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Escobedo v. State Respondent's Brief Dckt. 42683

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IN THE SUPREME COURT OF THE STATE OF IDAHO

OMAR ESCOBEDO,)	
)	No. 42683
Petitioner-Appellant,)	
)	Twin Falls County Case No.
v.)	CV-2013-878
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	

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**

**HONORABLE JOHN K. BUTLER
District Judge**

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State of Idaho**

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STATEMENT OF THE CASE

Nature Of The Case

Omar Escobedo appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

Statement Of Facts And Course Of The Underlying Criminal Proceedings (Docket No. 37050), Prior Post-Conviction Proceedings (Docket No. 40276), And Successive Post-Conviction Proceedings

A jury convicted Escobedo of one count of lewd conduct and one count of sexual abuse of a child under sixteen. State v. Escobedo, Docket No. 37050, 2011 Unpublished Opinion No. 500 (Idaho App. May 31, 2011). On direct appeal, Escobedo raised three claims: (1) error in giving the jury ICJI 205; (2) error in not giving a requested alibi instruction; and (3) sufficiency of the evidence. Id. at pp.2-3 and n.1.¹ The Court of Appeals rejected Escobedo's first claim but declined to consider his second and third claims because he failed to support the claims with argument and authority. (R., pp.98-100.)

Escobedo filed a timely petition for post-conviction relief in February 2012. (R., pp.152-176; see also p.104.) Escobedo raised numerous ineffective assistance of counsel claims in that petition, all of which were dismissed with the exception of one claim regarding Escobedo's sentence on the sexual abuse count because the sentence imposed exceeded the statutory maximum. (R., pp.152-164, 366-395; see also pp.104-106.) On appeal from the dismissal of his

¹ The opinion in Escobedo's direct appeal is also included in the Clerk's Record as it was the subject of a motion to take judicial notice filed by the state and by Escobedo. (R., pp.97-100, 797-802.) The district court took judicial notice of that opinion. (R., p.1033.)

remaining claims, Escobedo only challenged the dismissal of one claim in which he alleged his attorney was deficient for failing to provide him with a copy of the Court of Appeals' opinion on direct appeal prior to the expiration of the deadline for seeking review. Escobedo v. State, Docket No. 40276, 2013 Unpublished Opinion No. 716 (Idaho App. Oct. 18, 2013).² Escobedo argued that he was prejudiced by the alleged deficiency because his failure to seek review precluded him from pursuing relief in federal habeas. Id. at p.5. The Court of Appeals rejected Escobedo's argument on the basis that, because the deadline for filing a petition for review is not jurisdictional, Escobedo was not prejudiced because he could file a late petition for review. Id. at p.6.

On March 4, 2013, while his initial post-conviction appeal was pending, Escobedo filed a successive post-conviction petition. (R., pp.10-26.) In his successive petition, Escobedo alleged, as he did in his initial post-conviction petition, that he received ineffective assistance of counsel, and also alleged that post-conviction counsel was ineffective in presenting the claims in Escobedo's initial petition. (R., pp.12, 15-24.) Escobedo also filed a motion for appointment of counsel, which the district court granted. (R., pp.54-59.)

The state filed an Answer (R., pp.92-95), and a separate motion for summary dismissal with a supporting memorandum (R., pp.102-114, 405-406). The state later filed an amended motion for summary dismissal based on the

² The district court also took judicial notice of Escobedo's initial post-conviction petition, the district court's decision on Escobedo's initial petition, and the Court of Appeals' opinion affirming. (R., p.1033.)

Idaho Supreme Court's opinion in Murphy v. State, 156 Idaho 389, 327 P.3d 365 (2014). (R., pp.1014-1015.)

The district court summarily dismissed Escobedo's successive post-conviction petition, concluding Escobedo's claims "were previously raised and adjudicated or could have been raised and adjudicated in his first petition for Post-Conviction Relief." (R., p.1033.) The district court also dismissed any claim asserting ineffective assistance of post-conviction counsel since "there is no constitutionally protected right to the effective assistance of post-conviction counsel," and rejected any argument that the alleged ineffective assistance of post-conviction counsel provided a sufficient reason for filing a successive petition. (R., pp.1034-1035.) Escobedo filed a timely notice of appeal from the Judgment dismissing his successive post-conviction petition. (R., pp.1037-1043.)

Although the district court appointed the State Appellate Public Defender ("SAPD") to represent Escobedo on appeal (R., p.1048), the SAPD moved to withdraw after concluding that "three attorneys were unable to identify any meritorious issues for appeal" (Motion for Leave to Withdraw and to Suspend the Briefing Schedule; Affidavit in Support of Motion for Leave to Withdraw and Motion to Suspend the Briefing Schedule, p.2). The Court granted the SAPD's motion. (Order Granting Motion for Leave to Withdraw and Suspend Briefing.)

ISSUE

Escobedo states the issue on appeal as:

Did the district court err in dismissing the appellant's Petition for Post Conviction Relief?

(Appellant's Brief, p.6.)

The state rephrases the issue on appeal as:

Has Escobedo failed to show the district court erred in summarily dismissing his successive post-conviction petition?

ARGUMENT

Escobedo Has Failed To Establish The District Court Erred In Summarily Dismissing His Successive Post-Conviction Petition

A. Introduction

Escobedo contends the district court erred in summarily dismissing his successive post-conviction petition. Specifically, Escobedo argues dismissal was improper because he “set forth a Claim of Newly Discovered Evidence which existed prior to his trial, and in his first post-conviction proceeding.” (Appellant’s Brief, p.7 (capitalization original).) A review of the record shows that Escobedo did not allege a “newly discovered evidence” claim, and shows that Escobedo has failed to challenge the district court’s actual bases for dismissing the claim to which Escobedo refers. This Court may, therefore, affirm on the unchallenged bases for dismissal.

On appeal, Escobedo also raises complaints about the performance of successive post-conviction counsel, and claims that the lack of “Prison Law Libraries” and “the fact that there is no ri[g]ht to counsel in a [post-conviction] proceeding” results in the constructive denial of counsel. (Appellant’s Brief, pp.8-17.) Because these complaints are not properly before the Court, they may not be considered.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court “will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and

will liberally construe the facts and reasonable inferences in favor of the non-moving party.” Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010).

C. Escobedo’s Successive Post-Conviction Petition Does Not Include A “Newly Discovered Evidence” Claim And Escobedo Has Failed To Challenge The District Court’s Bases For Dismissing The Claim To Which Escobedo Refers

Escobedo claims he “set forth a Claim of Newly Discovered Evidence which existed prior to his trial, and in his first post-conviction proceeding” and argues that he raised a genuine issue of material fact entitling him to a hearing on his “newly discovered evidence” claim. (Appellant’s Brief, pp.7-8.) The alleged newly discovered evidence includes “Banking and Credit Card Records” Escobedo believes would have provided him an alibi. (Appellant’s Brief, p.7.) A review of the record shows that Escobedo did not allege a claim of newly discovered evidence, and the claim to which he refers was dismissed on grounds Escobedo does not challenge on appeal.

In support of his assertion that he raised a claim of newly discovered evidence, Escobedo relies on the following portions of his post-conviction petition and supporting affidavit (Appellant’s Brief, p.7):

Counsel failed to investigate and offer evidence that proved his clients true whereabouts. Even though Defendant continually asked for them to be produced along with his testimony. [Pages from the] Clerks Record . . . will all prove that I have tried throughout every step of this case to have the Banking statements provided counsel failed to hand them over even to this day he Dan Brown will not hand them over.

(R., p.15 ¶ 9c (verbatim, except brackets and ellipses).)

[Initial post-conviction counsel] had not contacted fuller law offices in Regards to the Bank Statements she needed to formulate a proper pition and fell below the standard of effective assistance. I told her if I was in court I was going to voice my opinion out loud and she said No I wouldn't. My Being in court would have allowed me to voice my concerns and views in a more clear way. I was Denied that oppportunity because of a comment I made that was misunderstood.

(R., p.16 ¶ D (verbatim, except brackets).)

Post conviction counsel, Marilyn Paul failed to follow Pre-Trial Procedural Order Pursuant to I.R.C.P. 16, Filed Feb. 24, 2012 @ 3:34 pm Twin Falls District Court. Pg 3 of that order says "Pursuant to Idaho Code 19-4906(a), Counsel for the petitioner will within 28 days of the date of this Order, File with the Court and serve on opposing counsel and Amended Application for Post-Conviction Relief . . ." Also take Note to footnote 2 bottom of page Downing v. State Regarding attachments and non-inclusions given. Had she done this and investigated claims properly courts could have seen the Reasons for some of the missing Documents Needed to proceed with factual Evidence to prove whereabouts and offer surrebutal.

(R., p.17 ¶ E (verbatim, including ellipses).)

Counsel was ineffective by failing to properly object to states Exhibit and offer surrebuttal on Exhibit #4. Testimony by Defendant along with Bank Statements in counsels possession (Dan Brown) would have proved that this picture was not taken by Defendant on or about the Dates or any other time.

(R., p.19 ¶ B (verbatim).)

Trial, Appellate Counsel, Dan Brown, Fuller Law Office & Post Conviction Counsel, Twin Falls Public Defender, Marilyn Paul Both failed to properly investigate and call upon witnesses and provide evidence within their ability to obtain. Both counsel have failed to amend or augment records for the Defendant in order to obtain facts, Evidence, and Records & Appeal Brief, Transcripts, Credit Card Statements and other material pertaining to defendants criminal case and Proceedings. . . .

(R., p.23 ¶ N (verbatim, except ellipses).)

It is readily apparent from the foregoing allegations upon which Escobedo relies that Escobedo did not assert a claim of newly discovered evidence in relation to his bank records; rather, he asserted trial and post-conviction counsel were ineffective based on their failure to introduce those records at trial or during post-conviction. In its order dismissing Escobedo's successive petition, the district court noted that any claim that was "previously raised and adjudicated or could have been raised and adjudicated in [Escobedo's] first petition" was "barred by reason of res judicata and pursuant to I.C. § 19-4908."³ (R., pp.1033-1034.) Because Escobedo also complained, in his initial petition, that trial counsel was ineffective for "failing to introduce evidence of his credit card receipts and bank statements to establish his whereabouts" (see R., p.387), the district court correctly rejected Escobedo's efforts to relitigate this claim in a successive petition.

The district court also noted that, pursuant to Murphy, 156 Idaho 389, 327 P.3d 365, the alleged ineffective assistance of post-conviction counsel does not provide a sufficient reason to avoid the successive petition bar set forth in I.C. § 19-4908. (R., p.1034.) On appeal, Escobedo has not challenged either of the district court's bases for rejecting the claims that were based on Escobedo's bank records. Instead, Escobedo relies on the mischaracterization of this claim

³ Idaho Code § 19-4908 provides, in relevant part: "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application."

as one based on newly discovered evidence and contends he raised a “genuine issue of material fact” entitling him to an evidentiary hearing. (Appellant’s Brief, pp.7-8.) Because Escobedo has failed to argue, much less establish, error with respect to the district court’s actual grounds for dismissing his “bank record” claim, this Court may affirm on the unchallenged bases. State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a ruling by a district court is unchallenged on appeal, appellate court will affirm on the unchallenged basis).

D. Escobedo’s Ineffective Assistance Of Successive Post-Conviction Counsel Claims And His Complaints About The “Constructive” Denial Of Counsel Are Not Properly Before This Court And Should Not Be Considered

On appeal, Escobedo also raises several complaints about successive post-conviction counsel’s performance and contends that the lack of “Prison Law Libraries” and “the fact that there is no ri[g]ht to counsel in a [post-conviction] proceeding” results in the constructive denial of counsel. (Appellant’s Brief, pp.8-17.) Because none of these complaints were alleged in Escobedo’s successive petition or adjudicated by the district court, they are not properly before this Court on appeal. Kelly v. State, 149 Idaho 517, 523–24, 236 P.3d 1277, 1283–84 (2010) (quotation and citations omitted) (“It is clearly established under Idaho law that a cause of action not raised in a party’s pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal.”).

Escobedo has failed to show error in the summary dismissal of his successive post-conviction petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Escobedo's successive petition for post-conviction relief.

DATED this 25th day of October, 2016.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 25th day of October, 2016, caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

OMAR ESCOBEDO
INMATE #55971
I.S.C.I. UNIT 10
P. O. BOX 14
BOISE, ID 83707-0014

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

JML/dd