3-10-2017

Fagundes v. State Respondent's Brief Dckt. 44374

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALEXANDER SANTOS FAGUNDES,	)	
	)	**No. 44374**
Petitioner-Appellant,	)	
	)	**Twin Falls County Case No.**
v.	)	**CV-42-16-1934**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-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

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STATEMENT OF THE CASE

Nature of the Case

Alexander Santos Fagundes appeals from the district court's order summarily dismissing his petition for post-conviction relief. On appeal, Fagundes argues the district court abused its discretion when it denied his motion for appointment of post-conviction counsel.

Statement of Facts and Course of Proceedings

Fagundes pled guilty to felony driving under the influence. (R., pp. 4-5.) The district court sentenced Fagundes to eight years with two years fixed. (R., p. 15.) Fagundes filed a Petition and Affidavit for Post Conviction Relief and a Motion and Affidavit in Support for Appointment of Counsel. (R., pp. 4-14.) In his petition, Fagundes claimed "(a) Ineffective Assistance of Counsel (b) Prosecutorial Misconduct and Statements of Counsel [and] (c) Sufficiency of the Evidence." (R., p. 5.) Based upon these claims Fagundes sought a reduction of his sentence. (R., pp. 6-7.) Specifically, Fagundes sought to have his eight year sentence reduced to a six year sentence (R., p. 6.)

The district court filed a Notice of Intent to Dismiss Petition. (R., pp. 15 - 17.) The district court first found that Fagundes' claims were frivolous and denied his application for court appointed post-conviction counsel. (R., p. 15.) The district court then explained that Fagundes' allegations were "purely conclusory and for that reason alone have no merit thus warranting summary dismissal of the petition." (R., p. 16.) Finally, the district court also found that even if Fagundes' allegations were true, he would not be entitled to any relief,

because he only sought to reduce his sentence and a post-conviction action is not a substitute for a Rule 35 motion for reduction of sentence. (Id.) The district court informed Fagundes that he had 20 days to respond to the notice of dismissal. (R., p. 17.)

Fagundes did not respond to the district court's notice of summary dismissal. (See generally R.) Since he did not respond, the district court entered judgment and dismissed Fagundes' Petition for Post-Conviction Relief. (R., pp. 22-23.) Fagundes filed a timely Notice of Appeal. (R., pp. 31-34.)

ISSUE

Fagundes states the issue on appeal as:

> Whether the district court erred by denying Mr. Fagundes' motion for appointment of post-conviction counsel.

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Fagundes failed to show the district court abused its discretion when it denied Fagundes' request for appointment of post-conviction counsel?

ARGUMENT

The District Court Did Not Abuse Its Discretion When It Denied Fagundes' Motion For Appointment Of Post-Conviction Counsel

A. Introduction

The district court found that Fagundes' claims were frivolous and denied his request for appointment of post-conviction counsel. (See R., pp. 15-17.) On appeal, Fagundes argues the district court applied the wrong standard when it denied his request to appoint post-conviction counsel. (See Appellant's brief, p. 4.) Fagundes is incorrect; it is proper for a district court to consider whether a claim is frivolous when it decides whether to appoint post-conviction counsel. Further, even if the district court applied an incorrect standard, the error was not prejudicial because application of the correct standard shows Fagundes is not entitled to the appointment of post-conviction counsel. The district court properly denied Fagundes' request to appoint counsel and properly dismissed his post-conviction petition.

B. Standard Of Review

The decision whether to grant or deny a request for court-appointed counsel in a post-conviction action is within the discretion of the district court. Plant v. State, 143 Idaho 758, 760–61, 152 P.3d 629, 631–32 (Ct. App. 2006) (citing Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); Fox v. State, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct.App.1997).)

C. Fagundes Has Failed To Show The District Court Abused Its Discretion When It Denied His Request For Court Appointed Post-Conviction Counsel

"A request for appointment of counsel in a post-conviction proceeding is governed by I.C. § 19-4904." Murphy v. State, 156 Idaho 389, 392-393, 327 P.3d 365, 368-369 (2014). The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Id. (citing Eby v. State, 148 Idaho 731, 738, 228 P.3d 998, 1005 (2010); Charboneau, 140 Idaho at 792, 102 P.3d at 1111). If the petitioner qualifies financially and "alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf," the court must appoint post-conviction counsel to assist the petitioner in developing his or her claims. Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. If, on the other hand, the claims in the petition are so patently frivolous that there appears no possibility that they could be developed into a viable claim even with the assistance of counsel and further investigation, the court may deny the request for counsel and proceed with the usual procedure for dismissing meritless post-conviction petitions. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007).

The district court denied Fagundes' request for the appointment of post-conviction counsel based on its finding that Fagundes' petition was "frivolous and not one that would be filed by a person who would retain counsel." (R., p .15.) Relying on Swader, supra, Fagundes argues the court erred by using a "frivolous" standard, "rather than evaluating whether there was a possibility of a

valid claim." (See Appellant's brief, p. 4 (citing Swader, 143 Idaho at 653-654, 152 P.3d at 14-15).) Fagundes' argument fails. The Court in Swader held, a "trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims." Swader, 143 Idaho at 655, 152 P.3d at 16. By finding Fagundes' petition "frivolous and not one that would be filed by a person who would retain counsel" (R., p. 15 (emphasis added)), the district court necessarily found the allegations in the petition did not present even the possibility of a valid claim.

Further, even if the district court expressed the incorrect standard in its Notice of Intent to Dismiss Petition, the error was not prejudicial, as the claims in Fagundes' petition were so patently frivolous that, even with the assistance of counsel they could not be developed into a viable claim. See Swader, 143 Idaho at 653, 152 P.3d at 14.

Fagundes argues that his petition raised the possibility of a valid ineffective assistance of counsel claim. (See Appellant's brief, pp. 5-8.) To establish a valid claim for ineffective assistance of counsel, the petitioner must show both deficient performance by the attorney and prejudice to the petitioner from the deficiency. Plant, 143 Idaho at 761-762, 152 P.3d at 632-633 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988)). Where the petitioner was convicted based upon a guilty plea, the claimant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

Fagundes argues he raised the possibility of a valid ineffective assistance of counsel claim because he claimed his trial counsel did not inform him of the consequences of his guilty plea and, second, that his trial counsel did not interview witnesses. (See Appellant's brief., pp. 5-8.) A claim that trial counsel failed to inform the petitioner regarding the consequences of pleading guilty is theoretically a viable ineffective assistance of counsel claim. See Hayes v. State, 146 Idaho 353, 356, 195 P.3d 712, 715 (Ct. App. 2008). However, the allegations in Fagundes' petition and affidavit are not sufficient to affirmatively show facts requiring the appointment of counsel. The entirety of Fagundes' allegation regarding the consequences of his guilty plea consists of the single sentence, "Defense counsel, failed to inform defendant of the [sic] entering of a guilty plea, consequences[.]" (See R., p. 6.) Fagundes' allegation is too vague. The district court gave Fagundes notice that his allegations were insufficient, but Fagundes made no effort to cure the deficiencies in his petition. (See R., pp. 15-17.) Without more, there is no basis to find the possibility of a valid claim.

The same is true for Fagundes' second claim. Fagundes argues he raised the possibility of a valid claim that his trial counsel failed to interview witnesses. (See Appellant's brief, pp. 6-8.) Failure to investigate and interview witnesses is theoretically a basis for a valid ineffective assistance of counsel claim. See Mitchell v. State, 132 Idaho 274, 279–80, 971 P.2d 727, 732–33 (1998). However, again, Fagundes has failed to show facts supporting the

possibility of a valid claim because his allegations are too vague. Fagundes' allegations that his trial counsel had not interviewed "possible witnesses" for either the state or defense and that he was only sleeping are not sufficient to show the possibility of a valid claim that trial counsel "failed to investigate potentially-exculpatory evidence." (See Appellant's brief, p. 6.) There is nothing in the petition or affidavit that explains who these "possible witnesses" are, or what they would have said. Sleeping in a car is not a defense to DUI without a showing that Fagundes was not in the driver's position and the motor not running. As noted above, the district court gave Fagundes the opportunity to allege more facts from which the court could determine whether there was a potentially viable claim, but Fagundes failed to do so. The district court is not required to appoint post-conviction counsel to search the record for non-frivolous claims. See Swader, 143 Idaho at 654, 152 P.3d at 15; Murphy v. State, 156 Idaho 389, 393, 327 P.3d 365, 369 (2014).

The Idaho Court of Appeals decision in Plant is instructive. 143 Idaho at 761-762, 152 P.3d at 632-633. Plant pled guilty to trafficking marijuana. Id. at 760, 152 P.3d at 631. Plant filed a petition for post-conviction relief alleging that "his attorney talked [him] into pleading guilty without thoroughly investigating [his] case." Id. at 762, 152 P.3d at 633. The district court found that this allegation was too vague to suggest even the possibility of a meritorious claim. Id.

> In Plant's petition, he alleged that his attorney "talked [him] into pleading guilty without thoroughly investigating [his] case." The failure of an attorney to properly investigate a case may constitute a deficiency in representation. Nevertheless, we agree with the district court's initial determination that this allegation in Plant's petition was insufficient to require appointment of counsel. Plant's

> complaint that his lawyer did not thoroughly investigate his case is simply too vague to suggest even the possibility of a meritorious claim. In particular, it does not identify any type of investigation that should have been done nor suggest the existence of any information or evidence helpful to the defense that a more thorough investigation might have uncovered.

Id. (internal citation omitted). The same is true here. Fagundes' allegations are too vague to suggest even the possibility of a meritorious claim.

However, in Plant, after the district court gave Plant notice of its intent to dismiss his petition, Plant responded and "fleshed" out his claim. Id. The Court of Appeals held that the additional allegations "fleshed" out by Plant were sufficient to raise at least the possibility of a valid claim. See id. Here, the district court provided Fagundes with a notice of intent to dismiss, but Fagundes did not respond and did not "flesh" out any of his claims.

Even if Fagundes' allegation could somehow be developed into a potentially viable ineffective assistance of counsel claim, the relief sought by Fagundes makes his petition patently frivolous. Fagundes only sought to have his sentence reduced:

> 12. State specifically the relief you seek:
>
> That state, that above Honorable Court reduce the imposed sentence, unified sentence of eight (8) years which is divided at fixed of two (2) years, and determinate of six (6) years, to be changed to a unified sentence of six (6) years, two (2) years fixed, four (4) years indeterminate. Also that a conflict attorney be assigned to represent defendant.

(R., p. 6 (capitalization altered, otherwise verbatim).)

Even if Fagundes was able to prove all of his claims, none of those claims would result in a reduction of his sentence. On appeal, Fagundes argues that

had post-conviction counsel been appointed counsel would have amended the petition to seek appropriate relief. (See Appellant's brief, p. 8.) Fagundes frames this issue in terms of a petitioner not knowing the essential elements of a claim. (See id.) This is backwards. While a pro se petitioner may not know all the elements of a post-conviction claim, a pro se petitioner certainly knows what relief he wants. In addition, when the district court gave Fagundes notice that he was not entitled to this type of relief, Fagundes failed to change his request for relief.

The relief that he would obtain by his ineffective assistance of counsel claim would be a withdrawal of his guilty plea. This would not result in a reduction of his sentence. The district court was correct when it determined that Fagundes was attempting to use post-conviction proceedings as a substitute for a timely Rule 35 Motion. (See R., p. 16.) A claim of excessive sentencing must be made by a motion under I.C.R. 35, and is not properly brought in a post-conviction proceeding. See Ramirez v. State, 113 Idaho 87, 741 P.2d 374 (Ct. App. 1987); Williams v. State, 113 Idaho 685, 687, 747 P.2d 94, 96 (Ct. App. 1987).

In his brief on appeal, Fagundes relies heavily upon Swader, supra; however, Swader is distinguishable. In Swader the pro se petitioner provided facts detailing the potential ineffective assistance of counsel claim. Swader, 143 Idaho at 652-653, 152 P.3d at 13-14. The Idaho Supreme Court explained the detail provided by Swader:

> On January 14, 2005, while still incarcerated at the Pocatello Women's Correctional Center, Swader filed a *pro se* petition for

> post-conviction relief. She alleged ineffective assistance of counsel and police misconduct as grounds for relief. On the same date, she also filed a motion for appointment of counsel on the ground that she was indigent and unable to afford counsel. The alleged instances of her counsel's ineffectiveness were the following: allowing a jailor's wife to sit as a juror; not seeing Swader at the jail or accepting her telephone calls; having a heart attack during the second day of trial making it impossible for him to be paying attention; not calling witnesses she wanted to testify about mitigating circumstances; not filing a motion to suppress a bag of pill packages and a .22 caliber rifle given to the police by a private party; not objecting to the admission of the .22 caliber rifle and permitting the bag of pill packages to sit in front of the jury even though it was not admitted into evidence; and not objecting to chemicals admitted into evidence but not tested by the police. The alleged police misconduct was a detective testifying that he did not charge Swader with possession of marijuana. She contends she was so charged.

Id. Then, after the district court gave written notice to dismiss, Swader provided additional information regarding her allegations. Id. at 653, 152 P.3d at 14. The court explained that a petitioner should be given a meaningful opportunity to supplement their claims. Id. at 653-654, 152 P.3d at 14-15 (citing Brown v. State, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001)).

Here, unlike Swader, Fagundes did not provide detail in his petition. He merely made vague and conclusory allegations. Further, unlike Swader, Fagundes did not supplement his petition when the district court explained that his allegations were merely conclusory and he was not entitled to the relief he sought. (See R., pp. 15-17.) Despite receiving notice that his claims were conclusory and he could not use a post-conviction action to reduce his sentence, Fagundes did not respond.

Swader is distinguishable and supports the district court's conclusion in this case. The district court did not abuse its discretion when it denied

Fagundes' request for appointment of post-conviction counsel and dismissed the petition.

CONCLUSION

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

DATED this 10th day of March, 2017.

_/s/ Ted S. Tollefson_____
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

__/s/ Ted S. Tollefson_____
TED S. TOLLEFSON
Deputy Attorney General

TST/dd