5-11-2012

Schultz v. State Respondent's Brief Dckt. 39065

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

CHRISTOPHER RAY SCHULTZ,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 39065

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

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STATEMENT OF THE CASE

Nature Of The Case

Christopher R. Schultz appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Schultz filed for post-conviction relief from his sentences for robbery and attempted rape with a weapon enhancement. (R., p. 8.) He claimed his trial counsel had been ineffective in sentencing proceedings for failing to advise him of his "rights against self incrimination" and failing to secure due process. (R., p. 10.) He alleged that his trial counsel "forc[ed]" him to "accept the plea deal" and "fail[ed] to hold the prosecutor to the benefit of the [plea] bargain." (R., p. 11.) In his accompanying affidavit he alleged he "was never fully advised of the his [sic] rights against self incrimination ... that may result from any or all information he may or may not disclose during any psychological, psychosexual, or social sexual evaluations." (R., pp. 14-15.)

The state filed an answer and a motion to dismiss. (R., pp. 38-40, 54-65.) The district court granted the motion to dismiss. (R., pp. 85-90.) The district court dismissed the claims of ineffective assistance of counsel on the grounds that they were vague and not supported by admissible evidence. (R., pp. 88-90.) Schultz filed a timely notice of appeal from the order summarily dismissing his petition. (R., pp. 93-94.)

ISSUES

Schultz states the issue on appeal as:

> Did the district court err when it summarily dismissed Mr. Schultz's claims that he received ineffective assistance of counsel?

(Appellant's brief, p. 5.)

The state rephrases the issues as:

1. Has Schultz failed to demonstrate on appeal that he made a showing in the district court of admissible evidence such as would create a material issue of fact regarding his claim that his counsel was ineffective for failing to advise him of his right to silence in regard to sentencing evaluations?

2. Has Schultz failed to show on appeal that the district court erred by dismissing his claim of ineffective assistance of counsel for allegedly failing to enforce a plea agreement that was never made?

ARGUMENT

I.
Schultz Has Failed To Demonstrate That The District Court Erred By Dismissing His Claim Of Ineffective Assistance Of Counsel For Allegedly Failing To Advise Him Of His Right To Silence In Regard To Sentencing Evaluations

A. Introduction

The district court concluded that the evidence Schultz submitted in support of his claim that counsel was ineffective for failing to advise him of his right against self-incrimination at sentencing was "bare, conclusory, and incomplete" and did not "sufficiently support both prongs of the required showing for ineffective assistance of counsel." (R., p. 89.) Schultz claims this was error (Appellant's brief, pp. 9-12), but review of the record supports the district court's holding.

B. Standard Of Review

On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Schultz Failed To Present Evidence Supporting A *Prima Facie* Claim Of Ineffective Assistance Of Counsel In Relation To Sentencing

"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 "if the applicant's evidence raises no genuine issue of material fact" as to each element of the petitioner's claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

In order to establish a *prima facie* claim of ineffective assistance of counsel, a post-conviction petitioner 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). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). 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. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999).

A post-conviction petitioner may demonstrate that his counsel was ineffective where counsel failed to inform him of his right to silence in relation to a psychosexual evaluation prepared for sentencing and the petitioner was prejudiced. Estrada v. State, 143 Idaho 558, 564-565, 149 P.3d 833, 839-840 (2006). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

Schultz alleged his counsel "failed to advise [him] of [his] rights against self incrimination." (R., p. 10.) He presented an affidavit in which he asserted he "was never fully advised of the his [sic] rights against self incrimination ... that may result from any or all information he may or may not disclose during any psychological, psychosexual, or social sexual evaluations." (R., pp. 14-15.) The allegation that he was not "fully" advised of his rights and that he "may or may not" have disclosed evidence had he been fully advised, without more, does not show deficient performance or resulting prejudice. Schultz provided no information about what he was or was not informed of regarding his rights against self-incrimination and does not even claim that being fully informed would have changed his choices in relation to sentencing. The district court did not err in concluding that Schultz's claims were conclusory and failed to set forth a *prima facie* claim of ineffective assistance of counsel.

Schultz argues that he alleged that "had counsel correctly advised [him] to invoke his Fifth Amendment rights and not participate in the court-ordered (non-privileged) evaluation, [he] presumably would have followed that advice and the

extremely prejudicial evaluations would not have been considered by the district court at sentencing." (Appellant's brief, p. 12.) This fanciful characterization of the pleadings and evidence presented to the district court does not withstand analysis.

First, nowhere does Schultz actually claim that it was counsel's advice about *whether* to invoke his right to silence that was deficient. (See R., p. 10 (claiming that counsel failed to "advise me of my rights against self incrimination"). The only evidence presented does not indicate counsel failed to advise Schultz about *whether* to invoke the right to silence but that counsel did not "fully" explain that right in some unspecified way. (R., pp. 14-15.) Schultz's attempt to completely re-write his claim on appeal speaks volumes. The district court did not err by concluding that the evidence presented by Schultz did not amount to a *prima facie* showing of deficient performance.

Second, Schultz does not claim that he alleged or presented evidence to the district court that, had he been informed of the right to silence he would have invoked that right, he instead asks this Court to "presum[e]" he would have done so. (Appellant's brief, p. 12.) This Court, however, must base its decision on the evidence presented in the record; it was Schultz's duty to present evidence, he was not entitled to a presumption of prejudice. See Workman, 144 Idaho at 522, 164 P.3d at 802; Lovelace, 140 Idaho at 72, 90 P.3d at 297. There is no evidence of prejudice in this record, and Schultz's request for a presumption in lieu of evidence is contrary to applicable legal standards.

Review of the evidence presented by Schultz in the form of his verified petition and accompanying affidavit shows that he did not present evidence showing the elements of his claim. Vague claims of not "fully" explaining rights against self incrimination did not show deficient performance and Schultz presented no evidence of prejudice. Because he presented only conclusory evidence that did not establish his claim, Schultz has failed to show that the district court erred by summarily dismissing it.

II.
Schultz Has Failed To Show That The District Court Erred By Dismissing His Claim Of Ineffective Assistance Of Counsel For Allegedly Failing To Enforce A Plea Agreement That Was Never Made

A. Introduction

At the time Schultz waived his opposition to being tried as an adult in the underlying criminal proceedings, the parties put the status of their plea negotiations on the record even though they had not at that time reached a plea agreement. State v. Schultz, 150 Idaho 97, 98-103, 244 P.3d 241, 242-47 (Ct. App. 2010). In this post-conviction action Schultz alleged that his attorney in the juvenile court was ineffective for failing to inform the prosecutor in adult court of a plea agreement, and that his attorney in adult court was ineffective for failing to enforce that plea agreement. (R., p. 11.) The district court dismissed Schultz's allegations of ineffective assistance of counsel for failure to present evidence sufficient to establish a *prima facie* claim. (R., pp. 88-89.)

On appeal Schultz acknowledges that in the juvenile proceedings a "negotiation was placed on the record," that Schultz had asserted on appeal that

it was an "agreement," and that in the criminal case the holding that there was no "meeting of the minds" at that time, and therefore no agreement, was affirmed on appeal. (Appellant's brief, p. 14.) Schultz argues he nevertheless raised a valid claim that if he "had been properly advised of all the terms of the agreement, [he would] have plead [sic] guilty to the more favorable terms." (Appellant's brief, p. 15.) This argument on its face makes no sense. Because there was never any agreement, there was no need to "properly advise" Schultz of its terms and he could not have "plead [sic] guilty" pursuant to the "more favorable terms" of a non-existent agreement.

Reading Schultz's brief on appeal very favorably, it is possible that Schultz intended to argue that the plea negotiations put on the record in the juvenile court constituted an offer, it was the offer (not the "agreement") that was not explained to Schultz, and that he would have accepted the offer and pled guilty according to its "more favorable terms." To the extent Schultz is arguing that he asserted a claim that counsel failed to convey a plea offer to him,[1] Schultz has failed to show error.

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 fact exists based on the pleadings, depositions and admissions together with any

[1] It appears that Schultz may have worded his appellate argument awkwardly to deliberately try to make the appellate argument match the pleadings. Unless the words "offer" and "agreement" have the same meaning, this Court should reject Schultz's attempt to effectively amend his pleadings on appeal.

affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." 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. Schultz Failed To Establish A *Prima Facie* Claim Of Ineffective Assistance Of Counsel Regarding A Plea Bargain In The Juvenile Proceedings

In order to establish a *prima facie* case of ineffective assistance of counsel, a post-conviction petitioner 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). An attorney's performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). 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. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

"[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1408 (2012). Failure to so communicate can result in prejudice if the petitioner can demonstrate that he would have accepted the offer, the prosecution would have gone through with the agreement rather than withdraw the offer, and the court would have also accepted the agreement. Id. at 1409. Here, however, Schultz did not allege any failure to convey any offer.

Schultz's allegation was as follows:

> my juvenile attorney failing to inform my public defender in adult court about the plea bargain, failing to have the agreement in writing, failing to hold the prosecutor to the benefit of the bargain, likewise, I have the adult court public defender failing to hold the prosecutor to the benefit of the bargain reached and partially performed on my behalf.

(R., p. 11 (verbatim).) In his affidavit Schultz stated his counsel was ineffective for "allowing the state to violate a stipulated agreement that was the basis for the plaintiff's agreeing to being waived into Adult court and the ultimate guilty pleas." (R., p. 15 (verbatim).) It is plain from the record that Schultz was not alleging failure to communicate a plea offer; he was re-alleging the already rejected claim that the parties had reached a plea agreement in the juvenile proceedings.

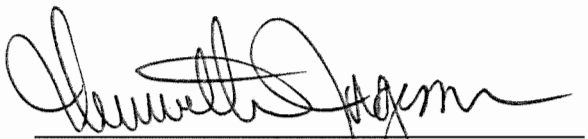
If Schultz is arguing on appeal that the statements about the plea negotiations placed on the record in his presence were actually a formal plea offer by the state that his attorney failed to convey to him, such must be rejected as not having been raised in the pleadings below. The actual claim he raised, that his attorneys failed to enforce an agreement entered by the parties, was

properly dismissed because it had been litigated against him in the underlying criminal case.

CONCLUSION

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

DATED this 11th day of May, 2012.



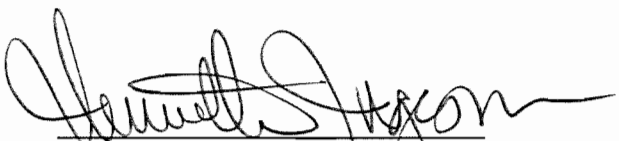
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of May, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

DIANE WALKER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



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KKJ/pm