10-27-2016

Cardoza v. State Appellant's Reply Brief Dckt. 43641

IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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. ARGUMENT IN REPLY

The state advances two arguments in support of the trial court's decision. Neither one has merit.

First, it misstates the holding of *Quemada v. Arizmendez*, 153 Idaho 609, 616, 288 P.3d 826, 833 (2012), as "a court is not obliged to search a record for evidence to support of motion." State's Brief, p. 5. In fact, that case only addresses motions for summary judgement and states that "the trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court's attention." *Id.*, *quoting Vreeken v. Lockwood Eng'g, B.V.*, 148 Idaho 89, 103-104, 218 P.3d 1150, 1164-65 (2009) (*in turn quoting Esser Electric v. Lost River Ballistics Tech., Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008)). A motion for summary judgment, of course, is not the same as the motion here, and the state cites to no authority that a party seeking permission to conduct discovery may not rely upon the information already within the files and records of the case. The state's citation to *Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 584, 329 P.3d 356, 366 (2014), is also not apposite because in a motion to reconsider under I.R.C.P. 11(a)(2)(B) "the burden is on the moving party to bring the trial court's attention to the new facts." *Id*. By contrast, the court's task here was to determine whether the requested discovery was needed to establish one of the pleaded claims in the petition. In order to make that determination, the court

needed to know what the claims were. If anything, the trial court had an affirmative duty to examine the record. *See Esser Elec. v. Lost River Ballistics Techs., Inc.*, 145 Idaho at 919, 188 P.3d at 861. ("The trial court must examine the pleadings to determine what issues are raised in the case [when ruling upon a motion for summary judgment].") Had the district court reviewed the pleadings to determine whether the requested discovery was "necessary to protect an applicant's substantial rights," as required by *Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App.1992), it would have seen Mr. Cardoza's sworn statement about the existence of the videorecording.

It should be remembered that the district court required Mr. Cardoza to proceed without counsel on the claims raised in his pro se petition and consequently the motion for permission to conduct discovery was a pro se pleading. R 98; 133. *See, Johnson v. State*, 85 Idaho 123, 128, 376 P.2d 704, 706 (1962) ("in dealing with petitions for habeas corpus submitted by persons on their own behalf without the advice, aid and assistance of counsel, a court cannot require the same high standards that might be imposed on members of the legal profession. In general, liberality rather than strictness should control in considering an application for a writ of habeas corpus.") Further, the court denied the motion without holding a hearing where Mr. Cardoza could have drawn the court's attention to his sworn statement. R 139.

Second, the state argues that 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) does not support a finding that the tape exists or who is in possession of it because it is "inadmissible hearsay." State's Brief, p. 6. This is truly an absurd argument because the purpose of the motion to conduct discovery is to obtain admissible evidence. The state cites to no authority that a request to conduct discovery must be based upon the petitioner's personal knowledge of the existence or contents of the item sought. Sometimes the item sought may not exist or may have been destroyed or discarded. There is no reason why the court may not issue a subpoena duces tecum for an item even though its existence has not been conclusively established. The entity receiving the subpoena can simply respond that it is unable to provide the item because it is not in its possession. To the extent the court denied the request for discovery on that basis, it failed to reach its conclusion by an exercise of reason. Thus, it abused its discretion. *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

III. CONCLUSION

For the reasons set forth above and in the Opening Brief, 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 27th day of October, 2016.

_____/s/_____
Dennis Benjamin
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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 27th day of October, 2016.

_____/s/_____
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