3-29-2019

McNeil v. State Appellant's Reply Brief Dckt. 45766

Electronically Filed
3/29/2019 9:53 AM
Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

LLOYD HARDIN MCNEIL,	)	
	)	**NO. 45766**
Petitioner-Appellant,	)	
v.	)	**ADA COUNTY NO. CV-PC-14-15680**
	)	
STATE OF IDAHO,	)	**APPELLANT'S**
	)	**REPLY BRIEF**
Respondent.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Lloyd Hardin McNeil challenges the district court's summary dismissal of his second amended petition for post-conviction relief. In his Appellant's Brief, Mr. McNeil argued there were genuine issues of material fact pertaining to three of his ineffective assistance of counsel claims and thus the district court erred by dismissing them. He respectfully requested that this Court vacate the district court's judgment and remand this case for an evidentiary hearing on those claims.

The State responded. This Reply Brief responds to some, but not all, of the State's arguments. For those not addressed here, Mr. McNeil respectfully refers this Court to his Appellant's Brief.

Statement of Facts and Course of Proceedings

Mr. McNeil's Appellant's Brief set forth the statement of facts and course of proceedings. (App. Br., pp.1–5.) They are not repeated here, but are incorporated by reference.

ISSUE

Did the district court err when it summarily dismissed Mr. McNeil's second amended petition for post-conviction relief?

ARGUMENT

The District Court Erred When It Summarily Dismissed Mr. McNeil's Second Amended Petition For Post-Conviction Relief

A. Introduction

In his Appellant's Brief, Mr. McNeil argued the district court erred when it summarily dismissed his second amended petition because an evidentiary hearing was necessary to resolve genuine issues of material fact for three ineffective assistance of counsel claims. (*See generally* App. Br., pp.7–31.) Those claims were: (1) ineffective assistance of counsel for failing to investigate the victim's recent attempt to pawn her ring (Claim 9); (2) ineffective assistance of counsel for failing to inform the judge that a juror saw Mr. McNeil in the back of a police officer's vehicle during trial (Claim 14); and (3) ineffective assistance of counsel for failing to move for a mistrial after a juror was seen speaking with the victim's uncle during trial (Claim 15).

The State responded that the district court properly dismissed these three claims. (*See generally* Resp. Br., pp.7–28.) Mr. McNeil replies. In general, Mr. McNeil disputes the State's position that the district court properly dismissed these claims for failing to satisfy one or both of the *Strickland*[1] prongs to establish ineffective assistance of counsel. Mr. McNeil specifically responds to each claim below.

B. Post-Conviction Jurisprudence & Standard Of Review

Mr. McNeil respectfully refers this Court to the standard of review in his Appellant's Brief. (App. Br., pp.7–9.)

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

C. The District Court Erred In Summarily Dismissing Claims 9, 14, And 15 Because There Were Genuine Issues Of Material Fact

1. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Investigate A Defense To The Grand Theft Charge

On this claim, Mr. McNeil argued he made a prima facie showing of deficient performance and prejudice. (*See* App. Br., pp.9–16.) Mr. McNeil filed admissible evidence with the district court showing that he informed his trial counsel that the victim had given him the allegedly stolen ring before her death. (R., p.343.) He averred that he told his trial counsel specifically that the victim gave him the ring at Vista Pawn after she tried to pawn the ring in exchange for a debt. (R., p.343.) In further support of this claim, Mr. McNeil submitted an affidavit from a Vista Pawn employee that stated, on the day that Mr. McNeil told his trial counsel about his Vista Pawn visit with the victim, the video of their visit would have been available and Vista Pawn would have held the video if requested. (R., p.355.) In light of this evidence, Mr. McNeil argued his trial counsel was deficient in failing to conduct a reasonable investigation into this grand theft defense. (App. Br., pp.13–15.) He further argued this deficient performance prejudiced him because, but for his counsel's failure to investigate, there is a reasonable probability the result of the trial on the grand theft charge would have been different. (App. Br., pp.15–16.)

A couple of the State's arguments warrant reply. First, the State asserted Mr. McNeil "failed to present admissible evidence showing a reasonable investigation would have produced the video." (Resp. Br., p.10.) The State argued no admissible evidence showed the video would be available *after* Mr. McNeil told his trial counsel about it and trial counsel had no "obligation to investigate Vista Pawn the very same day McNeil made his request." (Resp. Br., p.11.) The State's argument simply points out genuine issues of material fact to be resolved through an

evidentiary hearing. These factual issues on Vista Pawn's preservation of the video, the video's availability at some later date,[2] and the video's contents are valid inquires for an evidentiary hearing. But the State's speculation does not defeat Mr. McNeil's prima facie showing of a deficient investigation. As outlined by the American Bar Association ("ABA"), "[d]efense counsel's investigative efforts should commence *promptly* and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties." ABA CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION 4-4.1(c) (4th ed. 2015) (emphasis added); *see also Mitchell v. State*, 132 Idaho 274, 280 (1998) (recognizing defense counsel's duty to conduct "prompt" investigation). A prompt investigation in this situation would require Mr. McNeil's trial counsel to contact Vista Pawn shortly after their meeting in order to preserve the video. That is the proper investigation of an avenue that "reasonably might" lead to information relevant to one of the felony charges against Mr. McNeil. CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION 4-4.1(c). Based on the evidence provided, and liberally construing all facts and reasonable inferences in Mr. McNeil's favor, he has established a material issue of material fact on his trial counsel's deficient performance for failing to investigate.

Second, the State asserted Mr. McNeil failed to establish prejudice. (Resp. Br., pp.12–15.) The State argued Mr. McNeil failed to present admissible evidence on the specifics of Vista Pawn's surveillance system, so the State can only speculate what the video might (or might not)

[2] An affidavit from Mr. McNeil's investigator (which the district court deemed inadmissible hearsay) stated that Vista Pawn would have stored the video for forty-five days. (R., pp.230, 321.) Mr. McNeil told his trial counsel about the video on the fortieth day: Mr. McNeil and the victim went to pawn the ring on February 18, 2011, and Mr. McNeil met with his counsel on March 30, 2011. Therefore, Mr. McNeil's counsel had at least five more days to ask Vista Pawn not to destroy the video.

show. (Resp. Br., pp.12–14.) Mr. McNeil submits the State's argument misses the mark. This is, again, an appropriate inquiry for an evidentiary hearing—the extent and contents of Vista Pawn's video surveillance system—and it goes to deficient performance, not prejudice. Mr. McNeil has made a prima facie showing that Vista Pawn had a video surveillance system, Mr. McNeil and the victim went to Vista Pawn, Vista Pawn's video surveillance system would have been available from their visit, and thus the Vista Pawn video would verify, in some way, that Mr. McNeil and the victim were at Vista Pawn. (R., pp.343, 355.) These facts and inferences are sufficient to establish a duty to investigate.

As to prejudice, Mr. McNeil does not have to prove the specifics of the video to establish a reasonable probability that, but for the failure to investigate, the trial's result would have been different. The Vista Pawn video may have shown Mr. McNeil and the victim in the parking lot, entering the store, at the counter, or all of the above. These specifics are beside the point at the summary dismissal stage. Construing reasonable inferences in Mr. McNeil's favor, the video would show Mr. McNeil and the victim on Vista Pawn's property. It is probable this evidence would have changed the outcome of the grand theft charge. With that evidence, Mr. McNeil's trial counsel could have developed a defense to the grand theft charge: that the victim gave the ring to Mr. McNeil at Vista Pawn. This is significant because Mr. McNeil's trial counsel did not offer a defense to grand theft at the trial. Mr. McNeil's trial counsel made no mention of the grand theft charge in closing argument, (Vol. I Tr.,[3] p.1082, L.19–p.1095, L.15), and the State began its rebuttal with, "I guess they concede grand theft," (Vol. I Tr., p.1095, Ls.17–18). Moreover, the fact that Mr. McNeil did not testify at trial does not change the prejudice analysis.

[3] Mr. McNeil's citation to the two trial transcripts mirrors the State's: Volume I contains all trial proceedings except February 23 and 24, 2012. Volume II contains those two days. (*See* Resp. Br., p.1 n.2.)

Understandably, Mr. McNeil did not testify about the ring because his arguably self-serving statements may not have held much sway with the jury. That defense would be much more plausible with the Vista Pawn video to corroborate Mr. McNeil's testimony. The strategic and tactical decisions on how to present that defense, had trial counsel properly investigated and obtained the video, are appropriate to develop at an evidentiary hearing. At the summary dismissal stage, Mr. McNeil had alleged sufficient facts to show prejudice. For these reasons, and those in his Appellant's Brief, Mr. McNeil submits the district court erred by dismissing this claim.

2. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Inquire With A Juror Who Observed Mr. McNeil In Police Custody During Trial

Mr. McNeil does not reply herein and relies on the arguments in his Appellant's Brief to distinguish his case from *Bias v. State*, 159 Idaho 696, 705 (Ct. App. 2015). (*See* App. Br., pp.16–22.)

3. Mr. McNeil's Trial Counsel Was Ineffective For Failing To Inform The District Court And Move For A Mistrial Based On A Juror Communicating With The Victim's Uncle During Trial

Lastly, Mr. McNeil raised an ineffective assistance of counsel claim for his trial counsel's failure to inform the district court about a juror speaking with the victim's uncle during the trial. (R., pp.186–87, 347.) Upon learning of this contact, trial counsel told Mr. McNeil, "I can't take that to Judge Bail it will cause a mistrial and I don't want to retry this case." (R., p.347.) On appeal, Mr. McNeil argued the district court failed to provide notice of its basis for dismissal and, on the merits, he made a prima facie showing of deficiency and prejudice. (App. Br., pp.22–31.)

Turning first to the notice issue, Mr. McNeil submits the State's basis for dismissal did not give adequate notice of the district court's basis. (*See* Resp. Br., pp.26–27.) To be sure, the State argued generally that Mr. McNeil failed to meet the *Strickland* standard, (R., pp.245, 248), but the State narrowed its basis for dismissal on this biased juror claim to a purported lack-of-prejudice argument. In support of its motion for summary dismissal, the State argued: "These issues are groundless. It is apparent the jury did not abandon its role as fact finder in this case. They returned a verdict on a lesser included offense." (R., p.251.) As noted in Mr. McNeil's Appellant's Brief, this is not a lack-of-prejudice argument. (App. Br., p.25 n.7.) The jury's return of a guilty verdict for a lesser included offense (voluntary manslaughter as opposed to second degree murder) does not prove a juror was not biased by his contact with the victim's uncle. If the jury had acquitted Mr. McNeil, then he certainly would be unable to show a biased juror. But a lesser included offense does not disprove prejudice. There is still a reasonable probability that this error—trial counsel's failure to inquire and move for a mistrial—affected the trial's outcome. As such, the State's alleged lack-of-prejudice argument did not provide adequate notice of dismissal based on the correct prejudice standard.

Moreover, the State's argument did not provide notice of the district court's prejudice basis. The district court reasoned Mr. McNeil did not prove a "presumption of prejudice" as applied to the contact between the juror and the victim's uncle. (R., p.383.) This prejudice basis focused on the biased juror, not the overall prejudice to Mr. McNeil's case caused by deficient counsel. Put another way, there are two layers of prejudice to this claim: (1) the presumption of prejudice caused by the improper juror contact and (2) the prejudice caused by trial counsel's failure to act upon his knowledge of this improper contact and move for a mistrial. Therefore, the

State's prejudice argument in its brief in support of its motion for summary dismissal (which had been filed two years before the district court's order of dismissal) did not provide notice.

On the merits, Mr. McNeil submits he has alleged sufficient facts to overcome summary dismissal. (*See* App. Br., pp.25–31.) An evidentiary hearing is necessary to determine the subject matter of conversation between the juror and the victim's uncle. On its face, however, Mr. McNeil has triggered the presumption of prejudice due to the identity of the outside party: a family member of the victim. The State's conclusory argument that the issue was "groundless" did not overcome that presumption. The district court should have held an evidentiary hearing on this claim. At an evidentiary hearing, the district court can resolve genuine issues of material fact on trial counsel's knowledge of this improper contact, the substance of the contact, and why trial counsel chose not to notify the district court if trial counsel believed the contact rose to the level of necessitating a mistrial.

CONCLUSION

Mr. McNeil respectfully requests this Court vacate the district court's judgment and order dismissing his second amended petition for post-conviction relief and remand this case for an evidentiary hearing.

DATED this 29th day of March, 2019.

/s/ Jenny C. Swinford
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served as follows:

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JCS/eas