. 284-85.) The district court additionally concluded that the same disposition (execution of the sentence) was appropriate even without the finding of driving. (R., p. 285.) Finally, the district court concluded that the due process issue was "nonviable" on appeal, and therefore there was no deficient performance. (Id.)

On appeal Clapp claims the district court erred by granting the State's motion on grounds unasserted by the State and by concluding he was not

entitled to a hearing on this claim. (Appellant's brief, pp. 10-16.) Applying the standards articulated above, Clapp has failed to show error.

First, the claim Clapp lacked notice of the grounds for dismissing his claim of ineffective assistance of counsel is frivolous. The State argued and the district court concluded that the due process challenge was without merit and therefore there was neither deficient performance nor prejudice. (R., pp. 233-34, 284.) The differences Clapp claims to see in the grounds for the motion and the grounds for the order are entirely figments of imagination. The state argued, and the district court agreed, that the due process argument would not have prevailed on appeal and therefore there was neither deficient performance nor prejudice.

Second, dismissal on the merits was proper. Clapp claims that, had appellate counsel asserted that consideration of the probation officer's statement violated due process, he would have prevailed on appeal. This argument fails for two reasons. First, Clapp has failed to show any Sixth Amendment right to counsel on appeal from probation violation proceedings. The due process right to counsel is "limited to the first appeal as of right." Evitts v. Lucey, 469 U.S. 387, 393-94 (1985); Ross v. Moffitt, 417 U.S. 600 (1974). Clapp has cited no case indicating he had a constitutional right to counsel to appeal from the probation revocation proceedings. He has therefore failed to show error in the dismissal of his claim of a Sixth Amendment violation in how his counsel handled his appeal from revocation of his probation.

Second, even if Clapp had a right to the effective assistance of counsel he failed to present a viable claim that right was violated. Appellate counsel's

performance was not deficient and Clapp was not prejudiced because the due process violation claim is meritless.

Because no objection was asserted in the probation violation proceedings, appellate counsel would have had to show constitutional error, that the error was clear, and prejudice. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010) (setting forth the three-prong fundamental error standard). Review of the record shows no error, much less fundamental error.

The Sixth Amendment's Confrontation Clause "does not apply to probationers." State v. Rose, 144 Idaho 762, 766, 171 P.3d 253, 257 (2007). "Likewise, the Idaho Rules of Evidence, including the rule against hearsay, do not apply to probation revocation proceedings." Id. (citations omitted). The probation officer's statement about Clapp's admission to driving was properly considered by the district court at the revocation proceedings. See State v. Martinez, 154 Idaho 940, 946-47, 303 P.3d 627, 633-34 (Ct. App. 2013) (not error to consider statement by co-defendant incriminating defendant at sentencing hearing). Had appellate counsel attempted to raise the due process claim he would have failed to show constitutional error, much less that such error was clear on the record.

Likewise, the district court's finding of no prejudice was correct. Clapp failed to demonstrate, or even articulate, why he would have been placed back on probation but for consideration of his admission of driving. Lack of prejudice shows he could not have prevailed on a claim of fundamental error. Because there was no error, no clear error, and no prejudice, the due process claim would

have failed if raised on appeal. Because the claim would have failed on appeal it was neither deficient performance nor prejudicial for appellate counsel to not pursue it.

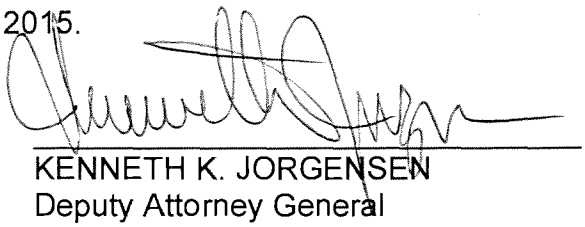
On this appeal Clapp argues that the probation officer's statement that Clapp admitted driving was rendered unreliable, and therefore beyond the scope of consideration, because his trial attorney stated (at a different hearing) that Clapp denied driving and that Clapp's father would assert he did not loan Clapp the car in question. (Appellant's brief, pp. 15-16.) Clapp confuses "contested" with "unreliable." He cites no legal reason that merely contesting evidence makes it unreliable, especially where, as here, hearsay evidence was contested by contrary hearsay evidence. Were Clapp's legal reasoning sound, a full evidentiary hearing would be required in sentencing or probation revocation proceedings whenever a defendant disputed any fact in any report or pre-sentence investigation. Clapp has failed to articulate, below or on appeal, why the probation officer's statement that Clapp had admitted driving was so unreliable that a court could not, in its discretion, rely on that evidence.

At no point has Clapp articulated a non-frivolous challenge to the district court's reliance on the probation officer's report at the probation violation disposition hearing. Because there is no basis to believe Clapp would have prevailed on an appellate claim that such was fundamental error, he has failed to establish a *prima facie* claim of ineffective assistance of appellate counsel.

CONCLUSION

The state respectfully requests this Court to affirm the summary dismissal of Clapp's petition for post-conviction relief.

DATED this 5th day of January, 2015.



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Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of January, 2015, 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:

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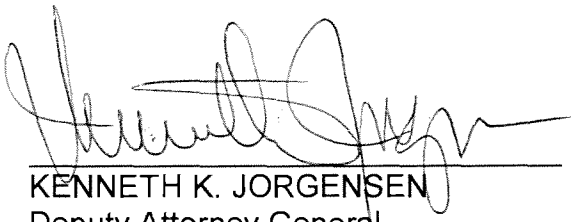

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