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IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS FERNANDEZ,)	
)	No. 45034
Petitioner-Appellant,)	
)	Jerome County Case No.
v.)	CV-2016-1090
)	
STATE OF IDAHO,)	
)	
Defendant-Respondent.)	
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BRIEF OF RESPONDENT

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

HONORABLE JOHN K. BUTLER
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Thomas Fernandez appeals from the district court's order denying his request for court-appointed post-conviction counsel and dismissing his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court set forth the factual background of Fernandez's underlying criminal case as follows:

On June 2, 2014, the Petitioner entered an [sic] Conditional *Alford* plea of guilty to Count 1: Driving Under the Influence, a felony, violation of Idaho Code Sections 18-8004 and 18-8005(9). The Petitioner also entered a Conditional plea of guilty to the persistent violator enhancement under Idaho Code Section 19-2514. The Court entered a Judgment of Conviction on July 21, 2014. The Court imposed a unified sentence of 15 years, consisting of [a] minimum period of confinement of 2.5 years and an indeterminate period of confinement of 12.5 years.

Prior to entry of the condition[al] guilty pleas, defense counsel hired experts to challenge the accuracy of the breath test. Defense counsel reported that the experts would testify as to the accuracy of the breath test and how diabetes and gastro-esophageal reflux disease (GERD) may affect breath test results. The State filed a motion in limine to prevent the expert from testifying on the subjects. This Court granted the motion due to lack of evidence of Petitioner's elevated blood sugar levels, ketoacidosis, GERD, acid reflux, or unabsorbed alcohol in his stomach at the time of the traffic stop.

(R., pp.27-28.)

Fernandez appealed, challenging both his conviction and the district court's order granting the state's *motion in limine*. (R., p.28.) In an unpublished opinion, the Court of Appeals affirmed both. State v. Fernandez, Docket No. 42370, 2015 Unpublished Op. No. 724 (Idaho App., November 19, 2015).

On December 27, 2016, Fernandez filed a *pro se* petition for post-conviction relief alleging that his attorney had been ineffective for failing to adduce additional expert witnesses for trial and present evidence that he was in a state of ketoacidosis when officers administered his breath test. (R., pp.3-22.) Fernandez also filed a motion for appointment of counsel. (R., p.25.) The district court denied the request for court-appointed counsel on the basis that Fernandez's petition for post-conviction relief failed to raise the possibility of a valid claim, and gave notice of its intent to dismiss the frivolous petition. (R., pp.27-35.) After Fernandez responded to the notice (R., pp.56-64), the district court dismissed his petition (R., pp.66-73). Fernandez filed a timely notice of appeal. (R., pp.75-78.)

ISSUE

Fernandez states the issue on appeal as:

Did the district court abuse its discretion when it denied Mr. Fernandez's Motion for the Appointment of Counsel because it applied the incorrect legal standard?

(Appellant's brief, p.3.)

The state rephrases the issue as:

Has Fernandez failed to show that the district court abused its discretion when it denied his motion for appointed counsel to pursue his patently frivolous petition for post-conviction relief?

ARGUMENT

Fernandez Has Failed To Show That The District Court Abused Its Discretion When It Denied His Motion For Appointed Counsel To Pursue His Patently Frivolous Petition For Post-Conviction Relief

A. Introduction

The district court denied Fernandez’s motion for court-appointed counsel and summarily dismissed his petition for post-conviction relief because he failed to allege facts showing the possibility of a valid post-conviction claim and his petition was subject to summary dismissal. (R., pp.28-30, 66-71.) On appeal, Fernandez contends that the district court abused its discretion when it denied his request for court-appointed counsel. (Appellant’s brief, pp.4-7.) Application of the correct legal standards to the facts of this case, however, demonstrates that Fernandez failed to raise the possibility of a valid claim. The district court, therefore, properly denied his motion for appointed counsel and dismissed his frivolous post-conviction petition. The district court should be affirmed.

B. Standard Of Review

A request for appointment of counsel in a post-conviction proceeding is governed by Idaho Code § 19-4904. “The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court.” Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); see also Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009). In reviewing the denial of a motion for appointment of counsel in post-conviction proceedings, “[t]his Court will not set aside the trial court’s findings of fact unless they are clearly erroneous. As to questions of law, this Court exercises free review.” Charboneau, 140 Idaho at 792, 102 P.3d at 1111 (quoting Brown v. State, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001)).

C. The District Court Properly Denied Fernandez’s Request For Counsel And Dismissed His Petition Because He Failed To Raise The Possibility Of A Valid Claim

There is no constitutional right to counsel in post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). While a district court may, pursuant to Idaho Code § 19-4904, appoint counsel for an indigent post-conviction petitioner in certain circumstances, the court is only required to appoint counsel when a petitioner “alleges facts showing the possibility of a valid claim that would require further investigation on the defendant’s behalf.” Swader v. State, 143 Idaho 651, 654, 152 P.3d 12, 15 (2007); Charboneau, 140 Idaho at 793, 102 P.3d at 1112. In determining whether the alleged facts justify the appointment of counsel, “every inference must run in the petitioner’s favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts.” Charboneau, 140 Idaho at 793-94, 102 P.3d at 1112-13. However, where the claims in the petition are so patently frivolous that there is no possibility that they could be developed into a viable claim, with or without counsel’s assistance, the court may deny the request for counsel and proceed with the usual procedure for dismissing the meritless post-conviction petition. Workman v. State, 144 Idaho 518, 529, 164 P.3d 798, 809 (2007); Hust, 147 Idaho at 684, 214 P.3d at 670.

The claims in Fernandez’s petition are patently frivolous, and there is no possibility that they could be developed into a viable claim, because they fail as a matter of law. Fernandez claimed that, were counsel appointed, he could do research that might find sufficient factual support to provide the necessary foundation to allow expert testimony regarding adverse health consequences (such as ketoacidosis) caused by his diabetes. (R., pp.44, 62-64.) His contention, apparently, was that such conditions could cause his breath test readings to be an inaccurate measure of his true blood alcohol content. (See R., pp.9-10, 13, 16-17, 28.) Even assuming that Fernandez was correct, this evidence would be entirely irrelevant.

Fernandez was convicted of driving under the influence based on measurements of the elevated blood alcohol concentration in samples of his breath. (See R., p.8; see also State v. Fernandez, Docket No. 42370, 2015 Unpublished Op. No. 724, pp.1-2 (Idaho App., November 19, 2015.) Idaho Code § 18-8004 makes operating a vehicle with a blood alcohol level of 0.08, as measured by a test of the blood, breath, or urine, a *per se* criminal offense. Idaho appellate courts have repeatedly explained that the actual level of alcohol concentration in a subject's blood is irrelevant under this *per se* theory. State v. Jones, 160 Idaho 449, 451, 375 P.3d 279, 282 (2016) (citing Elias-Cruz v. Idaho Dept. of Transportation, 153 Idaho 200, 204-05, 280 P.3d 703, 707-08 (2012)); see also State v. Hardesty, 136 Idaho 707, 709, 39 P.3d 647, 649 (Ct. App. 2002). Under Idaho Code § 18-8004(4), “the standard is no longer the concentration of alcohol in the driver’s blood.” Jones, 160 Idaho at 451, 375 P.3d at 282 (quoting Elias-Cruz, 153 Idaho at 205, 280 P.3d at 708). Rather, “a violation can be shown simply by the results of a test for alcohol concentration that complies with the statutory requirements.” Id. (quoting Elias-Cruz, 153 Idaho at 204, 280 P.3d at 707).

Because there is no legal basis for pursuing expert witness testimony regarding what is, by definition, legally irrelevant evidence, Fernandez’s petition for post-conviction relief fails to raise even the possibility of a valid claim. The district court correctly denied his request for court-appointed counsel.

Moreover, as the district court found, Fernandez’s claim of ineffective assistance of counsel was frivolous, not only because he had failed to present sufficient facts to support his claims at the post-conviction stage, but because no factual basis existed to provide foundation for additional expert testimony. (R., pp.33-35; 69-70.) There was no evidence that Fernandez was experiencing ketoacidosis or even that his blood sugar was elevated at the time the breath test

was administered; in fact, the evidence presented below showed that his blood sugar level was normal. (R., p.34.) Fernandez failed to produce evidence, either below or on post-conviction, that he had previously been diagnosed with GERD. (Id.) He failed to produce evidence, either below or on post-conviction, that he had unabsorbed alcohol in his stomach or that he belched during (both of) the breath test administrations. (Id.) In fact, Fernandez asserted that “evidence of the medical condition in which the Petitioner was in at the time” did not exist, because it was neither “preserve[d] or collect[ed].” (R., p.64.) Because there was no factual basis to allow expert witness testimony in support of Fernandez’s allegations, his claim that his attorney was ineffective for failing to call additional expert witnesses was patently frivolous, and the district court correctly determined that it could detect no possibility of a valid claim. (R., p.32.)

On appeal, Fernandez argues that the district court abused its discretion by applying an outdated legal standard. (Appellant’s brief, pp.5-7.) He contends that the district court determined that his petition was frivolous based on analysis under Idaho Code § 19-852, that a reasonable person with adequate means would not be willing to bring the action at his own expense, and that this statute no longer controls. (Id.) Review of the district court’s decision, however, shows no abuse of discretion.

First, the state agrees that subsequent case law has determined that Idaho Code § 19-852 no longer directly controls the decision to appoint counsel. See Swader, 143 Idaho at 653, 152 P.3d at 14. But it does not appear that the district court specifically relied on that statute when it reached its decision. Rather, its only citation to the statute is incidental, as part of a block quote of Charboneau. (See R., pp.29-30). Moreover, the legal standard of the reasonable person with adequate means still survives: In Swader, this Court held that “the trial court should appoint 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, 143 Idaho at 655, 152 P.3d at 16 (emphasis added). If the reasonable person with adequate means would not be willing to retain counsel, the petition is patently frivolous—in that it fails to show even the possibility of a valid claim—and the district court may properly deny counsel.

Second, even had the district court applied an incorrect legal standard when it denied Fernandez’s motion for court-appointed counsel, such error would still not require reversal in this case. Where the district court applies an incorrect legal standard when denying a motion for court-appointed counsel, this Court will simply review the petition and determine, under the correct legal standard, whether or not the appointment of counsel is appropriate. See Swader, 143 Idaho at 653, 152 P.3d at 14 (the question when a district court fails to apply the correct legal standard governing requests for appointment of counsel is whether, applying the correct legal standard, the motion for appointment of counsel would have been granted); accord Melton v. State, 148 Idaho 339, 343, 223 P.3d 281, 285 (2009); Judd v. State, 148 Idaho 22, 25, 218 P.3d 1, 4 (Ct. App. 2009). Applying the correct legal standards, as demonstrated above, Fernandez’s petition was patently frivolous because it failed to raise the possibility of a valid claim. Therefore, even had the district court applied an erroneous legal standard, Fernandez has still failed to show that it was ultimately error for the district court to deny his motion for appointed counsel, and the district court’s order should still be affirmed.

Because Fernandez failed to allege facts showing the possibility of a valid post-conviction claim, the district court correctly exercised its discretion by denying Fernandez’s motion for court-appointed counsel. The district court’s order denying counsel should therefore be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Fernandez's motion for court-appointed counsel and summarily dismissing his patently frivolous petition for post-conviction relief.

DATED this 13th day of February, 2018.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

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

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd