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Cardoza v. State Appellant's Brief Dckt. 43641

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARTIN CARDOZA,)	
)	
Petitioner-Appellant,)	S.Ct. No. 43641
vs.)	Canyon Co. CV-2014-11733
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third Judicial District of the State of Idaho
in and for the County of Canyon

HONORABLE MOLLY J. HUSKEY,
District Judge

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II. STATEMENT OF THE CASE

A. *Nature of the case*

Martin Cardoza appeals from the denial of his petition for post-conviction relief. Relief should be granted because the district court erred by denying Mr. Cardoza's request to conduct discovery.

B. *Procedural history*

1. The criminal case proceedings

The Court of Appeals summarized the testimony at trial as follows:

In May of 2011, an individual was arrested by the Idaho State Police. At the time, he was on felony probation for drug possession. With the aim of avoiding adverse probation consequences, this individual agreed to cooperate with law enforcement in pursuit of other drug distributors. He told Idaho State Police Detective Christensen that he had been selling methamphetamine that he obtained in bulk periodically from J.C. and another man he had met and communicated with several times but knew only as "El Primo." The informant further said that sometimes both men made the delivery but other times El Primo was alone. At Christensen's request, the informant arranged for the delivery of one pound of methamphetamine. The informant contacted El Primo and set a time for the delivery at [the Karcher] mall parking lot in Nampa.

The informant, Christensen, and several ISP officers attended and awaited the arrival of the vehicle that the informant said had been used in previous deliveries, a green GMC Yukon with Canyon County, Idaho license plates. When the Yukon arrived, it was accompanied by a red Mazda whose driver was apparently engaged in countersurveillance. The drivers were the only occupants of the vehicles. Before any exchange or contact between the informant and either driver, police pulled the drivers from the vehicles and arrested them. The driver of the Yukon was the defendant, Cardoza, whom the informant identified as the person he knew as El Primo. The driver of the Mazda was Trinidad Cardoza, the defendant's uncle. The Yukon was registered to Trinidad. A plastic bag containing a pound of

methamphetamine was found on the floor of the Yukon, partially hidden under a piece of paper.

The police, with the aid of Oregon authorities, obtained search and arrest warrants and went to J.C.'s residence in Nyssa, Oregon. There they found parked outside of the residence a white pickup with California plates that was registered to Cardoza. In searching the pickup, police found over one pound of methamphetamine in the glove box and airbag compartment. Based upon the drugs found in Idaho in the Yukon, Cardoza was charged with aiding and abetting trafficking in methamphetamine (over 400 grams) by delivery or possession, I.C. §§ 37-2732B(a)(4), 18-204.

State v. Cardoza, 155 Idaho 889, 891, 318 P.3d 658, 660 (Ct. App. 2014) (text in brackets added).

Mr. Cardoza's defense at trial was that he was not aware of the presence of the methamphetamine inside his uncle's truck. State's Exhibit 2 pg. 46, 105 (Trial Transcript, pg. 154, ln. 11-22 (opening statement); pg. 377, ln. 3-9 (closing argument)). The jury found Mr. Cardoza guilty and the conviction was affirmed on appeal. *State v. Cardoza, supra*.

2. The post-conviction proceedings

Mr. Cardoza filed a timely *pro se* Petition and Affidavit for Post-Conviction Relief. R 5. Among other claims, Mr. Cardoza alleged that he told his attorney, Kathy Edwards, that he was innocent of the charge, that the police planted the methamphetamine, and further alleged that she "failed to get the DVD security footage from the Karcher Mall security." R 19. He continued:

Cardoza told Edwards that he saw overhead cameras that were in a position to see both driver and passenger sides of the green GMC said to have contained the drugs.

Cardoza told Edwards that the footage would show that no one took any drugs out of the GMC truck.

Had the attorney Edwards shown the DVD to the jury, (Att.-B,) Cardoza would not have been found guilty of this crime. He would have been found NOT GUILTY!

R 19-20. Regarding “Att.-B,” Mr. Cardoza alleged that he “ha[d] contacted the security at Karcher Mall, they have the DVD available, but need an order from the Court in order to release it.” R 20, ft. 2.

Mr. Cardoza alleged the police reports and police audiorecordings supported his defense of police misconduct because the police never confronted him with the methamphetamine when he was arrested.

As all this is supposedly going on, no one bothers to show Cardoza any of this alleged (Methamphetamine) and Cardoza is standing right there.

Not once did any one say hay Cardoza, look what we found in your truck, or are these your drugs, there is no conversation between any police officer and Cardoza, that says there are drugs in your truck, or we found drugs in your trunk, not so long as they are at the Karcher Mall.

R 29-30 (verbatim).

Along with the Petition, Mr. Cardoza filed a Motion and Request for Discovery. R 38. Mr. Cardoza requested that the court issue an order to the Karcher Mall security personnel to surrender the following:

[A]ll security video from May 12, 2011, from the outside [cameras] on the south end of the parking lot from 10:00 [a.m.] to 11:00 [a.m.] from every angle available, centering on the arrest of the person in the green GMC pickup truck, and all other angles that can be seen from

any side of the Mall, from any camera either inside or outside or hand held [models], or mobile mounted cameras. And all footage of the GMC Truck from when it first parked, and from when it moved parking spots, until the scene was cleared after the arrest.

R 39. Mr. Cardoza stated that “this discovery will show that the officers that searched the green GMC pickup[] never removed any drugs or other packages from the truck. It will prove that Martin Cardoza is not guilty of this crime[.]” R 40.

Counsel was appointed to assist Mr. Cardoza. R 77. The state filed an Answer and attached a copy of the criminal trial transcripts. R 85. Appointed counsel later moved the court for permission to withdraw stating that he had prepared an amended petition for post-conviction relief but that Mr. Cardoza would not sign it. R 94. The court partially granted the motion to withdraw allowing Mr. Cardoza to proceed *pro se* on the claims raised in his petition but also ordering appointed counsel to remain as counsel in the claims in the amended petition. R 98.

A Supplemental Petition for Post-Conviction Relief was signed by Mr. Cardoza and filed by appointed counsel. R 100, 106. Mr. Cardoza renewed his Motion for Discovery. R 133. He again requested the security video from the Karcher Mall be produced, explaining that “[t]he videos of me being arrested[] will show the police searching the truck I was driving, and will show that the police never found anything illegal in that truck at all, which will lead to the [conclusion] of my innocence.” R 134-135.

The court denied the request for discovery without a hearing, ruling as follows:

Petitioner requests the security tape from the mall because he says it will show that the officers searched the truck he was driving and will show that the police never found anything illegal in his truck. Petitioner does not allege that these tapes exist or who has possession of the tapes. Without knowing that the tapes exist, the Court cannot order they be disclosed. Discovery is not a fishing expedition for evidence, as such, the Court denies to grant discovery on this issue.

R 144.

The state filed a Request for Evidentiary Trial Setting. R 149. At the evidentiary hearing, Mr. Cardoza testified but was not questioned by appointed counsel regarding any of the issues in the *pro se* petition. Mr. Cardoza asked the court to view the Karcher Mall video. He said:

MR. CARDOZA: I want you to see the video of when I was arrested, so that you could see that that recording shows there were no drugs. Because the police officer who arrested me asked me what did I have with me, and he pointed that way to the passenger side. And I said there is nothing there, and if there is something there, you need to show it to me.

THE COURT: All right. So your position is that when you were arrested, they did not take any drugs out of your vehicle?

MR. CARDOZA: None.

THE COURT: All right.

MR. CARDOZA: It wasn't even my vehicle.

. . . .

THE COURT: All right. Do we have copies – we have copies of the exhibits in the underlying trial in the underlying trial, and if the Court thinks those are relevant. Then I will watch them.

MR. SWANSON [Prosecuting Attorney]: And, Judge, we would object because that is a -- I think we're introducing what Mr. Cardoza has been saying, which would completely go back to the trial, and would be an issue right for appeal. He's claiming that he's actually innocent because there were no drugs there, and I believe it's a fabrication by the police officers, is what the theme is that I've read in some of his documents he's submitted.

THE COURT: And so your objection is that whether or not there was sufficient evidence to support the conviction was a claim that could have or should have been raised in direct appeal?

MR. SWANSON: That's correct, Your Honor, based on the record. And those audios, videos, trial documents, are not part of this record, and even getting them would be difficult. We'd have to search for them.

THE COURT: All right. The Court's going to find that I'm not going to watch the video of your arrest, Mr. Cardoza, and here's why. If there was not enough evidence to convict you, that was an issue that could have been raised on direct appeal. And you had an appeal and you were represented by counsel, and that was not an issue in the appeal, you cannot raise it now.

T pg. 73, ln. 19 - pg. 76, ln. 1.

In fact, the video of Mr. Cardoza's arrest was never introduced at the trial. State's Exhibit 2, pg. 6-7 (Exhibit Index in Trial Transcripts). In addition, the defense at trial was Mr. Cardoza did not know that the methamphetamine was inside his uncle's vehicle, not that the police lied about the presence of the methamphetamine.

After the hearing, the court dismissed both the *pro se* and successive petitions. R 183. As to the claim of ineffective assistance of counsel for failing to show the Karcher Mall DVD at trial, the court wrote:

Petitioner next asserts that counsel should have obtained the surveillance video from Karcher Mall to substantiate his claim that there were no drugs removed from his vehicle. Petitioner again failed

to support this claim with admissible evidence. He provides no evidence about what such a video actually may have shown or whether such a video even existed. As such, the claim is purely speculative and cannot be sustained.

R 173.

A Final Judgment was issued on August 31, 2015. R 185. A *pro se* Notice of Appeal, dated October 8, 2015, was filed on October 14, 2015. R 187, 192. The Supreme Court issued an Order Conditionally Dismissing the Appeal. R 201. Appellate counsel filed a response to that Order and the Court issued an Order to Reinstate Appellate Proceedings. R 202. An Amended Notice of Appeal was filed. R 203.

III. ISSUE PRESENTED ON APPEAL

Did the court abuse its discretion by denying Mr. Cardoza's motion for discovery?

IV. ARGUMENT

A. The district court abused its discretion in denying the motion for discovery.

1. Standards on review

When discovery is necessary for acquisition of evidence to support a claim for post-conviction relief, the petitioner must seek permission from the court to conduct discovery. I.C.R. 57(b); *Raudebaugh v. State*, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001). On appeal, the denial of a motion for permission to conduct discovery is reviewed under the abuse of discretion standard. *Aeschliman v. State*, 132 Idaho

397, 402, 973 P.2d 749, 754 (Ct. App. 1999). In matters of discretion, the Court examines: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any rules applicable to specific choices; and (3) whether the court made its decision by an exercise of reason. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991). While discretionary, the district court is required to permit discovery when it is “necessary to protect an applicant’s substantial rights.” *Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App.1992).

2. Why relief should be granted

The determination of whether discovery is necessary to protect the rights of the petitioner must of necessity turn on the particular facts of the case. *See e.g., Murphy v. State*, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006) (discussing need for retention of forensic pathologist in light of facts). In light of the above, discovery was necessary to protect Mr. Cardoza’s rights. The videotape of Mr. Cardoza’s arrest could have shown that no drugs were found inside of the vehicle and would have established his defense of police misconduct. If such a videorecording exists and was in the possession of Karcher Mall security since the arrest, trial counsel was deficient in failing to obtain a copy prior to trial.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d

1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 688 (1984).

To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, there is a reasonable probability of a different result. *Id.* While courts generally will not second-guess the tactical or strategic decisions of trial counsel, an exception exists when those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

The arrest videotape could show that trial counsel failed to conduct a professionally reasonable investigation and thus her strategic decision to present the unknowing possession defense (notwithstanding the discovery of drugs in Mr. Cardoza's truck in Oregon) would not need to be deferred to as it was based upon inadequate preparation. Failure to conduct a reasonable investigation is deficient performance as defense counsel is bound to conduct a prompt and thorough investigation of his or her case. *Richman v. State*, 138 Idaho 190, 192–93, 59 P.3d 995, 997–98 (Ct. App. 2002); *Davis v. State*, 116 Idaho 401, 407, 775 P.2d 1243,

1249 (Ct. App. 1989). The course of that investigation will naturally be shaped by a variety of factors, many peculiar to the particular case. *Richman, supra*. A decision not to conduct a particular line of investigation is assessed for reasonableness, giving deference to counsel's judgment. The reasonableness of counsel's decision may be determined or greatly influenced by the defendant's statements or behavior. *Id.* Here, Mr. Cardoza specifically alleged that he told attorney Edwards that he did not possess any methamphetamine and that the arrest video would show that the police did not remove anything from his uncle's truck. Further, the audio from the arrest did not show the police confronting Mr. Cardoza with the drugs at the time of arrest. R 18-20. Given that specific information from Mr. Cardoza, it was unreasonable for trial counsel to fail to obtain that videorecording as it would have shown his innocence of the Idaho charge.

The court's reason for denying the motion for discovery was that the "Petitioner does not allege that these tapes exist or who has possession of the tapes. Without knowing that the tapes exist, the Court cannot order they be disclosed." R 144. This ruling, however, ignores Mr. Cardoza's verified statement that he "ha[d] contacted the security at Karcher Mall, they have the DVD available, but need an order from the Court in order to release it." R 20, ft. 2. Mr. Cardoza was not on a fishing expedition. He requested production of a specific piece of evidence, from a specific organization, after it acknowledged the existence of the evidence, its possession thereof and its willingness to release the evidence upon service of a

subpoena. Trial counsel's failure to obtain this particular piece of evidence was a known grievance against her; thus, the request was not an opportunity to search for additional bases for complaint. Compare *Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App. 1992) (request to inspect prosecutor's files was properly denied because even if exculpatory evidence were discovered, Griffith admitted his criminal culpability by pleading guilty and waived all non-jurisdictional defects and defenses); and *Leytham v. State*, No. 43551, 2016 WL 4239225, at *2 (Ct. App. 2016) (discovery not necessary because Leytham had personal knowledge of the grievances he alleged against trial counsel.) The discovery was necessary to protect his right to effective trial counsel because Mr. Cardoza could not conclusively prove the existence of the videorecording without gaining its possession; nor could he hope to establish the failure to play it at trial was prejudicial under *Strickland* unless the court viewed the actual recording. And, in fact, the court dismissed his claim for failure to produce admissible evidence. R 173. Here, the court abused its discretion in denying the discovery request because its decision was not made consistently with the applicable legal standards and because it was not made in the exercise of reason.

Moreover, its refusal to view the videorecording at the evidentiary hearing was based upon the mistaken impression that the recording was in the criminal case record. Had the videorecording been admitted at trial, a sufficiency of evidence issue could have been raised both at trial and on appeal. But the claim on post-

conviction is that the recording was never obtained by defense counsel, as the court recognizes in its written ruling. R 19-20; 173. But it is manifestly unfair for the court to belatedly recognize the true nature of the claim only to dismiss it due to lack of the evidence Mr. Cardoza sought and the court refused to allow him to obtain.

The requested discovery could have led to evidence supporting a valid claim of relief and it was necessary to protect Mr. Cardoza's substantial rights, as he had no other way to prove the contents of the videorecording and his claim was dismissed from failure to produce admissible evidence in support thereof. Thus, the motion should have been granted.

V. CONCLUSION

For the reasons set forth above, Mr. Cardoza asks this Court to vacate the denial of his petition and remand the matter so that the requested discovery may be conducted.

Respectfully submitted this 31st day of August, 2016.

_____/s/_____
Dennis Benjamin
Attorney for Martin Cardoza

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):

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Dated and certified this 31st day of August, 2016.

_____/s/_____
Dennis Benjamin