4-20-2018

Standley v. State Appellant's Reply Brief Dckt. 45262

IN THE SUPREME COURT OF THE STATE OF IDAHO

WESLY STANDLEY, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 45262 Twin Falls No. CV42-17-15

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls

HONORABLE ERIC WILDMAN,
District Judge

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A. *Introduction*

The state argues that Mr. Standley's ineffective assistance of counsel claim is based solely on counsel's failure "to object on *res judicata* grounds to the re-filing of Count 1 of the state's motion to revoke his probation." State's Brief, pg. 5. In fact, he argued that counsel's performance was deficient "because she failed to object to a second evidentiary hearing on the same allegation the court found had not been proved." R 11. Mr. Standley argued that there were two bases for objection: 1) "[t]here is no rule or statutory authority permitting relitigation of alleged probation violations" and 2) the relitigation was barred by *res judicata*. *Id.* The district court granted the state's motion for summary disposition "ruling that for purposes of res judicata, no final judgment was entered on the first probation revocation hearing." R 470.

B. *Argument in Reply*

1. *Res judicata* applies here.

The state argues that *res judicata* does not apply to previous rulings made in the same case. It, however, fails to cite to an Idaho case which so holds.

Moreover, while *Arizona v. California*, 460 U.S. 605, 619 (1983), states that "res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment," the state in this case was not asking the court to correct or modify its judgment. It did not claim the

court ruled incorrectly the first time. It just wanted another chance to present the evidence which it failed to present the first time. Further the state fails to mention that the Supreme Court *prevented* relitigation of the claim in *Arizona v. California,* even though the district court was asked to modify a ruling in the same case. It wrote that "a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. 'To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Id., quoting Montana v. United States*, 440 U.S. 147, 153-154 (1979).[1]

The other federal and out-of-state cases string-cited by the state (State's Brief, pg. 8-9) involve cases where the trial court had rule-based or statutory authority to reconsider a previous ruling. There is no rule of procedure in Idaho which permits the refiling of a probation violation after the court has determined the state failed to carry its burden of proof at the first hearing. Those cases are neither controlling nor apposite. *See e.g.*, *Thompson v. Paul*, 657 F. Supp. 2d 1113, 1119 (D. Ariz. 2009) (where reconsideration was authorized by Fed.R.Civ.P. 60(b))

[1] In addition, the Supreme Court cited with favor the section of the Restatement of Judgments cited by Mr. Standley in his Opening Brief. *Arizona v. California*, 460 U.S., at 617 ft. 7, citing Restatement (Second) of Judgments § 13, Comment e (1982) ("A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest").

and *Pac. Emplrs. Ins. Co. v. Sav-A-Lot*, 291 F.3d 392, 399 (6th Cir. 2002) (where the court declined to apply *res judicata* because "there was no final judgment on the merits."); *Smith v. Hruby-Mills*, 380 P.3d 349 (Utah App. 2016) (where trial *de novo* was authorized by state code); *see also Griset v. Fair Political Practices Com.*, 23 P.3d 43, 51 (Cal. 2001) (where the Court held that "the superior court's later judgment was void insofar as it encompassed or rested upon a redetermination of the merits of the litigation").

Moreover, as the state acknowledges, "neither the state's cross-motion for summary disposition nor the district court's order alleged or found (respectively) that the doctrine of *res judicata* is inapplicable in the same (or unitary) hearing." State's Brief, pg 16. Thus, this Court should not even consider that theory for the first time on appeal because Mr. Standley was never given the notice required by I.C. § 19-4906(b). Under that provision, the district court may *sua sponte* dismiss a petitioner's post-conviction claim only if the court provides the petitioner with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the petitioner to respond. Under I.C. § 19-4906(c), the district court may also dismiss a petitioner's post-conviction claims on the motion of either party. If the State files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). The reason why subsection (b), but not subsection (c), requires a twenty-day notice by the court of intent to dismiss is that,

under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995).

When the state's motion fails to give notice of the grounds, the court may not grant summary dismissal unless it first gives the petitioner twenty days notice of intent to dismiss and the grounds therefore, pursuant to Section 19-4906(b). *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996). "This procedure is necessary so that the petitioner is afforded an opportunity to respond and to establish a material factual issue." *Mallory v. State*, 159 Idaho 715, 721, 366 P.3d 637, 643 (Ct. App. 2015).

Notwithstanding the above, the state contends that notice is unnecessary in this case because the question of the applicability of *res judicata* is purely a question of law. State Brief, pg. 11. (Notably, it does not cite to a case to support the application of a "futility" exception to the statutory requirement.) In any case, the legal response to the state's argument is set forth above. Further, the failure to give notice to Mr. Standley is not harmless because he has been deprived of the opportunity to develop the evidentiary record as to his other factual basis for relief, *i.e.*, that trial counsel's failure to object to the relitigation was deficient because there is no rule or statute which permits such relitigation. Had the state or court given notice that it might rule that *res judicata* was categorically not applicable in the case, Mr. Standley would have broadened his argument beyond the *res judicata* claim and supported his alternative theory more robustly. Or he could have

amended his petition to allege that the relitigation was barred by the law of the case doctrine. "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S., at 618. Thus, even if a futility doctrine existed, it would not be applicable in this case.

Nor did the state's generic statement that "[t]here is no bar to refiling the allegation" give notice of a theory that *res judicata* was categorically inapplicable. This is manifest when the entire argument is read, as it is clear that the state is saying *res judicata* does not apply in this case solely due to the absence of a final judgment.[2]

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[2] The entire paragraph reads:

> The Court should reject Petitioner's argument that res judicata precludes the State from refiling a motion to revoke probation after the District Court's dismissal upon evidentiary findings. Res judicata stands for the proposition that a "final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim." Black's Law Dictionary, (Sixth Ed., 1991). *On Count I, there was no "final judgment" rendered after the first evidentiary proceeding when the Court dismissed the State's probation violation allegation regarding unapproved associations*. <u>There is no bar to refiling the allegation. Therefore, no legal basis exists to sustain the objection Petitioner claims his counsel should have made.</u> Counsel cannot be considered ineffective for failing to raise an issue upon which he could not succeed. <u>Maxfield v. State</u>, 108 Idaho 493, 700 P.2d 115 (Ct. App 1985).

R 387 (emphasis added). The germane portion of the argument is in italics, while the state selectively quotes only the underlined portion.

2. There was a final judgment on the merits.

As to the question of whether Judge Stoker's ruling that the state had not proved the probation violation at the first hearing was a final judgment on the merits, the state simply argues that Mr. Standley "reads too much into [*State v.*] *Dempsey*[, 146 Idaho 327, 193 P.3d 874 (Ct. App. 2008)]." State's Brief, pg. 14. That is not the case. The fact of the matter is that there was no final appealable order from the probation violation proceedings in Mr. Dempsey's 1999 case when it was used to prevent the relitigation of the same probation violation in the 2002 case. Any argument to the contrary is less than totally candid. Since the non-appealable order in Mr. Dempsey's case was found by the Court of Appeals to be a final judgment on the merits in *Dempsey*, the same must be true here.[3] As *Dempsey* was issued prior to the probation violation proceedings here, defense counsel should have been aware of it and objected to the relitigation on that basis. The failure to object was deficient performance under *Strickland*.

III. CONCLUSION

For the reasons set forth above, Wesly Standley asks this Court to vacate the order summarily dismissing his post-conviction petition and remand to the district court for further proceedings.

[3] This is confirmed by the iCourt dockets, which the state concedes were "included in the record below, and presumably considered[.]" State's Brief, pg. 21.

Respectfully submitted this 20th day of April, 2018.

/s/Dennis Benjamin
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Attorney for Wesly Standley

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 20th day of April, 2018.

/s/Dennis Benjamin
Dennis Benjamin