6-3-2016

Thurlow v. State Appellant's Reply Brief Dckt. 42763

IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH EUGENE THURLOW,	)	
	)	S.Ct. No. 42763-2014
Petitioner-Appellant,	)	Bonner Co. CV-2012-1635
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Bonner

HONORABLE JEFF M. BRUDIE,
District Judge

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II. ARGUMENT IN REPLY

The district court erred by summarily dismissing the inaccurate information claim. There was a material issue of fact whether Mr. Thurlow would have pleaded guilty had he not been advised by counsel that he would only be convicted of accessory after the fact if he went to trial.

1. Deficient performance

Mr. Thurlow argues that the trial court erred when it dismissed the claim finding that Mr. Thurlow had not provided any evidence to contradict trial counsel's account of the advice she gave regarding the likely outcome at trial. In fact, he presented evidence that trial counsel advised him that he would only be found guilty of Accessory after the Fact and that he rejected the plea offer and proceeded to trial because of her assurances. In response, the state argues that Mr. Thurlow's allegations do not raise a genuine issue of material fact because they are contradicted by Ms. Payne's deposition testimony. Respondent's Brief, pg. 11. But that line of argument misses the point. The district court didn't even consider Mr. Thurlow's allegations because it was under the mistaken impression that those allegations did not amount to evidence. That conclusion, however, is incorrect as "[a] verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signator is, in substance, an affidavit and is accorded the same probative force as an affidavit." *Loveland v. State*, 141 Idaho 933, 936, 120 P.3d 751, 754 (Ct. App. 2005), *citing Mata v. State*, 124 Idaho 588, 593, 861 P.2d 1253, 1258 (Ct. App.1993). The Respondent does not address either *Loveland* or *Mata* in its Brief.

In addition, at this point, Mr. Thurlow's allegations should be accepted as true. On summary disposition, both the district court and this Court view the facts in the light most favorable to the applicant. *Crawford v. State*, — Idaho —, — P.3d —, 2016 WL 1358103, at *4 (2016). The district court did not consider Mr. Thurlow's allegations at all and the order dismissing the case should be reversed for this reason alone. *Id*.

The state next argues that "Payne explained that her advice as it was related to a conviction for accessory after the fact was based on her opinion that that was 'the very least' Thurlow would be convicted of if he went to trial." Respondent's Brief, pg. 11. But that explanation is contradicted by Mr. Thurlow's allegation that his "attorney had advised him that she believed he would be found guilty of Idaho Code 18-205[.]" R 21 (bold omitted). The trial court should have taken this dispute over evidentiary facts in the light most favorable to Mr. Thurlow. In addition, Ms. Payne's testimony is contradicted by the note she wrote stating that he "would/will be found guilty of [accessory after the fact] if we go to trial." R 214; Appendix A to brief; Exhibit D in record.

The state points out that the note was made in September of 2006, and Ms. Payne claimed that "the state's plea offer . . . expired in June [thus] there was 'no offer on the table' when Payne provided Exhibit D to Thurlow." Respondent's Brief, pg. 12. However, Mr. Thurlow alleges the offer of a plea to second degree murder with a 10-year fixed sentence was still open when he received the erroneous advice.

R 21. He also stated: "AFFIANT would have accepted the state['s] proffered plea bargain of a recommended ten year sentence in return for a plea of second degree murder, if he had not received the note from his trial attorney[.]" R 26. The reasonable inference from that statement is that the second-degree offer was still open at the time of the note. That's why Ms. Payne sent Mr. Thurlow that note: To inform his decision about whether to accept or reject the plea offer. Thus, there are genuine questions of fact over whether the offer was still open in September of 2006.

While it is not *per se* ineffective to inaccurately predict the outcome of a trial, counsel's advice here was objectively unreasonable. The cases cited by the state are inapposite. In *Lafler*, the parties conceded counsel was deficient when the client rejected a settlement offer "after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist." *Lafler v. Cooper*, 132 S. Ct. 1376, 1380 (2012). In *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992), the defendant was charged with first degree murder. "Griffith's participation in the brutal killing was never at issue, the only question being his intent. 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." Finally, the broad statement in the pre-*Lafler* case of *Bjorklund v. State*, 130 Idaho 373, 377, 941 P.2d 345, 349 (Ct. App. 1997), that "counsel's incorrect predictions about a possible sentence or action by the court does not amount to

ineffective assistance," is not a categorical rule. The alleged erroneous advice was not ineffective under the facts of *Bjorkland*, but the Supreme Court found incorrect sentencing advice to constitute deficient performance in *Booth v. State*, 151 Idaho 612, 620, 262 P.3d 255, 263 (2011). ("Given that the information Harris provided when advising Booth to plead guilty to first-degree murder was based on a blatantly erroneous reading of the sentencing statutes, the district court did not err in determining that Harris' performance fell below an objective standard of reasonableness.") The point of all theses cases is that the determination of whether counsel's advice was deficient depends upon the facts of the individual case. In this case, trial counsel knew that her client and Mr. Lewers could be placed at Evergreen Towing at the moment the victim was murdered, that Mr. Thurlow asked Mr. Dixon to help him dispose of the body, and that a shirt covered with the victim's blood and the murder weapon were both recovered from Mr. Thurlow's home. Tr., pg. 398, l. 12 - pg. 400, l. 4; pg. 421, l. 21 - pg. 422, l. 18; pg. 578, l. 24 - pg. 579, l. 11; pg. 1022, l. 14 - pg. 1024, l. 3. It was unreasonable under the facts of this case for trial counsel to believe that Mr. Thurlow would be acquitted of both first and second-degree murder and that the jury would finally land upon the lowly accessory after the fact charge. The court should reject the state's arguments regarding deficient performance.

2. Prejudice

The state next argues that there has not been a showing of prejudice. However, the fact that Mr. Thurlow's co-defendant pleaded guilty to first-degree murder and was sentenced to a twenty-year fixed term is evidence of prejudice. *See, State v. Lewers*, No. 34900, 2008 WL 9471223, at *1 (Ct. App. 2008) ("Pursuant to a plea agreement, Lewers pled guilty to the charge and the state agreed to recommend a determinate sentence of not more than twenty years and agreed to dismiss any other pending charges. The district court sentenced Lewers to life imprisonment with twenty years determinate.") If Mr. Thurlow had pleaded guilty to second-degree murder with a ten year recommendation the chances of him being sentenced to fixed life are practically nil.

In addition, this Court should not consider the state's prejudice arguments because they were not raised below. The basis for the state's motion for summary disposition was that Ms. Payne attempted to persuade Mr. Thurlow to accept the offer. The entirety of the state's argument in this regard was this:

> Petitioner next alleges his constitutional right to effective counsel was denied when Attorney Payne failed to provide him with accurate information during plea bargaining. Ms. Payne addresses that allegation in her deposition in pages 18 thru 21. Contrary to Petitioner's claims, Ms. Payne stated she tried to get her client to seriously consider the plea offer that was initially given by the prosecution. Mr. Thurlow as given that information but chose to go to trial anyway. Deposition of Linda Payne, page 19.

R 123-124. Further, the court did not dismiss this claim for the absence of a showing of prejudice. It wrote: "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 177. That is a finding that Ms. Payne's performance was adequate. Only now does the state argue Mr. Thurlow did not make an adequate showing of prejudice.

This Court, however, should not resolve this case on a basis not raised below.

> Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state or federal constitutions. This requirement is met when the defendant is provided with notice and an opportunity to be heard. The opportunity to be heard must occur at a meaningful time and in a meaningful manner.

In re Pangburn, 154 Idaho 233, 242, 296 P.3d 1080, 1089 (2013) (internal quotation marks and citations omitted); *Smith v. State*, 146 Idaho 822, 829, 203 P.3d 1221, 1228 (2009) (same). In the post-conviction context, due process is provided by the giving of advance notice through a motion from the district court or by the respondent particularly stating the basis for dismissal combined with an opportunity to present evidence to contradict the assertions made in that notice. I.C. § 19-2906.

Here, the state argued below that trial counsel's performance was not deficient. The state's argument was the basis of the district court's summary dismissal. Mr. Thurlow did not need to respond with evidence to an argument which was not being made in the trial court proceedings. It would violate Mr. Thurlow's due process rights for this Court to affirm the district court on a new theory because he never had advance notice of the theory or an opportunity to

respond to it. And there is no meaningful opportunity to respond now because a party may not introduce new evidence on appeal. Therefore, the Court should decline the state's invitation to address this new issue for the first time on appeal. *Caldwell v. State*, 159 Idaho 233, 239, 358 P.3d 794, 800 (Ct. App. 2015), *review denied* (2015) (Affirming the district court's decision on a basis not raised below would be akin to the district court summarily dismissing a petition on a basis other than what the state provided him notice of and would violate petitioner's right, pursuant to I.C. § 19–4906(b), to twenty days' notice that his petition was subject to dismissal on this new basis and an opportunity to present additional evidence to meet the argument.) The Court should not consider the state's arguments regarding prejudice.

III. CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Thurlow asks this Court to vacate the summary dismissal of the amended petition in part and remand the matter for further proceedings.

Respectfully submitted this 3rd day of June, 2016.

____/s/_____
Dennis Benjamin
Attorney for Kenneth Thurlow

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
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Dated and certified this 3rd day of June, 2016.

_____/s/_____
Dennis Benjamin