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Cole v. State Appellant's Brief Dckt. 44952

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TOMMY D. COLE,)	
)	
Petitioner-Appellant,)	NO. 44952
)	
v.)	Idaho Co. CV-PC-2016-44589
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF IDAHO**

**HONORABLE GREGORY FITZMAURICE
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the summary dismissal of his petition for post conviction relief asserting the court erred when it did not consider his evidence.

Statement of the Facts and Course of Proceedings

The Idaho Court of Appeals in its unpublished opinion from the direct appeal, *State v. Cole*, docket 42149 (Idaho Ct. Appeals 2/2/2012 unpublished) explained the facts as follows:

The state charged Cole with two counts of aggravated assault and one count of operating a vehicle without the owners consent following a confrontation between Cole, his ex-wife, and another male outside of a bar. Evidence at trial showed that Cole observed his ex-wife and the male inside a bar. When the male and female exited the bar and as the female was getting into her vehicle, Cole emerged from the backseat of the vehicle, confronted the female with a firearm, and threatened to kill both the female and the male. The female retreated back into the bar. Cole followed her, continued to threaten her, and pointed the firearm at her. Subsequently, the male came to the front door of the bar and got Cole's attention. Cole chased the male back outside and pointed the firearm at him. The female hid inside the bar with the bartender and contacted the police. Before the police arrived, Cole left the scene in the female's vehicle, which was later found abandoned. Cole was arrested three days later.

Prior to trial, the state filed notice of its intent to introduce certain evidence at trial. Specifically, the State gave notice that it intended to offer statements allegedly made by Cole to the female over the telephone the day following the incident at the bar. Cole objected, arguing that the admission of the alleged statements was impermissible pursuant to Idaho Rule of Evidence 404(b). After a hearing, the district court ruled that the state could offer the phone statements into evidence. At trial, the female offered testimony concerning

these phone statements. A jury found Cole guilty of the two counts of aggravated assault, I.C. §§ 18-901(b) and 18-905(a), and operating a motor vehicle without the owner's consent, I.C. § 49-227. Cole appeals, challenging the admission of Cole's phone statements.

State v. Cole, p. 2.

The Court of Appeals held that the admission of the phone statements were error, albeit harmless, and affirmed the convictions. *Id.*, p. 8.

Mr. Cole timely brought a pro se petition for post conviction relief and affidavit in support. (R. p. 5-11.) Mr. Cole requested counsel be appointed. (R. p. 12-14.)

The state filed an answer and a separate motion for summary dismissal. (R. p. 15-17; 19-20.) The grounds for the motion and its support follows in full:

The State bases said motion on grounds that:

1. The allegations of the petition for post-conviction relief are bare and conclusory, and are not supported by specific facts or evidence sufficient to raise a genuine issue of material fact.
2. The Petitioner is not entitled to post-conviction relief and no purpose would be served by further proceedings.

In making its motion, the State relies on the record and pleadings. The State further moves that this Court take judicial notice of all its records and pleadings in *State v. Tommy D. Cole*, Idaho County Case No. CR 2012-53507, with respect to the motion.

State's Motion for Summary Dismissal of Post-conviction Petition, p. 1.¹ (R. p. 19.)

Next, the court appointed counsel. (R. p. 21.) Appointed counsel filed an opposition to the state's motion for summary dismissal with exhibits in support. (R. p. 32-46.) Appointed counsel also filed various affidavits at Petitioner's request. (R. p. 50-54.)

Then, Petitioner's counsel was allowed to withdraw as counsel (after Petitioner move for substitute counsel) due to a break down in the attorney client relationship and new counsel was appointed. (R. p. 47-49, 57, 59, 61.)

New counsel filed nothing (nor did the state). (R. p. 70.) A hearing was held on the state's motion for summary dismissal and the court took the matter under advisement. (R. p. 68.)

The court granted the state's motion and summarily dismissed the petition in a written decision. (R. p. 69-73.) A separate judgment was filed. (R. p. 74.)

Appellant timely appeals. (R. p. 76.)

¹ The court does not appear to have ever taken judicial notice of the criminal case.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST CONVICTION RELIEF PETITION BECAUSE IT FAILED TO CONSIDER OR ADDRESS PETITIONER'S EVIDENCE

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most

favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

More specifically as to allegations of ineffective assistance of counsel based on tactical decisions, the Court of Appeals explained in *Stevens v. State*, 156 Idaho 396 (Ct. App. 2013):

This Court has long adhered to the proposition that tactical or strategic decisions of counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. There is a strong

presumption that counsel's performance fell within the wide range of professional assistance.

Id., p. 385-386 (internal citations omitted).

C. The Claims and the Court's Rulings

The court's rulings in its Memorandum Opinion State's Motion for Summary Dismissal (hereinafter Opinion) are as follows:

Cole had three different attorneys during the course of this proceeding. He alleges that all of them were ineffective. He alleges that his first attorney disclosed information to the prosecutor. He states that he gave his trial attorney a list of 30 possible witnesses that would have undermined the integrity of the victims. Counsel did not call any of them to testify, and, provided no defense. He also alleges that the evidence presented as part of his motion for a new trial and Rule 35 motion should have been discovered prior to trial.

In support of his petition, Cole presents several affidavits. His affidavit contends that although this matter was self-defense, his attorney did not offer that as a defense. However, Cole offers no proof that he believed he was in imminent danger of death or bodily [sic] or that he believed his assault of his ex-wife and friend were necessary to save him from the danger presented. *See ICJI 1517*. The Court is not required to accept conclusory allegations unsupported by admissible evidence of the petitioner's conclusions of law. *Payne, supra*.

He also refers to a list of witnesses that he believes would have been useful to prove his innocence if they had been called, but does not elaborate on how their testimony would have changed the outcome of the trial.

The notarized statement of Barbra O'Nash, as she points out, is heresay [sic] and not admissible. The affidavit of Delbert Wadsworth appears to have been made in support of Cole's civil matter with the Reids, not his criminal conviction. It makes no reference to the criminal incident. The statements both discuss incidents involving the victims and Cole other than the one charged in this matter and would have been inadmissible as not being relevant.

Cole has presented no admissible evidence which shows how he was prejudiced by his counsel not calling witnesses in his defense or that he actually had a self-defense claim. The Court does not have to determine if counsel was ineffective if there is not a showing of prejudice. *State v. Shackelford*, 150 355, 383, 247 P.3d 582, 610 (2010), *citing Strickland*, 466 U.S. at 697. The Court finds that Cole has not shown how his counsel's actions prejudiced the outcome of the trial.

Cole's petition also refers to his counsel as being ineffective because there was no in court I.D. He provides no evidence or elaboration on that claim so that the Court can even determine what he is referring to. This claim will not be considered.

Opinion, p. 3-4. (R. p. 71-72.)

D. The court erred by ignoring Petitioner's evidence

Oddly, while the court addresses some of the evidence in support of the petition, it simply ignores other evidence provided with Petitioner's opposition to the state's motion for summary dismissal and follow-up affidavits.

In the opposition, appointed counsel explained there were attached four items which supported Mr. Cole's defense. First is Nicole Lowe's (ex-wife/victim) request to modify or dismiss no contact order stating she enough time has passed and they have moved on and she is not afraid of him. (R. p. 38.) The second is Nicole Lowe's later trial testimony inconsistently stating "I'm still scared" of him. (R. p. 41.)

The court did not acknowledge or address this in any fashion. It did address the hearsay statement of Barbara O'Nash and said it addressed a different incident, apparently referring to Mr. Cole's home

and shop burning down, and so would not have been admissible in the criminal case because it was not relevant. (R. p. 54.) But the statement also did address Ms. Nash's daughter-in-law Bessie who was at the bar that night and disputed the victim's version of events. But Bessie was afraid of what would happen to her if she testified for Mr. Cole.² Ms. O'Nash also stated that Nicole Lowe told her that she didn't want to testify against Mr. Cole but that Sean Reid (other victim) threatened to leave her if she did not testify. (R. p. 54.)

The next statement (unaddressed by the court) was a typewritten "transcript" of a statement of Many Doherty. (R. p. 44.) It stated among things that Nicole and Sean tormented Mr. Cole whenever he came to town or drove past the bar. It also stated she witnessed an incident when Sean pointed a gun at Mr. Cole and pretended to shoot him. (R. p. 44.)

The court did address the next statement, the affidavit of Delbert Wadsworth. He said that Mr. Cole had dropped by his house one day and Sean Reid pulled up, threw a beer can at Mr. Cole and yelled at him "I'm going to f*ucking kill you." (R. p. 52.) Mr. Wadsworth also related that on another occasion he saw Mr. Cole, who appeared to be in pain, and told him a relative of Sean Reid just rammed his car. (R. p. 53.) The court's comment is the affidavit appears to be filed in the civil case between Mr. Cole and the Reids and was a different incident and so it would not have been admissible in the criminal case because it was not relevant.

² The fourth item, Nicole Lowe's statement to police, confirmed Bessie was there. (R. 45.)

In short, the court ignored some evidence and gave short shrift to the rest. For example, Mr. Cole was claiming it was a case of self defense. Thus, the court was wrong when it ruled that the evidence of other incidents involving Sean Reid would be inadmissible because they were not relevant. Rather, other incidents regarding him would be very relevant.

The pertinent part of the pattern self defense jury instruction provides as follows:

In deciding upon the reasonableness of the defendant's beliefs, you should determine what an ordinary and reasonable person might have concluded from all the facts and circumstances which the evidence shows existed at that time, and not with the benefit of hindsight.

ICJI 1517.

Thus, evidence of the victim threatening to shoot Mr. Cole, as well as the victim having pointed a gun at him on another occasion, would be relevant to Mr. Cole's beliefs that he was in imminent danger and thus admissible. The same is true of a relative of the victim ramming Mr. Cole's car (for the purposes of summary dismissal this statement appearing in Delbert Wadsworth's affidavit could be considered an excited utterance).

Likewise, what may otherwise be considered hearsay statements could be admissible as evidence of the reputation of the victim to be quarrelsome. ICJI 1520.

Therefore, since the court erroneously disregarded some of the evidence provided by Mr. Cole and did not even consider additional

evidence, the court erred by summarily dismissing the petition.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's order summarily dismissing his petition for post-conviction relief be reversed and remanded to the district court.

DATED this 12th day of September, 2017.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

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):

Idaho State Attorney General
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Dated and certified this 12th day of September, 2017.

/s/ Greg S. Silvey
Greg S. Silvey