5-13-2016

Thurlow v. State Respondent's Brief Dckt. 42763

IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH EUGENE THURLOW,	)	
	)	**No. 42763**
Petitioner-Appellant,	)	
	)	**Bonner Co. Case No.**
v.	)	**CV-2012-1635**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

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

Kenneth Eugene Thurlow appeals from the judgment entered upon the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The Idaho Court of Appeals described the facts and proceedings of Thurlow's underlying criminal case as follows:

> In August 2005, Thurlow and Christopher Lewers went to a junkyard armed with concealed shotguns and baseball bats. The victim, who was working on his vehicle near the junkyard's garage, was shot in the head with a shotgun at close range. Prior to the shooting, Thurlow approached the caretaker, who was working in the junkyard garage, and asked the caretaker if he had any muriatic acid. The caretaker left the garage and went to his residence on the junkyard property to look for the acid. When he was unsuccessful in locating the acid, the caretaker began to walk back to the garage to notify Thurlow. However, as he was leaving his residence, he noticed Thurlow approaching. Thurlow told the caretaker that the victim was dead and asked for help loading the body into a nearby truck. The caretaker walked back toward the garage and observed the victim's body lying on the ground and Lewers standing nearby.
>
> The caretaker informed Thurlow and Lewers that the truck was inoperable and, fearful for his life, fled the junkyard. After hiding out for several hours, the caretaker returned to the junkyard and called the police. During the caretaker's absence, Thurlow and Lewers stole several items from the victim's truck, left the victim's body behind, and sold the victim's possessions to an acquaintance later that night.
>
> Thurlow was charged with first-degree murder, and Lewers was charged with aiding and abetting. . . . Thurlow went to trial and, at the conclusion of its case-in-chief, the state moved to amend the information to charge Thurlow in the alternative with first degree murder by aiding and abetting in the crime. The jury found Thurlow guilty of first degree murder.

State v. Thurlow, 152 Idaho 256, 257, 269 P.3d 813, 814 (2011).[1] The district court imposed a fixed life sentence, and the Court of Appeals affirmed. Id.

Thurlow filed a timely post-conviction petition, a supporting affidavit, and a motion for appointment of counsel. (R., pp.15-28.) The district court granted Thurlow's request for counsel. (R., p.52.) Although Thurlow did not file a motion for discovery, and although the court did not authorize discovery, Thurlow deposed Linda Payne, who represented him at trial, and Gaylan Warren, who was a defense expert witness at trial.[2] (R., pp.69-74, 83-85; see R., pp.42-43 (letter to Thurlow from Payne noting Warren's involvement at trial).) Thurlow subsequently filed an amended petition. (R., pp.89-109.) In his amended petition, Thurlow alleged several ineffective assistance of counsel claims. (R., pp.90-108.) Included among the allegations was a claim that trial counsel "failed to provide [Thurlow] with accurate information during plea bargaining." (R., p.99.)

The state filed an answer and a separate motion for summary dismissal with a supporting brief. (R., pp.111-113, 118-125.) Thurlow filed a brief in response to the state's motion after which the district court held a hearing on the

[1] The Idaho Supreme Court has taken judicial notice of the Clerk's Record and Reporter's Transcript in Thurlow's underlying criminal appeal, Docket No. 39969. (Amended Order Re: Judicial Notice, dated December 31, 2014.) The Court's judicial notice order does not include the exhibits submitted in Thurlow's prior appeal. (Id.)

[2] It appears the state did not object to these depositions and perhaps even agreed to them. (Tr., p.7, Ls.18-22 (prosecutor complimenting post-conviction counsel for doing an "excellent job putting the amended petition together, and then obviously conducting the depositions," which "ma[de] it easier from a standpoint of at least having the relevant information on the record").)

motion. (R., pp.127-135; see generally Tr.) After the hearing, the district court issued a written decision granting the state's motion for summary dismissal and a final judgment dismissing Thurlow's petition. (R., pp.171-181.) Thurlow filed a timely notice of appeal pursuant to the "prison mailbox rule." (R., pp.197-199, 203-210.)

ISSUE

Thurlow states the issue on appeal as:

> Did the court err in summarily dismissing the ineffective assistance claim that trial counsel misinformed petitioner about the likely outcome of the trial causing him to go to trial and reject the state's plea offer?

(Appellant's brief, p.12.)

The state rephrases the issue on appeal as:

Has Thurlow failed to show any basis for reversing the district court's order summarily dismissing his post-conviction petition?

ARGUMENT

Thurlow Has Failed To Show Any Basis For Reversing The District Court's Summary Dismissal Decision

A. Introduction

Thurlow challenges the summary dismissal of a single claim in his amended post-conviction petition. (Appellant's brief, pp.12-17.) More specifically, Thurlow argues that the district court erred in summarily dismissing his claim that counsel was ineffective in relation to plea negotiations. (Appellant's brief, pp.12-17.) Thurlow's claim fails. Application of the correct legal standards to the evidence presented to the district court supports its decision to summarily dismiss Thurlow's claim that counsel was ineffective in the plea negotiation process.

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 material 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. Thurlow Has Failed To Show Any Error In The District Court's Decision Summarily Dismissing His Claim That Counsel Was Ineffective In Relation To The Plea Negotiations

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "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 pursuant to I.C. § 19-4906 "if the applicant's evidence raises no genuine issue of material fact" as to each element of 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.

In determining whether summary dismissal is appropriate, the district court "is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law." Bjorklund v. State, 130 Idaho 373, 375, 941 P.2d 345, 347 (Ct. App. 1997) (citations omitted). Moreover, although an applicant's uncontroverted factual allegations are deemed to be true for purposes of summary dismissal, "because the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary disposition is permissible, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences." Hayes v. State, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008) (citations omitted). "That is, the judge in a post-conviction action is not constrained to draw inferences in favor of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts." Id. "The issue on appeal from the dismissal of an application

for post-conviction relief is whether the application alleges facts which, if true, would entitle the applicant to relief." Griffith v. State, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992) (citing Whitehawk v. State, 116 Idaho 831, 780 P.2d 153 (Ct. App. 1989)).

On appeal, Thurlow challenges only the summary dismissal of his "inaccurate information" claim. (Appellant's brief, pp.12-17.) With respect to this claim, Thurlow alleged in his amended petition that his trial attorney, Linda Payne, "failed to provide him with accurate information during plea bargaining." (R., p.99.) In particular, Thurlow asserted that "prior to trial, the state made an offer of ten (10) years in return for a plea of guilty to second degree murder which he refused" because Payne "advised him that she believed that he would be found guilty of Accessory after the Fact, Idaho Code section 18-205, if he proceeded to trial." (R., pp.99-100 (capitalization original).) In his amended petition, Thurlow acknowledged that, in her deposition, Payne "denied she had ever given such advice." (R., p.101.) Thurlow, however, alleged he "adamantly disagree[d]" with the "'self-serving spin' [Payne] placed on the nature of the plea negotiations." (R., pp.102-103.) That alleged "spin" included Payne's explanation that her discussions with Thurlow involved her recommendation that he accept the state's offer to plead to second-degree murder because, if Thurlow proceeded to trial, the minimum he would be convicted of was accessory after the fact, but she never advised him that it was her opinion that he would be convicted of that offense if he proceeded to trial; indeed, such an opinion would

be contrary to her recommendation to accept the state's offer to plead to second-degree murder. (R., pp.101-102 (quoting Payne's deposition testimony).)

In moving for summary dismissal of Thurlow's "inaccurate information" claim, the state asserted that Payne testified in her deposition that "she tried to get her client to seriously consider the plea offer that was initially given by the prosecution" and gave Thurlow "that information, [but] he chose to go to trial anyway." (R., pp.123-124 (citing Payne deposition at p.19).) In response, Thurlow argued, in part:

> It appears that Ms. Payne did feel that Mr. Thurlow would be convicted of Accessory after the Fact from her written note in Exhibit D. She asked that the judge give an instruction to the jury on that crime and he did so. Ms. Payne testified at deposition that the Accessory after the Fact charge was never on the table at the time of the deadline to accept the State's offer.
>
> Mr. Thurlow adamantly disagrees with the timeline of events placed on the nature of the plea negotiations as characterized by attorney Payne in her deposition. Due to her assurances that he would most likely be convicted of Accessory after the Fact and his faith and trust in her legal experience, he decided to proceed to trial. This decision proved fatal and the advice given by Ms. Payne as to the probable outcome of the trial is, by definition, ineffective assistance of counsel.

(R., pp.133-134.)

Exhibit D, which Thurlow referenced in his argument, consists of copies of I.C. § 18-205, which defines accessories, and I.C. § 18-206, which sets forth the punishment for accessories, with a handwritten note from Payne to Thurlow, which reads:

> This is the crime I believe you would/will be found guilty of if we go to trial. Maximum penalty is 5 yrs. State v. Barnes is attached. It is a Bonner Co. Case + explains how little a person has to do to

> become an accessory after the fact. Thought you might be interested.

(Exhibit D (verbatim).)[3]

With respect to the timing of the note written on Exhibit D, Payne testified at her deposition that the state's offer had already expired when she sent Thurlow the note in September. (Exhibit C, p.19, L.16 – p.21, L.8; see also Exhibit D (reflecting a print date of 9/11/2006).)

In summarily dismissing Thurlow's "inaccurate information" claim, the district court stated:

> In deposition, attorney Payne testified she talked to Thurlow about the State's offer for him to plead to second degree murder and explained to him that under the law, he was guilty of the crime of murder if he aided and abetted the crime. Attorney Payne testified she informed Petitioner a plea of guilty to second degree murder would likely result in a sentence of ten (10) years rather than life, but that Petitioner was adamant about going to trial. Attorney Payne further testified that she informed Petitioner the best he could hope for was to be convicted of accessory to murder if he went to trial, and that at trial she requested and received jury instructions for second degree murder and accessory to murder. The Court finds no evidence that disputes attorney Payne's testimony regarding her communications with Petitioner Thurlow. Therefore, the Court is unable to find she was ineffective, as she communicated to Petitioner the offers from the State and offered Petitioner an accurate legal analysis regarding the offers.

(R., pp.176-177(footnote omitted).) The district court's decision was correct.

A criminal defendant's Sixth Amendment right to the effective assistance of counsel extends to plea negotiations. Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). In order to prevail on a Sixth Amendment ineffective assistance of

[3] Exhibit D also includes the handwritten words "durress" [sic] and "necessity," which are in different handwriting than the note authored by Payne.

counsel claim, a post-conviction petitioner must establish both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). The deficient performance prong requires proof that "counsel's representation fell below an objective standard of reasonableness." Harrington v. Richter, 131 S.Ct. 770, 787 (2011) (citations and quotations omitted). There is a "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Id. To overcome this presumption, the petitioner has the burden of showing "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Id.

To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Richter, 131 S.Ct. at 787. "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S.Ct. at 1384. Where there is a claim that deficient performance led to the rejection of a state's plea offer, to establish prejudice the defendant must show (1) "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances)"; (2) "the court would have accepted its terms"; and (3) "the conviction or

sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 1385.

The district court correctly concluded that the evidence did not support a finding that Payne was ineffective with respect to plea negotiations. Payne testified at her deposition, and Thurlow did not dispute, that she, in fact, advised him of the state's plea offer. (Exhibit C, pp.18-20; see R., p.99.) Indeed, Thurlow's claim is premised on having knowledge of the state's offer and his decision to reject it based on allegedly inaccurate information provided by Payne. (R., pp.99-100.) However, the evidence presented to the district court did not create a genuine issue of material fact on either deficient performance or prejudice.

Payne explained that her advice as it related to a conviction for accessory after the fact was based on her opinion that that was "the very least" Thurlow could be convicted of he if proceeded to trial. (Exhibit C, p.17, Ls.8-15.) Even if Thurlow interpreted Payne's comments as her "belief" that he would be convicted of that offense as opposed to the charged offense of murder (R., pp.100, 133), "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." Lafler, 132 S.Ct. at 1391; see also Bjorklund, 130 Idaho at 377, 941 P.2d at 349 ("counsel's incorrect predictions about a possible sentence or action by the court does not amount to ineffective assistance"); Griffith, 121 Idaho at 373, 825 P.2d at 96 ("Counsel's opinion that a jury would find Griffith guilty of second degree murder and that the court would impose a

sentence of fifteen years or more was a reasonable prediction of the outcome of a trial.").

More importantly, the evidence presented to the district court established that the note from Payne to Thurlow that states Payne's "belie[f Thurlow] would/will be found guilty of" being an accessory if he went to trial was provided in September 2006. (Exhibit D; Exhibit C, pp.20-21.) The state's plea offer, however, expired in June, and there was "no offer on the table" when Payne provided Exhibit D to Thurlow. (Exhibit C, pp.20-21.) Thus, Thurlow's contention that Exhibit D represents the "inaccurate information" provided in plea negotiations is belied by the evidence presented to the district court.

Thurlow also failed to demonstrate a genuine issue of material fact with respect to prejudice. Thurlow's claim of prejudice was that he "would have taken the initial plea offer of ten (10) years [for second-degree murder] instead of proceeding to trial" but for Payne's "belie[f] that he would be found guilty of Accessory after the Fact." (R., pp.99-100.) This allegation fails to show a prima facie case of prejudice as defined by Lafler for two reasons. First, Thurlow failed to establish a genuine issue of material fact that there was "a reasonable probability that the plea offer would have been presented to the court" since the plea offer had expired by the time Payne gave Thurlow Exhibit D. (Exhibit C, pp.19-21.) Moreover, Payne testified that the plea offer "required that Chris Lewers accept the deal and that Kenny Thurlow take the deal. It was both or none[,]" but "Lewers wasn't taking the deal" and Thurlow "wanted to testify. He did not want to take the deal." (Exhibit C, p.19, L.16 – p.20, L.2.) Although

Thurlow responded to the state's motion for summary dismissal by asserting he "adamantly disagree[d] with the timeline of events placed on the nature of the plea negotiations as characterized by attorney Payne in her deposition" (R., p.133), his brief in response to the state's motion for summary dismissal did not constitute evidence and he provided no evidence that Payne's characterization of the plea offer was incorrect even though the plea offer was memorialized in a letter that was provided to Thurlow (Exhibit C, p.19, Ls.16-18). It was Thurlow's burden to present evidence establishing a genuine issue of material fact; he failed to do so.

Second, Thurlow's claim of prejudice did not demonstrate a prima facie case that the court would have accepted the terms of the plea agreement. Lafler, 132 S.Ct. at 1385. The only reasonable inference from the uncontroverted evidentiary facts was that the court would not have accepted the plea agreement because the terms of the agreement, as outlined by Payne, could not be satisfied.

Because Thurlow has failed to show any error by the district court, he is not entitled to relief.

CONCLUSION

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

DATED this 13th day of May, 2016.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of May, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

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

JML/dd