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Tucker v. State Respondent's Brief Dckt. 42448

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS TAYLOR TUCKER,)
)
) No. 42448
)
) Petitioner-Appellant,)
)
) Canyon Co. Case No.
 vs.) CV-2013-5427
)
)
) STATE OF IDAHO,)
)
)
) Respondent.)
)

COPY

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**

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District Judge**

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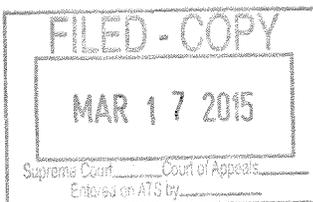


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STATEMENT OF THE CASE

Nature Of The Case

Thomas Taylor Tucker appeals from the district court's order dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the factual background and procedural history of the underlying proceedings as follows:

In Canyon County case CR 2010-32074, the Petitioner was found guilty following a jury trial of one count of felony Driving Under the Influence; he pleaded guilty to the Persistent Violator enhancement. Judgment was entered on October 12, 2011, and Petitioner was sentenced to a unified term of fifteen (15) years, with five (5) years fixed. The sentence was executed. Thereafter, the Petitioner filed an appeal and an Idaho Criminal Rule 35 (Rule 35) motion; the Judgment of Conviction and the Denial of the Rule 35 motion were affirmed on appeal, with a Remittitur issued February 15, 2013.

(R., p.155.)

On June 3, 2013, Tucker filed his petition for post-conviction relief. (R., pp.4-10.) Following amendments, Tucker ultimately alleged that he was entitled to relief on the grounds that (1) his attorney was ineffective (a) for failing to investigate and introduce relevant evidence; (b) for failing to procure an expert witness to evaluate the state's administration of field sobriety tests; (c) for failing to call Tucker as a witness; (d) for failing to request production of the preliminary hearing transcript; and (e) due to the cumulative effect of the foregoing; and that (2) he was deprived of his constitutional right to testify at trial. (R., pp.115-24.)

Early in the post-conviction proceedings, the district court gave its notice of intent to dismiss Tucker's petition on the bases that (1) he had failed to support some of his claims; (2) some of his claims could have been raised on direct appeal; (3) some of his claims could not be raised on post-conviction; and (4) he failed to allege prejudice in all of his claims dealing with the ineffective assistance of counsel. (R., pp.39-45.) Following Tucker's amendments, the state also filed a motion for summary dismissal, arguing that Tucker had failed to support his claims with admissible evidence, had failed to present sufficient evidence of deficient performance, and had failed to present sufficient evidence of prejudice. (R., pp.97-102.) Following hearings on the state's motion for summary dismissal (R., p.140; see also Tr.), the district court dismissed Tucker's post-conviction petition (R., pp.155-62).

Tucker filed a timely notice of appeal. (R., pp.166-67.)

ISSUE

Tucker's statement of the issues on appeal is found at pages 3-4 of his appellant's brief and is lengthy. The state rephrases the issue as:

Has Tucker failed to show error in the district court's order dismissing his petition for post-conviction relief?

ARGUMENT

Tucker Has Failed To Show Error In The District Court's Order Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

In his second amended post-conviction petition, Tucker asserted that he was entitled to relief because, he claimed, his attorney was ineffective and he was deprived of his right to testify at his trial. (R., pp.115-24.) The district court summarily dismissed Tucker's petition. (R., pp.155-62.) On appeal, Tucker argues that the district court erred by dismissing his post-conviction petition. (Appellant's brief, pp.4-20.) However, application of the correct legal standards to the facts of this case shows that summary dismissal was proper.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file ..." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. The District Court Correctly Dismissed Tucker's Post-Conviction Petition

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, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). Generally, the

Idaho Rules of Civil Procedure apply to petitions for post-conviction relief. Pizzuto v. State, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). However, unlike other civil complaints, in post-conviction cases the “application must contain much more than a short and plain statement of the claim that would suffice for a complaint under I.R.C.P. 8(a)(1).” Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008) (quoting Goodwin v. State, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002)). Instead, the application must be supported by a statement that “specifically set[s] forth the grounds upon which the application is based.” Id. (citing I.C. § 19-4903). “The application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008) (citing I.C. § 19-4903).

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief on the trial court’s own initiative or in response to a party’s motion. “To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297. While a court must accept a petitioner’s un rebutted allegations as true, 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. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990)) “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

Articulating and applying relevant legal standards, the district court addressed and properly dismissed Tucker’s post-conviction claims because he failed to present admissible evidence establishing a *prima facie* case supporting them. (R., pp.155-62.) Tucker failed to present sufficient evidence to make a *prima facie* claim of ineffective assistance of counsel. (R., pp.156-60.) Tucker failed to present sufficient evidence establishing that he was deprived of a constitutional right. (R., pp.160-62.)

1. Tucker Failed To Present Sufficient Evidence To Make A *Prima Facie* Claim Of Ineffective Assistance Of Counsel

The majority of Tucker’s post-conviction claims alleged that his attorney was ineffective. (R., pp.116-19.) Where the petitioner alleges entitlement to relief based on ineffective assistance of counsel, he must show that his attorney’s performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To establish deficient performance, the petitioner must overcome the strong presumption that counsel’s performance was adequate and “show that his attorney’s conduct fell below an objective standard of reasonableness.” Baldwin

v. State, 145 Idaho 148, 154, 177 P.3d 362, 368 (2008) (citations omitted). “[S]trategic or tactical decisions will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.” Id. To establish prejudice, the petitioner must show “a reasonable probability that but for his attorney’s deficient performance the outcome of the proceeding would have been different.” Id.

Addressing his ineffective assistance of counsel claims, the court found that Tucker failed to present evidence showing that his attorney’s performance was deficient. Tucker did not show that his attorney failed to investigate his proposed defense. (R., pp.156-57.) Tucker failed to provide admissible evidence that his attorney could have called an expert witness to refute Tucker’s failed field sobriety tests. (R., pp.157-58.) Tucker failed to present sufficient evidence that his attorney was deficient for failing to call Tucker as a witness. (R., pp.158-59.) Tucker failed to show in what specific ways counsel could have used the preliminary hearing transcript to challenge testimony presented at trial. (R., pp.159-60.)

In each of his ineffective assistance of counsel claims, Tucker also failed to present sufficient evidence that, assuming deficient performance, the ultimate outcome of his trial would have been any different. (R., pp.156-60.) In this regard, Tucker’s claims were almost entirely conclusory. (See R., pp.116-19.) In the one instance where Tucker arguably attempted to allege some evidence of prejudice—in regards to his attorney not calling him to testify—the court determined that his testimony would not have affected the outcome of his trial, noting:

The evidence of Petitioner’s impaired driving was the fact that he had rear-ended a car at a stoplight, was weaving on the road, exhibited physical

symptoms of intoxication—red eyes, slurred speech, smelling of alcohol, and swaying and stumbling when Petitioner got out of the car, the urine-stained pants and the failed sobriety tests. Although Petitioner could testify that the car had steering difficulties, he has not alleged any facts that would support him testifying as an expert about the mechanical difficulties with the car that would correlate to the driving pattern. He has not alleged facts, supported by admissible evidence, to explain why he failed the field sobriety tests or to explain the physical symptoms observed by the officer. In light of the other evidence presented at trial, it does not appear to this Court that the outcome of the trial would have been different had Petitioner testified.

(R., pp.158-59.)

Regarding his ineffective assistance of counsel claims, Tucker confines his appellate arguments to his not testifying at trial. (See Appellant's brief, pp.5-14.) Tucker first asserts that the state's motion for summary dismissal did not give notice that he had failed to produce evidence of deficient performance in relation to his ineffective assistance of counsel claim. (Appellant's brief, pp.5-8.) Among the bases for which the district court dismissed Tucker's claim was because he failed to produce sufficient evidence that his counsel's performance was deficient; specifically, Tucker failed to produce "any evidence that the failure to call him as a witness was based on ignorance of the relevant law, inadequate preparation or other shortcomings capable of objective evaluation." (R., p.158.) Contrary to his assertion on appeal, Tucker was in fact given notice that his claim could be dismissed because he had failed to show sufficient evidence of deficient performance. (See R., pp.99-101.) That the district court went further and explained in its order *specifically* how Tucker failed to meet his evidentiary burden does not show that Tucker lacked notice that he had failed to meet his evidentiary burden.

Tucker also argues that he did present a *prima facie* claim of ineffective assistance of counsel. (Appellant's brief, pp.8-14.) He asserts that his statement that he "expressed a desire to testify on his own behalf" and still "counsel concluded the presentation of the defense evidence without calling" Tucker to testify is, by itself, sufficient to show deficient performance. (Appellant's brief, pp.8-12.) Tucker asserts that the decision whether to call a defendant is the "one exception" to the general trial strategy rule. (Id., p.11.) This is contrary to his argument below, where Tucker explained to the court that "[c]ertainly it is within a defense attorney's trial strategy not to have a client testify at his own trial." (Tr., p.12, Ls.7-9.) Moreover, Tucker's assertions are significantly undercut by his acknowledgment that his attorney *advised* him against testifying. (See R., p.119.) Properly advising a client whether to take the stand at trial is within the range of counsel's strategic decisions and does not constitute deficient performance. Barcella v. State, 148 Idaho 469, 477, 224 P.3d 536, 544 (Ct. App. 2009). Finally, even had Tucker alleged a *prima facie* case of deficient performance, he still failed to establish a claim of ineffective assistance of counsel because he failed to allege facts that, if true, demonstrated prejudice.

Tucker attempts to address this failure in his next argument, claiming that he alleged sufficient evidence of prejudice to meet his burden under Strickland by claiming that he "could have provided information for the jury to consider in its deliberations which could have resulted in a favorable verdict." (Appellant's brief, pp.13-14.) This is insufficient; Tucker must show a reasonable probability that the outcome of trial *would* have been different, not that it *could* have been different. See Baldwin, 145 Idaho at 154, 177 P.3d at 368. That was something Tucker could not even say below. (See Tr.,

p.12, L.17 – p.13, L.2; p.20, Ls.6-10.) And the testimony Tucker alleged he might have offered if called to testify at trial would not have changed the outcome of his trial. The physical evidence against Tucker in the underlying case was overwhelming. The district court addressed Tucker's proposed testimony and correctly found it wanting. (See R., pp.158-59.)

2. Tucker Failed To Present Sufficient Evidence To Show That He Was Deprived Of A Constitutional Right

Addressing Tucker's claim that he was deprived of his right to testify, the district court determined that Tucker failed to demonstrate that he was denied his right to testify. (R., pp.161-62.) Contrary to his assertions at the hearing (see Tr., p.13, Ls.8-20), the record showed that the trial court had informed Tucker that he had the right to testify and that the decision whether to testify was his (R., pp.161-62). Additionally, the court noted that the record could have been sufficiently developed to address Tucker's claim on direct appeal, and so the claim might be waived under Idaho Code § 19-4901(b). (R., p.162.)

On appeal, Tucker again raises a notice issue in the state's motion for summary dismissal. (Appellant's brief, pp.14-15.) The state's motion was based, in part, on Tucker's failure to support his claims with evidence. (See R., p.99.) Tucker was on notice that he needed to support his claims, and the district court determined that he failed to do so in regards to this claim. (R., pp.160-62.) Furthermore, Tucker placed this specific claim—that he was deprived of his right to testify at trial—before the district court at both the first hearing on the state's motion for summary dismissal (Tr., p.12, L.7 – p.13, L.20) and the second (*id.*, p.20, L.20 – p.21, L.13). So Tucker was on notice.

Even if the district court failed to provide Tucker with sufficient notice before dismissing this claim, such a failure would be harmless in this case. The resonant difference between an ineffective assistance of counsel claim and a deprivation of a constitutional right claim based on the defendant not testifying at trial is which party bears the burden of persuasion regarding prejudice. See Rossignol v. State, 152 Idaho 700, 703, 274 P.3d 1, 4 (Ct. App. 2012). As the court correctly noted, Tucker's hypothetical testimony would not have affected the ultimate outcome of his trial. (R., pp.158-59.) Because the district court could properly dismiss Tucker's claim that he was deprived of his right to testify on the basis that his proposed testimony would not have affected the outcome of his trial, and because Tucker was on notice that there had to be *some* evidence of prejudice at least in relation to his other claims, any failure to provide specific notice in relation to this claim is harmless.

Finally, even if this Court concludes that the district court failed to provide sufficient notice and that such a failure is not harmless, the lack of notice only applies to this claim. Tucker was specifically given notice that he failed to present sufficient evidence to meet his burden in relation to all of his ineffective assistance of counsel claims. (See R., pp.99-101.) The district court's dismissal of those claims is unaffected by any claim that Tucker lacked notice as to this specific constitutional claim, and those dismissals should be affirmed.

On the merits, Tucker asserts that his claim that he "expressed a desire to testify on his own behalf" and "counsel concluded the presentation of the defense evidence without calling" him creates a genuine issue of material fact whether he was deprived of his right to testify. (Appellant's brief, pp.15-17.) The evidence shows that Tucker knew

he had the right to testify below; the district court both informed him that he had that right and that the decision whether to testify was his. (See R., pp.161-62.) The right to testify is not a self-effectuating right. At trial, the default is to enforce the defendant's Fifth Amendment right not to be compelled to give evidence against himself by taking the stand. To be deprived of the right to testify, Tucker had to assert his right to testify and then have been prevented from testifying. His allegations, that his attorney advised him against testifying (R., p.119) and rested the case without calling him to the stand (R., p.123), are insufficient to show that anything like a deprivation of the right to testify occurred during his trial.

Finally, Tucker contends that his claim that he was deprived of his constitutional right to testify at trial could not be raised on direct appeal and that it was appropriate for post-conviction. (Appellant's brief, pp.17-19.) Assuming that Tucker is correct that this is an appropriate claim for post-conviction and not direct appeal, the contention is ultimately irrelevant in this case. Tucker has not shown that the district court erred when it dismissed on the merits his claim that he was deprived of his right to testify. The ultimate dismissal of this claim, therefore, should be upheld.

The district court correctly dismissed Tucker's petition for post-conviction relief because Tucker failed to present sufficient evidence to make a *prima facie* case that his counsel was ineffective or that he had been deprived of his right to testify. The district court's order dismissing Tucker's post-conviction petition should be affirmed.

CONCLUSION

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

DATED this 17th day of March, 2015.



RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 20th day of February, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

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