3-13-2018

Bennett v. State Respondent's Brief Dckt. 44993

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSHUA THOMAS BENNETT,	)	
	)	**No. 44993**
Petitioner-Appellant,	)	
	)	**Bonneville County Case No.**
v.	)	**CV-2015-5524**
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature Of The Case

Joshua Thomas Bennett appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

Bennett was charged with delivery of a controlled substance in CR-2012-16081. (See R., pp.120-23.) Following a jury trial, where a confidential informant testified, Bennett was convicted. (R., pp.638-39.)[1]

Bennett filed a petition for post-conviction relief stating two claims: 1) "The district court erred & violated Mr. Bennett's Sixth Amendment rights when it refused to allow him to confront accuser & sustained the [State's] objection during cross examination"; and 2) "ineffective assistance of counsel." (R., p.7 (capitalization altered).) In an affidavit supporting the petition, Bennett alleged, among other things, that:

> [During] our cross-examination with the [confidential informant] we asked about his drug history that the prosecution asked about and was shut down by the prosecution. And [we] were not allowed to question further.

(R., p.26.)

[1] Bennett filed a direct appeal from the judgment of conviction where he appeared to raise the same claim at issue in the instant appeal. In State v. Bennett, Bennett argued that "the limitations placed upon his cross-examination of the informant were inconsistent" with the Idaho Rules of Evidence "and violated the Sixth Amendment right to confront witnesses." No. 41355, 2015 WL 877943 at *2 (Idaho Ct. App., Mar. 3, 2015). In an unpublished decision, the Court of Appeals concluded that Bennett failed to show fundamental error. Id. at * 3-4.

The state filed an Answer (R., pp.37-38) and a Motion for Summary Dismissal "request[ing] summary dismissal of Petitioner's petition in its entirety" (R., pp.40-44). The state, "synthesiz[ing]" Bennett's arguments, specifically addressed a claim that Bennett's trial attorney was ineffective for not presenting a plea offer to Bennett, and a claim that "Mr. Meikle was ineffective at trial because he did not object at times that [Bennett] felt like he should have objected, did not call a witness, and advised [Bennett] not to testify." (R., p.40.) The state did not specifically address Bennett's Confrontation Clause claim (see R., pp.40-44); however, the state argued as a general matter that "Petitioner's statements are unsupported, inadmissible, and conclusory," and that Bennett accordingly "failed to meet his burden and this petition should be dismissed." (R., p.43.)

The district court held a hearing on the state's Motion for Summary Dismissal. (2/2/17 Tr.) At the hearing, the state argued that "[w]hen you boil this down, there just simply is not the evidence to proceed with this claim." (2/2/17 Tr., p.4, Ls.21-22.) Bennett's counsel responded that "my argument, legally, simply, is that [Bennett] does not have to produce the actual admissible evidence. He just has to point to the existence of potentially admissible evidence." (2/2/17 Tr., p.13, Ls.8-11.) Neither party specifically addressed Bennet's Confrontation Clause claim. (See generally, 2/2/17 Tr.)

Ruling on the state's motion, the district court made the following findings:

> THE COURT: All right. Well, first of all—I mean, this is Mr. Bennett's petition. If he's not going to cooperate in the prosecution of his petition, I mean, that's the price he has to pay. And he's certainly under a substantial obligation to timely prosecute this matter, to participate with counsel, to assist in the prosecution of the petition. There's no real indication that he has done that. And so that's—that falls on him. And his neglect in doing that is not a basis for any further continuances.

> Second, looking at, you know, motions for summary dismissal of a post-conviction case, a post-conviction clearly requires more than just notice of pleadings. This is not your typical—it's a civil action but not your typical civil action. A notice of pleading is insufficient. A petition is to contain evidence which at least raises an issue about whether a fair trial was denied or counsel was ineffective. And allegations are completely insufficient to do that.
>
> To present a prima facie case, a prima facie case is supposed to be presented at the time the petition is filed. And nothing in the petition really presents any concrete evidence. There's a lot of allegations and suppositions and assumptions and innuendo but no real evidence that there was a violation of the standard applicable to an attorney representing Mr. Bennett and whether any such violation had an effect on the ultimate outcome of the case, which are the [Strickland][2] standards.
>
> So I'm just not seeing the evidence, the petition that would actually support this case going forward and to withstand a motion for summary dismissal. So I am going to grant the motion, and this case will be dismissed.

(2/2/17 Tr., p.15, L.12 – p.16, L.22.) Thereafter, the district court entered an order stating that "Petitioner has failed to provide sufficient evidence to support his claim," and that "[a]ccordingly, Defendant's motion for summary dismissal is granted." (R., p.96). The district court entered a judgment dismissing the petition with prejudice. (R., p.97.)[3]

Bennett timely appealed from the judgment. (R., pp.105-08.)

[2] Strickland v. Washington, 466 U.S. 668 (1984).

[3] Prior to filing the instant appeal, Bennett also filed a motion to reconsider the court's order and judgment dismissing his petition. (R., pp.99-102.) That motion, which was ultimately denied (R., pp.655-59), did not raise the Confrontation Clause claim at issue in this appeal, and the court's denial of the motion has not been challenged on appeal. (See generally R., pp.99-102; see Appellant's brief, p.4, n.2.)

ISSUES

Bennett states the issue on appeal as:

> Did the district court err when it dismissed Mr. Bennett's petition for post-conviction relief, because the court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal?

(Appellant's brief, p.5.)

The state rephrases the issues as:

I. Has Bennett failed to show that the district court erred by dismissing his petition without additional prior notice?

II. Has Bennett failed to show the district court erred by dismissing his petition on the merits?

ARGUMENT

I.
Bennett Has Failed To Show The District Court Erred By Dismissing His Petition Without Additional Prior Notice

A. Introduction

Bennett contends on appeal that "the district court erred when it dismissed his petition for post-conviction relief, because the court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal." (Appellant's brief, p.6.)

This claim fails. The district court dismissed the entirety of the petition, which would include the Confrontation Clause claim, for the same grounds articulated by the state in its motion for summary dismissal: the petition was not supported by sufficient evidence. (Compare R., p.43 with 2/2/17 Tr., p.16, Ls.3-22.) Because the court's grounds for dismissing the petition were not so disparate as to become a *sua sponte* dismissal, the district court did not err by summarily dismissing these claims without additional prior notice.

B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001).

C. Because The District Court At Least Partially Based Its Dismissal Decision On Grounds Already Given By The State, The Court Was Not Required To Give Bennett Any Additional Prior Notice Before Summarily Dismissing The Petition

Petitions for post-conviction relief may be summarily disposed of "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c); see also Kelly v. State, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010). The court may summarily dismiss a post-conviction petition pursuant to the state's motion or on its own initiative. I.C. § 19-4906(b). If the court *sua sponte* dismisses a petition, it must give the petitioner notice of the grounds for dismissal and "an opportunity to reply within 20 days." Id. Where the court grants the state's motion for summary dismissal, the motion itself serves as notice to the petitioner, and no additional notice is required. Baruth v. Gardner, 110 Idaho 534, 715 P.2d 369 (Ct. App. 1986).

A petitioner may not challenge the adequacy of notice in the state's motion for summary dismissal for the first time on appeal. DeRushe v. State, 146 Idaho 599, 602, 200 P.3d 1148, 1151 (2009). "Where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide twenty days notice." Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); see also DeRushe, 146 Idaho at 602, 200 P.3d at 1151 (stating "the court cannot dismiss a claim on a ground not asserted by the State in its motion unless the court gives the twenty-day notice required by Section 19-4906(b)").

Where the district court grants summary dismissal both on grounds asserted in the state's motion and on grounds not asserted in the state's motion, a defendant fails to show that he was deprived of the statutory 20-day notice requirement. See Kelly, 149 Idaho at 523, 236 P.3d at 1283 (finding where district court grants dismissal based "in part" on the grounds set forth in the state's motion "this is sufficient to meet the notice requirements"); see also Workman v. State, 144 Idaho 518, 524, 164 P.3d 798, 804 (2007) (stating "[t]he district court's reasoning for dismissal of Workman's petition is not so different in kind as to transform its decision into a sua sponte dismissal and, therefore, the district court was not required to give 20 days notice of [its] intent to dismiss").

Here, the district court summarily dismissed the petition without providing any notice in addition to the notice already provided by the state's motion for summary dismissal. Doing so was proper because the court's dismissal grounds were not so different from the state's grounds that the court's decision was transformed into a *sua sponte* dismissal; thus, additional pre-dismissal notice was not required. The state argued for dismissal of the petition because, among other things, "*[p]etitioner's statements are unsupported, inadmissible, and conclusory*," and that [i]n light of this, he failed to meet his burden and this petition should be dismissed." (R., p.43 (emphasis added).)

The district court's grounds supporting dismissal were substantially similar to the state's:

> *A petition is to contain evidence which at least raises an issue about whether a fair trial was denied or counsel ineffective. And allegations are completely insufficient to do that.*
>
> To present a prima facie case, a prima facie case is supposed to be presented at the time the petition is filed. *And nothing in the petition really presents any concrete evidence.* There's a lot of allegations and

> suppositions and assumptions and innuendo but no real evidence that there was a violation of the standard applicable to an attorney representing Mr. Bennett and whether any such violation had an effect on the ultimate outcome of the case, which are the [Strickland] standards.
>
> *So I'm just not seeing the evidence, the petition that would actually support this case going forward and to withstand a motion for summary dismissal.* So I am going to grant the motion, and this case will be dismissed.

(2/2/17 Tr., p.16, Ls.3-22 (emphasis added).)

The district court concluded "that Petitioner has failed to provide sufficient evidence to support his claim," and accordingly summarily dismissed his petition. (R., p.96.) Doing so without additional notice was proper, because the district court's decision was based—and was at the very least *partially* based—on the state's grounds for dismissal: Bennett's "statements are unsupported, inadmissible, and conclusory" and therefore insufficient to meet his burden to state a claim. (See R., p.43.)

On appeal, Bennett argues that the "State's motion did not articulate any grounds for dismissal of the Confrontation Clause claim as a separate claim." (Appellant's brief, p.8.) Bennett likewise contends that "[w]hen the district court dismissed Mr. Bennett's post-conviction petition, it did not discuss the Confrontation Clause claim as a separate claim, much less give its contemplated ground for dismissal of that claim." (Appellant's brief, p.9.) As such, he argues, "the district court did not provide Mr. Bennett with any notice of the grounds for dismissal of the Confrontation Clause claim." (Appellant's brief, p.9.)

This argument fails. First, to the extent Bennett complains about the adequacy of the state's motion, with particular regard to the Confrontation Clause claim, he cannot raise that claim for the first time on appeal. The state plainly sought to dismiss the

petition in its entirety (See R., p.43), and the district court dismissed the petition in its entirety (2/2/17 Tr., p.16, Ls.3-22). Bennett sought reconsideration of that decision, but never claimed that the state's motion (or the district court's dismissal) did not sufficiently "articulate any grounds for dismissal of the Confrontation Clause claim as a separate claim." (Compare Appellant's brief, p.8 with R., pp.99-101.) To the extent he argues the state should have provided additional notice with particular regard to the Confrontation Clause claim, he cannot raise that claim for the first time on appeal. State v. Garcia-Rodriguez, 162 Idaho 271, ___, 396 P.3d 700, 704 (2017) ("Issues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court.").

Even if preserved, Bennet fails to show the court should have provided him additional notice prior to dismissal. While the state admittedly focused on the Strickland standard in its briefing, and did not specifically articulate the "Confrontation Cause claim" (see R., pp.40-43), the state also plainly addressed the petition in its entirety when it contended, without limitation, that "Petitioner's statements are unsupported, inadmissible, and conclusory," requiring a dismissal. (See R., p.43.) The district court likewise found "I'm just not seeing the evidence, the petition that would actually support this case going forward and to withstand a motion for summary dismissal." (2/2/17 Tr., p.16, Ls.18-22.) Because the state argued the petition in its entirety was unsupported by any evidence, and the district court concluded the same, the dismissal was at the very least partially based on the state's grounds. Bennett fails to show that the district court erred by summarily dismissing his petition without additional notice.

II.
Bennett Has Failed To Show The District Court Erred By Dismissing His Petition On The Merits

A. Introduction

Alternatively, even if this Court concludes the district court did not provide adequate notice, this does not require automatic reversal. Because Bennett provides no argument on the merits that the district court incorrectly dismissed his Confrontation Clause claim, and because the record shows the decision was correct on the merits, this Court should nevertheless affirm.

B. Standard Of Review

Summary dismissal is appropriate where the applicant's evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). On review of a summary dismissal of a post-conviction petition, "this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party." Id. at 523, 164 P.3d at 803. "A court is required to accept the petitioner's unrebutted allegations as true, but need not accept the petitioner's conclusions." Id. Accordingly, if alleged facts, even if assumed true, would not entitle the petitioner to relief, the trial court may dismiss the petition without hearing. Id. Allegations are insufficient for the granting of relief when "(1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law." Id.

C. Bennett Failed Below, And Fails On Appeal, To Support His Confrontation Clause Claim On The Merits; It Was Therefore Properly Dismissed By The District Court

Even where appellate courts are "unable to conclude" that a district court gave "appropriate notice of its intention to dismiss," "[t]his conclusion does not automatically require reversal." Ridgley v. State, 148 Idaho 671, 676, 227 P.3d 925, 930 (2010). In Ridgley, the Idaho Supreme Court held that "Where the lower court reaches the correct result, albeit by reliance on an erroneous theory, this Court will affirm the order on the correct theory." Id. (citing Boise Tower Assocs., LLC v. Hogland, 147 Idaho 774, 782, 215 P.3d 494, 502 (2009) (citing Nampa & Meridian Irr. Dist. v. Mussell, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003)). Of particular relevance here, the Ridgley Court found that "[b]ecause this Court employs the same standards on appellate review that the trial court applies in considering summary dismissal of a petition for post-conviction relief, if Ridgley failed to provide admissible evidence supporting these claims, they were properly dismissed." Ridgley, 148 Idaho at 676, 227 P.3d at 930. Assessing Ridgley's petition on the merits, the Court there found that he "did not demonstrate the existence of a genuine issue of material fact supporting his claim that his attorneys allegedly deficient performance resulted in prejudice." Id. at 679, 227 P.3d at 933. Thus, notwithstanding the district court's inadequate notice of dismissal, the district court's dismissal of Ridgley's petition was nevertheless affirmed. Id.

Here, Bennett's petition meets the same fate. Bennett's Confrontation Clause claim did not state who his "accuser" was, or which state's objection violated his rights, or what district court ruling violated his rights. (See R., p.7.) Liberally construing his

"Affidavit of Facts in Support of Post-Conviction Petition," one assumes[4] he intended to support his claim with the following alleged facts:

> [During] our cross-examination with the [confidential informant] we asked about his drug history that the prosecution asked about and was shut down by the prosecution. And [we] were not allowed to question further.

(R., p.26.)

However, Bennett failed to show that this would have been a Confrontation Clause violation. (See R., pp.6-10, 22-31.) A defendant's right to confront adverse witnesses is protected by the Sixth Amendment, and the Confrontation Clause's "main and essential purpose" is to secure the opportunity of cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986). This includes, among others things, the right to expose a witness's possible bias, or motive for testifying, so the jury can appropriately weigh that testimony. Davis v. Alaska, 415 U.S. 308, 316–17 (1974); State v. Gomez, 137 Idaho 671, 674–75, 52 P.3d 315, 318–19 (2002); State v. Harshbarger, 139 Idaho 287, 293, 77 P.3d 976, 982 (Ct. App. 2003); State v. Green, 136 Idaho 553, 556–57, 38 P.3d 132, 135–36 (Ct. App. 2001).

However, a defendant is not entitled to conduct a cross-examination that "is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20 (1985). To the contrary, trial judges are able to "impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or

[4] Bennett appears to make the same assumption on appeal; in a discussion about the Confrontation Clause claim he notes that "Mr. Bennett asserted the district court had precluded him from cross-examining the State's confidential informant witness about their drug-history." (Appellant's brief, p.1 (citing R., p.26).)

interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 679. See also State v. Pierce, 107 Idaho 96, 104, 685 P.2d 837, 845 (Ct.App.1984).

Applying these standards, the district court did not violate Bennett's Confrontation Clause rights by reasonably limiting the scope of inquiry into a witness's prior drug history. And there was certainly no violation in light of what occurred *after* the sustained objection: Bennett's counsel again inquired about the informant's prior drug history—specifically, about being punished "for that cocaine arrest"—and the state lodged a similar objection. (R., pp.445-46.) But the district court did not sustain this second objection, and "allow[ed] [counsel] to make this inquiry"—which ultimately allowed Bennett's counsel to inquire about the informant being "in fact, guilty of selling cocaine" after all. (See R., p.446.) Thus, to the extent the initially narrowed scope of inquiry could have even led to a Confrontation Clause violation, Bennett failed to show how the ensuing inquiry, where Bennett was allowed to confront the witness about his drug history, did not cure it. As a result, per Ridgley, even if the district court did not give sufficient notice of the reasons for its dismissal, it correctly dismissed Bennett's petition because Bennett's claims—including this one—were unsupported, and failed on the merits.

On appeal, Bennett continues to avoid the merits of this claim. He does not state which objection or district court ruling violated the Confrontation Clause, nor does he cite any Sixth Amendment authority. (See generally, Appellant's brief.) Bennett does not contend, at any point, that the district court's decision was wrong on the merits. (See generally, Appellant's brief.) Moreover, Bennett cannot belatedly raise such an argument in his Reply. Suitts v. Nix, 141 Idaho 706, 708, 117 P.3d 120, 122 (2005). Bennett has

therefore waived a challenge to the district court's decision on the merits on appeal, and this Court should affirm on the merits, should it even reach them.[5]

Bennett failed to support his claims below, and fails to support his Confrontation Clause claim on the merits on appeal. Accordingly, even if the district court erred by dismissing his petition without notice, the dismissal should be affirmed on the merits.

CONCLUSION

The state respectfully requests this Court affirm the summary dismissal of Bennet's petition for post-conviction relief.

DATED this 13th day of March, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

[5] Should this Court reach the merits of the Confrontation Clause claim despite the lack of a merits-based claim in the Opening Brief, the district court correctly dismissed this claim on the merits, as described herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of March, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd