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Vanzant v. State Appellant's Brief Dckt. 44269

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRADLEY VANZANT,)	
)	
Petitioner-Appellant,)	S.Ct. No. 44269
vs.)	Ada Co. CV-PC-15-17561
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho in and for the County of Ada

HONORABLE SAMUEL HOAGLAND,
District Judge

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

Bradley Vanzant appeals from the summary dismissal of his petition for post-conviction relief. R 107-111. This Court should grant relief because the district court erred in denying his motion for appointment of conflict free counsel.

B. *Procedural History and Statement of Facts*

Mr. Vanzant filed a *pro se* petition for post-conviction relief following a conviction for possession of a controlled substance. He raised four claims: 1) his plea was not knowingly, intelligently, and voluntarily entered; 2) ineffective assistance of trial counsel; 3) ineffective assistance of counsel as a result of the policies and practices of the Ada County Public Defender's Office; and 4) ineffective assistance of appellate counsel. R 4-6.

The district court appointed counsel. R 39. And, substitute counsel for the public defender filed a notice of appearance. R 44-45.

The state filed an answer and motion for summary dismissal. R 46-49. Counsel filed an opposition to the state's motion. R 76-82.

At the close of the hearing on the state's motion for summary dismissal, the district court gave Mr. Vanzant 20 days to file an affidavit and/or briefs regarding two of the claims of ineffective assistance of counsel - specifically the failure to file a motion to suppress and the policy and practice of the public defender's office. R 83; Tr. p. 13, ln. 15-p. 15, ln. 2.

Twenty days passed and counsel did not file any affidavits or briefs. R 2.

Mr. Vanzant then filed a *pro se* motion for conflict free counsel. R 84-87. He alleged that counsel had taken the position of the state and refused to assist him. R 85.

The district court did not hold any sort of hearing on or make any inquiry into Mr. Vanzant's motion. R 2-3. Instead, the court denied Mr. Vanzant's motion in a footnote in its order granting summary disposition. R 89. The court wrote:

Petitioner filed a 'Motion for Conflict Free Counsel' on May 20, 2016, which was 23 days after the hearing [on the motion for summary dismissal]. Petitioner raises complaints about his court appointed post-conviction counsel and asserts that his post-conviction counsel has a conflict of interest, because he has 'sided' with the prosecuting attorney regarding various issues Petitioner raised in his Petitioner (sic) for Post-Conviction Relief. '[T]here is no constitutionally protected right to the effective assistance of counsel in post-conviction relief proceedings.' *Schwartz v. State*, 145 Idaho 186, 189, 177 P.3d 400, 403, n. 3 (Ct. App. 2008). 'Thus, such an allegation, in and of itself, is not among the permissible grounds for post-conviction relief.' *Id.* Accordingly, Petitioner's 'Motion for Conflict Free Counsel,' is DENIED.

R 89.

The court entered a final judgment. R 105-106. And, this appeal timely follows. R 107-111.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Mr. Vanzant's motion for conflict free counsel without holding a hearing on or conducting any inquiry into the basis for his motion?

2. Did the district court err in denying Mr. Vanzant's motion for conflict free counsel on the basis that Mr. Vanzant did not have a right to effective assistance of

counsel?

3. Did the record before the district court support its denial of Mr. Vanzant's motion for conflict free counsel?

IV. ARGUMENT

A. The District Court Erred in Denying Mr. Vanzant's Motion for Conflict Free Counsel Without Holding a Hearing or Otherwise Conducting Any Inquiry into the Basis for his Motion.

The state and federal constitutions guarantee due process. United States Const. Amend. 14; Idaho Const. Art. I, § 13. In this case, the district court violated Mr. Vanzant's due process rights.

When a litigant claims that the court violated his or her rights to due process, the appellate court defers to the trial court's findings of fact, if supported by substantial evidence. *Rios-Lopez v. State*, 144 Idaho 340, 342, 160 P.3d 1275, 1277 (Ct. App. 2007), citing *State v. Smith*, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). However, the appellate court freely reviews the application of constitutional principles to those facts found. *Id.*

To determine whether state action has violated procedural due process, the appellate court considers three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the existing procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Rios-Lopez, supra*, citing *Matthews*

v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976); *Aeschliman v. State*, 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999).

Pursuant to I.C. § 19-4904, a trial court should appoint counsel if a post-conviction petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim. *Swader v. State*, 143 Idaho 651, 655, 152 P.3d 12, 16 (2007).

In this case, the district court appointed counsel for Mr. Vanzant in accord with this requirement. R 39.

Idaho Code § 19-855 provides that no person may be given the primary responsibility of representing an indigent person unless licensed to practice law in Idaho and otherwise competent to counsel and defend a person charged with a crime.

In this case, the private issue at stake is Mr. Vanzant's interest in adequately presenting his claims in his original petition for post-conviction relief. The district court made an implicit factual finding that the action was non-frivolous when it appointed counsel for Mr. Vanzant. *Swader v. State, supra*. Mr. Vanzant's interest thus includes enforcement of his statutory right to representation under I.C. § 19-4904. Mr. Vanzant also has an independent strong interest in adequately presenting all of his post-conviction claims in his original petition. Whatever meritorious claims he has will be lost to state review and possibly federal review if he does not adequately raise them in his original post-conviction petition. *Murphy v.*

State, 156 Idaho 389, 395, 327 P.3d 365, 371 (2014), holding that ineffective assistance of counsel in the original post-conviction proceeding is not a sufficient reason for filing a successive petition.

The second factor to be considered is the risk of an erroneous deprivation of Mr. Vanzant's interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. In this case, unlike *Rios-Lopez* where the petitioner only alleged that counsel had not contacted him, Mr. Vanzant alleged a conflict of interest on the part of counsel. This allegation, if well-founded, would disqualify his appointed attorney from acting in the case. See IRPC 1.7(a) stating, ". . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."; I.C. § 19-855 stating that no person may be given the primary responsibility of representing an indigent person unless he/she is licensed and otherwise competent to counsel and defend. If the district court erred in its determination of whether there was a conflict, it deprived Mr. Vanzant completely of his statutory right to counsel and of his interest in having his claims properly raised in post-conviction.

The risk of this deprivation was great because the court completely failed to hold a hearing or make any inquiry into the validity of Mr. Vanzant's allegations of a conflict. *State v. Bias*, 157 Idaho 895, 898, 341 P.3d 1264, 1267 (Ct. App. 2014), *rev. denied* (2015) (some inquiry into a motion for substitute counsel may be guaranteed by procedural due process); *Rio-Lopez v. State*, 144 Idaho at 342, 160 P.3d at 1276

(Ct. App. 2007) (right to inquiry cases discussed as persuasive authority).

Furthermore, the probable value of additional procedural safeguards is high, both to Mr. Vanzant and to the state. For Mr. Vanzant, there is the value of assurance of conflict-free counsel. For the state, there is the societal value of fair and just proceedings and the economic value of foreclosing later federal claims that would otherwise be procedurally defaulted. *See, Martinez v. Ryan*, ___ U.S. ___, ___, 132 S.Ct. 1309, 1315 (2012), holding that inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. There can be no more inadequate assistance of counsel at an initial review collateral proceeding than assistance of counsel who is laboring under a conflict of interest. The simple expedient of holding a hearing or making an inquiry upon a claim of conflicted counsel offers great value to all parties to the post-conviction proceedings.

Finally, the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail militate in favor of requiring a hearing or at least an inquiry upon a claim of conflicted counsel. A 10-minute hearing would be of minimal fiscal and administrative burden and would ultimately avoid both unfair procedures and foreclose further federal litigation which carries its own significant expense for the state. *State v. Lippert*, 145 Idaho 586, 596, 181 P.3d 512, 522 (Ct. App. 2007) (an adequate inquiry requires the court to make some reasonable non-suggestive efforts to determine the nature of the complaints and to apprise itself of the facts necessary

to determine whether the relationship with appointed counsel has deteriorated to the point that sound discretion requires substitution; even if the judge suspects the requests are disingenuous and designed solely to manipulate the judicial process and to delay, perfunctory questioning is not sufficient).

The failure of the district court to allow a hearing or at least make some sort of inquiry into Mr. Vanzant's assertion that his counsel was laboring under a conflict violated the constitutional guarantee of due process. Thus, the district court's grant of summary dismissal must be reversed and the matter remanded for a proper determination after a hearing or further inquiry of Mr. Vanzant's motion and then, if new counsel is appointed, for a re-hearing of the motion for summary dismissal. *See, State v. Lippert*, 145 Idaho at 597, 181 P.3d at 523 (proper remedy is to remand for a hearing on motion for new counsel and if the motion is well-founded the district court must appoint counsel and grant a new trial).

B. The District Court Erred in Denying Mr. Vanzant's Motion for New Counsel on the Basis that he did not have a Right to Effective Assistance of Counsel

The district court denied Mr. Vanzant's motion for conflict free counsel on the basis that he had no right to effective assistance of counsel in post-conviction. In denying the motion on this basis, the district court confused conflict-free counsel, which was statutorily required, with effective counsel. This was error.

As noted above, I.C. § 19-4904 requires the appointment of counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further

investigation into the claim. *Swader v. State, supra*.

While there is no guarantee that the counsel appointed will be effective, there is a guarantee that the counsel appointed will be a person licensed to practice law in Idaho and otherwise competent to counsel and defend. I.C. § 19-855. Counsel laboring under a conflict of interest is not “otherwise competent to counsel and defend.” *Id.* IRPC 1.7(a) prohibits a lawyer from representing a client if “the representation involves a concurrent conflict of interest.” Thus, in a situation where there is a conflict of interest, it is not a question of counsel being ineffective, it is a question of that particular attorney being ineligible to be appointed at all. These are two different questions and the district court erred in determining that Mr. Vanzant’s motion for conflict-free counsel should have been denied because he had no right to effective assistance of counsel.¹

On this basis also, the order denying Mr. Vanzant’s motion should be reversed and the matter remanded for reconsideration upon a proper hearing or inquiry into the alleged conflict and then appropriate reconsideration of the grant of summary disposition if new counsel is appointed.

¹ In fact, if the district court’s analysis is correct then the court could appoint anyone, lawyer or not, as counsel in a post-conviction case because there would be no requirement that the person appointed be eligible to appear. The appointment of the courthouse janitor to represent a post-conviction petitioner is clearly not within the intent of the legislature in I.C. § 19-4904. Nor is it within any reasonable definition of due process. Nor is it in anyone’s best interests, neither the state’s nor the petitioner’s.

C. The Record Before the Court did not Support the Denial of the Motion for Appointment of Conflict Free Counsel.

Mr. Vanzant alleged in his motion for conflict-free counsel that his attorney had made it absolutely clear that he would not raise any claim of ineffective assistance of counsel or file any type of document that calls into question the state or a police officer. R 84. He further alleged a conflict because counsel had taken the position of a prosecutor and was defending the case as if he was the prosecutor. R 85. Neither the state nor counsel made any allegation that counsel had not taken the position of the state and was not defending the case as if he was working for the state.

This record, as minimal as it is, does not support the conclusion that counsel was not laboring under a conflict and thus did not support the denial of the motion for appointment of conflict free counsel. *Wohrie v. Kootenai County*, 147 Idaho 267, 272, 207 P.3d 998, 1003 (2009) (error to grant motion not supported by record). *See also, Rios-Lopez v. State*, 144 Idaho at 342, 160 P.3d at 1277, ftnt. 1, stating that if the appellate provides no argument or authority on the merits of the district court's denial of his motion, he has waived a challenge to the ruling on the merits. Thus, this Court cannot simply affirm the denial of the motion on the basis that the claim of a conflict was not properly raised below or has been abandoned on appeal. Rather, this Court must either find that the motion was well-founded and must be granted, or in the alternative, that the district court must conduct a hearing or other inquiry into the basis of the motion and upon that further developed record make a

ruling in accord with I.C. §§ 19-4904 and 19-855. *State v. Lippert, supra.*

V. CONCLUSION

The district court erred in denying Mr. Vanzant's motion for conflict free counsel. This Court should reverse the denial and remand for further proceedings.

Respectfully submitted this 12th day of October, 2016.

/s/Deborah Whipple _____

Deborah Whipple

Attorney for Bradley Vanzant

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 12th day of October, 2016.

/s/Deborah Whipple _____

Deborah Whipple