

1-23-2017

Ward v. State Respondent's Brief Dckt. 44005

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JASON WARD,)	
)	No. 44005
Petitioner-Appellant,)	
)	Twin Falls Co. Case No.
vs.)	CV-42-15-2916
)	
STATE OF IDAHO,)	
)	
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 G. RICHARD BEVAN
District Judge**

**LAWRENCE G. WASDEN
Attorney General
State of Idaho**

**PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division**

**MARK W. OLSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534**

**ATTORNEYS FOR
RESPONDENT**

**JASON WARD
IDOC #87653
I.S.C.C. - PIE Building
P.O. Box 70010
Boise, Idaho 83707**

**PRO SE
PETITIONER-APPELLANT**

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STATEMENT OF THE CASE

Nature of the Case

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

Statement of Facts and Course of Proceedings

In May 2011, Ward forcibly raped an acquaintance, M.M., in a secluded location near a canal in Twin Falls County. (#40467 R., pp.12-15; #40467 Tr., p.100, L.13 – p.149, L.14.¹) M.M. called 911, was transported to a hospital, and underwent a sexual assault exam. (#40467 R., pp.12-15; #40467 Tr., p.150, Ls.5-20; p.307, L.13 – p.345, L.5.) The state charged Ward with rape and the persistent violator sentencing enhancement. (#40467 R., pp.92-95.)

Pursuant to an agreement with the state, Ward pled guilty to rape and the state agreed to dismiss the sentencing enhancement. (#40467 R., pp.152-161; #40467 Tr., p.6, L.15 – p.23, L.15.) However, approximately three months later, and after Ward retained new counsel (#40467 R., pp.176-177), the district court granted Ward's motion to withdraw his guilty plea on the ground that the plea was based upon erroneous legal advice given by Ward's previous counsel. (#40467

¹ On March 18, 2016, the Idaho Supreme Court entered an order augmenting the appellate record with the clerk's record, transcripts, and exhibits associated with Ward's direct appeal from his underlying conviction, Docket No. 40467. (3/18/16 Order.) On June 28, 2016, the Idaho Supreme Court granted Ward's motion to take judicial notice of its own files and records from the same case. (6/28/16 Order.) In the post-conviction proceeding, the district court took judicial notice of the "underlying trial and appellate records." (R., p.375 n.3.) In its Respondent's brief in this case, the state refers to the transcript that contains the change of plea hearing, hearing on motion to withdraw guilty plea, pretrial conference, jury trial, and sentencing hearing as "#40467 Tr."

R., pp.185-200, 236-237; #40467 Tr., p.73, L.25 – p.76, L.7.) The case proceeded to trial, where the jury found Ward guilty of rape. (#40467 R., p.315.) Ward then pled guilty to the persistent violator sentencing enhancement. (See #40467 R., p.338.) The district court imposed a unified 20-year sentence with seven years fixed to run consecutive to two other sentences Ward was serving at the time. (#40467 R., pp.349-353; #40467 Tr., p.517, L.11 – p.535, L.1.) The Idaho Court of Appeals affirmed Ward’s judgment of conviction. State v. Ward, 2014 WL 3555769 (Idaho App. July 17, 2014) (unpublished).

In July 2015, Ward filed a post-conviction petition. (R., pp.6-13.) The district court appointed counsel to represent Ward in the proceeding. (R., pp.18-19.) In an amended petition, Ward, through counsel, raised five ineffective assistance of trial counsel claims. (R., pp.304-309.) Among them, relevant to this appeal, Ward asserted that trial counsel was ineffective for failing to “fully investigate” or utilize potential defense witness Lane Buddenhagen. (R., p.306.) The district court granted the state’s motion to summarily dismiss the amended petition. (R., pp.373-385.) With respect to Ward’s claim relating to Lane Buddenhagen, the district court concluded that Ward failed to provide evidence indicating what, specifically, Buddenhagen would have testified about, how such testimony would have been admissible at trial, how trial counsel’s decision not to utilize Buddenhagen constituted deficient performance, and how such testimony would have impacted the outcome of the trial. (R., p.381.) Therefore, the court concluded, the claim was “bare and conclusory,” and subject to dismissal on that basis. (Id.)

Ward timely appealed. (R., pp.386-390.) The district court appointed counsel to represent Ward on the appeal. (R., pp.391-393.) However, the Idaho Supreme Court granted appointed counsel's motion to withdraw from the case after counsel determined that he could not file an opening brief that complied with I.A.R. 11.2(a). (6/28/16 Motion and Affidavit; 7/19/16 Order.) Ward proceeds *pro se*.

ISSUES

Ward states the issues on appeal as:

1. Did the district court [err] in dismissing the petition for post[-]conviction relief, specifically the claim of newly discovered evidence?
2. Did the court [err] in ignoring petitioner[']s motion for conflict counsel?
3. Does the cumulative error doctrine apply?

(Appellant's brief, p.5.)

The state rephrases the issues on appeal as:

1. Has Ward failed to show that the district court erred by summarily dismissing his post-conviction claim that his trial counsel was ineffective for failing to adequately investigate Lane Buddenhagen and/or call him as a witness at the jury trial?
2. Did Ward fail to preserve his conflict claim regarding his appointed post-conviction counsel?
3. Has Ward failed to demonstrate that the cumulative error doctrine applies to this case?

ARGUMENT

I.

Ward Has Failed To Show That The District Court Erred By Summarily Dismissing His Post-Conviction Claim That His Trial Counsel Was Ineffective For Failing To Adequately Investigate Lane Buddenhagen And/Or Call Him As A Witness At The Jury Trial

A. Introduction

Ward contends that the district court erred in summarily dismissing his post-conviction petition. (Appellant’s brief, pp.6-7.²) Specifically, Ward contends that the district court erred by summarily dismissing his claim that his trial counsel was ineffective for failing to adequately investigate Lane Buddenhagen and/or call him as a witness at the jury trial. (Id.) Ward has failed to show that the district court erred. As the district court correctly concluded, Ward failed to present any evidence regarding what Budenhagen would have testified about, whether such testimony would have been admissible, and how such testimony would have supported his defense.

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).

² Some of the pages in Ward’s Appellant’s brief are not numbered consistently with other pages. (See generally Appellant’s brief.) Therefore, in this brief, page citations to the Appellant’s brief are numbered sequentially from the first page.

C. The District Court Correctly Concluded That Ward Was Not Entitled To Post-Conviction Relief

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman, 144 Idaho at 522, 164 P.3d at 802; State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

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, if the applicant "has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction application are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Bare assertions and speculation, unsupported by

specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

With respect to the deficiency prong of Strickland, “[w]hen evaluating an ineffective assistance of counsel claim, this Court does not second-guess strategic and tactical decisions, and such decisions cannot serve as a basis for post-conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law or other shortcomings capable of objective review.” State v. Payne, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008). The decision to call a witness falls within the category of trial counsel's strategic or tactical decisions and will generally not be second-guessed. Rodgers v. State, 129 Idaho 720, 724, 932 P.2d 348, 352 (1997). Thus, to prevail on a claim that trial counsel was ineffective in failing to call a specific witness, a petitioner is required to present facts, supported by admissible evidence, to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Strickland, 466 U.S. at 689 (citation omitted).

To establish Strickland prejudice, a defendant must show a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 245 (Ct. App. 1999).

In this case, the district court summarily dismissed Ward’s claim that his trial counsel was ineffective for failing to adequately investigate Lane

Buddenhagen and/or call him as a witness at the jury trial.³ (R., p.381.) After citing the applicable law, the court concluded:

Nothing in Ward's petitions or supporting affidavits provides anything in the way of evidence as to what Mr. Buddenhagen's testimony would have been (beyond the cursory statement that he would have testified "about prior sexual conduct of the victim"), how it would have been relevant, how it would have satisfied I.R.E. 412(b), how the decision not to call him as a witness was due to a deficiency on counsel's part, and how the addition of such testimony would have affected the outcome of Ward's trial. As such, this claim is bare and conclusory and will be summarily dismissed.

(Id.)

A review of the record supports the conclusions of the district court. In his amended petition, with respect to this ineffective assistance of counsel claim, Ward asserted only that his counsel was ineffective for failing to adequately investigate Buddenhagen, and for failing to provide proper notice for Buddenhagen's potential testimony pursuant to I.R.E. 412(b).⁴ (R., p.306.) In a *pro se* affidavit submitted by Ward prior to the appointment of counsel, Ward

³ On appeal, Ward describes this as a "new evidence" claim and cites law applicable to a defendant's motion for a new trial. (Appellant's brief, pp.6-7.) The "new evidence" discussed by Ward is the potential trial testimony of Lane Buddenhagen. (Id.) Ward did not file a motion for a new trial in district court, and did not attempt to raise a "new evidence" claim in his amended post-conviction petition. (See R., p.304-309.) Therefore, the state liberally construes this claim on appeal as asserting that the district court erred by summarily dismissing Ward's post-conviction claim that his trial counsel was ineffective for failing to adequately investigate Lane Buddenhagen and/or call him as a witness at the jury trial.

⁴ Idaho Rule of Evidence 412(b) governs the admissibility, in a criminal case where the defendant is accused of a sex crime, of the victim's past sexual activity.

asserted that “there were other guys that had been accused of the same thing by the same person,” and that Buddenhagen was one of these people. (R., p.11.)

In an affidavit submitted in support of Ward’s post-conviction petition after counsel was appointed, Ward asserted that “[t]he prospective testimony of Lane Buddenhagen was discussed on page 85 [of the transcript of the trial and pre-trial hearings], lines 18-23, and pages 92 through 94, lines 19 through 15.” (R., p.303.) These portions of the transcript, however, do not support Ward’s ineffective assistance of trial counsel claim. On page 85, Ward’s trial counsel simply informed the court that he planned on calling up to five witnesses, including Ward, but did not specifically reference Buddenhagen. (#40467 Tr., p.85, Ls.18-23.) On pages 92 through 94, the parties and the court discussed the state’s motion in limine to prevent Buddenhagen from testifying at the trial. (#40467 Tr., p.92, L.19 – p.94, L.15.) The district court declined to rule on the motion because it did not know the nature of Buddenhagen’s potential testimony. (#40467 Tr., p.93, L.4 – p.94, L.16.) The court also noted that Buddenhagen was the defendant in a pending murder trial.⁵ (#40467 Tr., p.93, Ls.6-11.) Ward’s trial counsel informed the court that he was “exploring” the possibility of utilizing Buddenhagen as a witness, and that if he ultimately chose to do so, he would provide the proper notice of such testimony to the extent required by I.R.E. 412(b). (#40467 Tr., p.93, L.19 – p.94, L.6.)

⁵ In 2012, Buddenhagen pled guilty to voluntary manslaughter and received a 15-year unified sentence with 5 years fixed. See ICourt Portal, State v. Buddenhagen, Twin Falls County District Court Case No. CR-2011-09146.

At the hearing on the state's motion for summary dismissal, Ward's post-conviction counsel did not submit any additional argument to the court in support of this claim, other than asserting, in a conclusory manner, that "we believe [trial counsel] failed to sufficiently investigate this witness." (Tr., p.18, L.24 – p.19, L.3.)

As the district court correctly concluded, Ward did not allege specifically what Buddenhagen would have testified about, how this testimony would have been beneficial to his defense, which provision of I.R.E. 412(b) would govern the admissibility of the testimony, how such testimony would have been admissible under this rule, how trial counsel's investigation of Ward was deficient, or how it was some objective shortcoming (rather than a strategic decision), that resulted in Ward's trial counsel ultimately deciding not to utilize Buddenhagen as a witness at the jury trial. Therefore, this claim is conclusory and unsupported by facts which, if true, demonstrate that Ward was entitled to relief under a Strickland analysis. Ward has therefore failed to demonstrate that the district court erred in summarily dismissing this ineffective assistance of trial counsel claim.

II.

Ward Failed To Preserve His Conflict Claim Regarding His Appointed Post-Conviction Counsel

A. Introduction

Ward contends that the district court erred by failing to rule on his "Motion For Appointment Of Conflict-Free Counsel" prior to summarily dismissing his post-conviction petition. (Appellant's brief, p.8.) Ward also contends, for the first

time on appeal, that his appointed counsel, a Twin Falls County public defender, had an actual conflict of interest because, he asserts, the Twin Falls County Public Defender's Office represented one of the state's witnesses at Ward's underlying jury trial. (Appellant's brief, pp.4, 8.) Ward failed to raise this actual counsel conflict allegation to the district court below. Therefore, this claim is waived and cannot be considered on appeal.

B. Ward Failed To Preserve His Conflict Claim

It is well-settled that Idaho's appellate courts "will not consider issues not raised in the court below." State v. Mosqueda, 150 Idaho 830, 833, 252 P.3d 563, 566 (Ct. App. 2011) (citing State v. Wheaton, 121 Idaho 404, 407, 825 P.2d 501, 504 (1992)).

In October 2015, after counsel was appointed to represent him in the post-conviction proceeding, and after appointed counsel filed an amended post-conviction petition, Ward filed a *pro se* "Motion For Appointment Of Conflict-Free Counsel" and supporting affidavit. (R., pp.310-321.) There is no indication in the appellate record that the district court ruled on this motion. In his Appellant's brief, Ward asserts that the Twin Falls County public defender who was appointed to represent him in his post-conviction proceeding⁶ had an actual conflict of interest because the Twin Falls County Public Defender's Office previously represented "one of the state's center[]piece witnesses" at the jury

⁶ While Marilyn Paul, a Twin Falls County public defender, was appointed to represent Ward in the post-conviction proceeding (R., pp.18-19), Ward retained David Smethers, private counsel, for his jury trial (See generally #40467 Tr., pp.98-494).

trial. (Appellant's brief, pp.4, 8.) However, Ward did not make this assertion in his "Motion For Appointment Of Conflict-Free Counsel" filed in district court. (See R., pp.310-321.) Instead, in that motion, Ward described a personal conflict between himself and his appointed counsel, and made various complaints relating to counsel's representation. (See id.); see also State v. Wood, 132 Idaho 88, 98, 967 P.2d 702, 712 (1998) ("A conflict of interest is active representation of competing interests not mere disagreements between a petitioner and counsel."). Because Ward did not allege an actual conflict to the district court, his corresponding claim on appeal is waived.

Further, even if Ward had preserved his conflict claim, and even assuming the district court erred in failing to rule on Ward's motion, any such error is harmless. "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." I.R.C.P. 61. In this case, any error related to the district court's failure to rule on Ward's motion for conflict-free counsel was harmless because, as the Idaho Court of Appeals recently clarified, a post-conviction petitioner is not entitled to conflict-free counsel when challenging a non-capital conviction. Green v. State, 160 Idaho 658, ___, 377 P.3d 1120, 1121 (Ct. App. 2016) ("A petitioner is not entitled to conflict-free or effective counsel when the trial court has discretion to appoint counsel, as in noncapital post-conviction proceedings.").

C. In the Alternative, Even If This Court Construes Ward's Appellant's Brief As Challenging The District Court's Failure To Address The Issues He Actually Raised Below, Ward Has Still Failed To Demonstrate He Is Entitled To Relief

In his Appellant's brief, Ward does not expressly reference any of the allegations he actually made in his "Motion For Appointment Of Conflict-Free Counsel" filed in the district court. (See Appellant's brief, pp.4, 8.) In that motion and supporting affidavit, Ward requested "conflict-free" counsel on the grounds that his appointed counsel: (1) did not adequately communicate with him; (2) inappropriately filed "ex parte" motions for transport with the district court; (3) failed to obtain case files from his previous retained attorneys; and (4) failed to provide him with complete copies of the state's filings in the post-conviction case. (R., pp.310-321.) To the extent this Court construes Ward's Appellant's brief as challenging the district court's failure to rule on these allegations, rather than the actual conflict claim he raises on appeal, Ward has still failed to show he is entitled to relief for several reasons.

First, Ward has not presented any argument or authority standing for the proposition that a district court is required to rule on a *pro se* motion for substitute counsel filed by a represented post-conviction petitioner. Nor has he attempted to explain why the grounds he set forth to the district court entitled him to substitute counsel. Therefore, this claim is waived for appeal. "A party waives an issue on appeal if either authority or argument are lacking." State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)).

Ward has additionally failed to demonstrate he is entitled to relief because the district court's order granting the state's motion for summary dismissal constituted an implicit denial of Ward's motion for substitute counsel. The Idaho Supreme Court has held that "where a district court fails to rule on a motion, we presume the district court denied the motion." State v. Wolfe, 158 Idaho 55, 61-62, 343 P.3d 497, 503-504 (2015) (citing Sales v. Peabody, 157 Idaho 195, 202, 335 P.3d 40, 47 (2014); United States v. Claxton, 766 F.3d 280, 291 (3rd Cir. 2014) (noting that several federal circuit courts of appeals treat a district court's failure to rule on an outstanding motion as an implicit denial of that motion); United States v. Jasso, 634 F.3d 305, 307 n. 2 (5th Cir. 2011) (treating a district court's failure to rule on a motion for reconsideration as an implicit denial based on the entry of a final judgment); Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994) ("The denial of a motion by the district court, although not formally expressed, may be *implied* by the entry of a final judgment or of an order inconsistent with the granting of the relief sought by the motion.")). Therefore, although it does not appear from the appellate record that the district court explicitly ruled on Ward's motion, this Court may presume that the district court denied that motion.

Ward has failed to demonstrate he is entitled to relief on his claim that the district court erred by failing to rule on his "Motion For Appointment Of Conflict-Free Counsel," and on the claims within that motion pertaining to alleged deficiencies in the performance of his appointed post-conviction counsel. This

Court should therefore affirm the district court's order summarily dismissing Ward's post-conviction petition.

III.

Ward Has Failed To Demonstrate That The Cumulative Error Doctrine Applies To This Case

Ward asserts that even if the errors he alleges were individually harmless, his constitutional due process rights were violated by the accumulation of errors. (Appellant's brief, p.9.) "Under the doctrine of cumulative error, a series of errors, harmless in and of themselves, may in the aggregate show the absence of a fair trial. However, a necessary predicate to the application of the doctrine is a finding of more than one error." State v. Parker, 157 Idaho 132, 149, 334 P.3d 806, 823 (2014) (quoting State v. Perry, 150 Idaho 209, 230, 245 P.3d 961, 982 (2010)).

Ward has failed to demonstrate that the cumulative error doctrine is applicable to this case and the claims he raises on appeal. While some courts have applied the cumulative error doctrine to Strickland ineffective assistance of counsel claims, see e.g., State v. Woodel, 145 So.3d 782, 801-803 (Fla. 2014); but see State v. Hardin, 60 S.W.3d 397 (Ark. 2001) (holding that it was error for the trial court to entertain a claim of cumulative error in a Strickland analysis), Ward has only appealed the district court's dismissal of *one* of the ineffective assistance of counsel claims raised in his amended post-conviction petition. (See generally Appellant's brief.) Thus, there is no asserted Strickland prejudice to cumulate. The only other claim Ward raised on appeal - that his post-conviction counsel had an actual conflict of interest - does not allege trial error,

and thus, cannot be cumulated with Ward's ineffective assistance of counsel claim. Because Ward has not alleged multiple errors that could theoretically cumulate in a manner to create an unfair trial, he has failed to show that the cumulative error doctrine applies in this case.

In any event, as discussed above, Ward has failed to demonstrate any error, let alone "more than one error" required for application of the cumulative error doctrine. Therefore, Ward has failed to demonstrate that he is entitled to relief pursuant to the cumulative error doctrine, or that the district court erred by declining to apply the cumulative error doctrine in the post-conviction proceeding.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Ward's petition for post-conviction relief.

DATED this 23rd day of January, 2017.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 23rd day of January, 2017, caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Jason Ward
IDOC No. 87653
ISCC - Pie Bldg.
PO Box 70010
Boise, ID 83707

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General