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IN THE SUPREME COURT OF THE STATE OF IDAHO

JACOB ALLEN HICKEY,)	
)	NO. 45801
Petitioner-Appellant,)	
v.)	CANYON COUNTY
)	NO. CV-2016-5633
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

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

HONORABLE GEORGE A. SOUTHWORTH
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUES PRESENTED ON APPEAL.....	3
ARGUMENT.....	4
I. The District Court Erred In Summarily Dismissing Mr. Hickey’s Petition For Post-Conviction Relief	4
II. The District Court Erred In Denying Mr. Hickey’s Motion For Reconsideration Of The Order Summarily Dismissing His Petition For Post-Conviction Relief	5
A. Introduction	5
B. The Claims Arising Out Of The Investigation and Interrogation (Claims 1 And 2) Should Not Have Been Summarily Dismissed.....	5
C. The Claims Relating To Mr. Hickey’s Disability (Claims 3, 4 And 5) Should Not Have Been Summarily Dismissed.....	6
1. Claim 3	8
2. Claim 4	9
3. Claim 5	9
D. Mr. Hickey’s Ineffective Assistance Of Counsel Claims Should Not Have Been Summarily Dismissed	10
CONCLUSION.....	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases

Ridgely v. State, 148 Idaho 671 (2010).....12

Schultz v. State, 153 Idaho 791 (Ct. App. 2012).....7

State v. Gonzales, 158 Idaho 112 (Ct. App. 2015)9, 10

State v. Smith, 162 Idaho 878 (Ct. App. 2017).....8

Statutes

I.C. § 18-210.....11

I.C. § 18-211..... 11, 12

I.C. § 18-1501(5).....10

STATEMENT OF THE CASE

Nature of the Case

Mr. Hickey appeals from the district court's order denying his motion for reconsideration of its order summarily denying his petition for post-conviction relief. He argued in his Appellants' Brief that the district court erred in: (1) summarily dismissing his petition prior to the date the court had given him to respond to its notice of intent to dismiss; and (2) denying his motion for reconsideration because he raised genuine issues of material fact which, if resolved in his favor, would entitle him to relief. He submits this Reply Brief to respond to the State's legal argument on these issues.

Statement of Facts and Course of Proceedings

Mr. Hickey included a statement of facts and course of proceedings in his Appellant's Brief, which he relies on and incorporates herein. (Appellant's Br., pp.1-4.) He includes this section only to address the State's multiple citations to the police reports in its statement of facts. (*See* Respondent's Br., pp.1-2.) Mr. Hickey recognizes the district court took judicial notice of the presentence investigation report, which included the police reports as attachments. (*See* R., p.205.) Mr. Hickey questions, however, whether the police reports are a proper source of the facts for purposes of a post-conviction proceeding. The State did not present any evidence to refute Mr. Hickey's allegations, and the district court dismissed Mr. Hickey's petition on its own motion. (R., pp.225-33, 245-49.)

If the police reports are properly considered as facts, this Court should consider certain portions of the police reports which the State omitted from its statement of facts. Officer Hale's police report states:

- The pre-test questions were gone over with Jacob and he was not able to follow the instructions as he was told. He seemed easily confused when Det. Palfreyman would tell him to lie to him on certain questions. He would end up telling the truth instead of telling the lie as instructed.
- Prior to the actual [polygraph] exam, Det. Palfreyman . . . told me he didn't expect the test to go very well because Jacob couldn't hold still and couldn't follow instructions.
- During the first test, Jacob couldn't hold still despite being advised to. He would answer questions wrong [from] what he was instructed to.
- [After Jacob took the first polygraph, he told Detective Palfreyman he couldn't take the test again because he was supposed to be at work.] Jacob was then asked to sit in the other interview room.
- [Officer Hale then interrogated Jacob at length, despite his statement that he needed to go to work.] I told Jacob I thought it was probably more consensual between the two of them. He didn't understand what I meant by consensual so I explained it to him.
- [The interrogation continued.] He said he didn't want to have to register [as a sex offender] because if he had to do that then he wouldn't be able to have kids someday.

(Conf. Exs., pp.38-40.)

ISSUES

- I. Did the district court err in summarily dismissing Mr. Hickey's petition for post-conviction relief?
- II. Did the district court err in denying Mr. Hickey's motion for reconsideration of the order summarily dismissing his petition for post-conviction relief?

ARGUMENT

I.

The District Court Erred In Summarily Dismissing Mr. Hickey's Petition For Post-Conviction Relief

In his Appellant's Brief, Mr. Hickey argued the district court erred in summarily dismissing his petition prior to the date the court had given counsel to respond to the court's notice of intent to dismiss. (Appellant's Br., pp.6-8.) Mr. Hickey asserted that on November 13, 2017, his counsel filed a motion for extension of time to respond, stating he needed until March 5, 2018, to respond because he was working on obtaining a mental health evaluation for Mr. Hickey through the Canyon County Public Defender's Office. (Appellant's Br., p.7; R., pp.237-38.) Mr. Hickey asserted that on November 29, 2017, the district court entered an order extending the time for him to respond to February 15, 2017, with the year 2017 presumably representing a typographical error. (Appellant's Br., pp.7-8; R., pp.240-41.) In its Respondent's Brief, the State correctly points out that the district court's order in fact extends the time for Mr. Hickey to respond to "the 15 day Fecember, 2017 by 5:00 p.m." (Respondent's Br., p.6.) Mr. Hickey recognizes the typographical error may have been that "Fecember" was intended to mean "December."

In any event, Mr. Hickey agrees with the State that, because the district court treated the motion for reconsideration as a response on the merits, and did not rely on the untimeliness of that response in dismissing Mr. Hickey's petition, this Court need only address the second issue on appeal. (Respondent's Br., pp.11-12.) As explained below, the district court erred in summarily dismissing Mr. Hickey's petition based on Mr. Hickey's response to the notice of intent to dismiss, as set forth in the motion for reconsideration.

II.

The District Court Erred In Denying Mr. Hickey's Motion For Reconsideration Of The Order Summarily Dismissing His Petition For Post-Conviction Relief

A. Introduction

Mr. Hickey argued in his Appellant's Brief that the district court erred in denying his motion for reconsideration instead of setting the matter for an evidentiary hearing because there were genuine issues of material fact that, if true, would have entitled Mr. Hickey to relief. (Appellant's Br., pp.9-16.) The State acknowledges this Court must liberally construe the facts and grant all reasonable inferences in favor of the non-moving party. (Respondent's Br., p.15.) The State then takes almost 20 pages to argue against Mr. Hickey's version of the facts, despite the fact that the State did not present any evidence in the district court to refute Mr. Hickey's allegations. (Respondent's Br., pp.16-37.) Mr. Hickey presented to the district court a factual basis for all his claims, making summary dismissal improper.

B. The Claims Arising Out Of The Investigation and Interrogation (Claims 1 And 2) Should Not Have Been Summarily Dismissed

The State argues the district court properly dismissed Claims 1 and 2 because Mr. Hickey waived them when he pled guilty and failed to present admissible evidence showing he was in custody during the police interview. (Respondent's Br., p.14.) The State acknowledges, as it must, that a guilty plea does not waive ineffective assistance of counsel claims. (Respondent's Br., p.18.) Thus, the question is whether the district court properly concluded Mr. Hickey's claims arising out of the investigation and interrogation were not supported by the record, construing the facts and granting all reasonable inferences in Mr. Hickey's favor. It did not.

The district court concluded Mr. Hickey was never in custody because he willingly met with officers for questioning and voluntarily took a polygraph test. (R., pp.279-80.) The State argues this is the only possible conclusion because “[e]ven though Detective Palfreyman intended to administer a second polygraph examination, he immediately stopped when Hickey indicated he needed to go to work.” (Respondent’s Br., p.38.) While it is true that Detective Palfreyman did not administer a second polygraph examination, it is also true that he did not let Mr. Hickey go to work. Instead, according to the police reports, Mr. Hickey “was . . . asked to sit in the other interview room.” (Conf. Exs., p.38.) The State asserts that because Detective Palfreyman *asked* Mr. Hickey to wait in the other room, Mr. Hickey was not in custody. (Respondent’s Br., p.38.) But this is surely not the only possible conclusion that could be reached, construing all inferences in Mr. Hickey’s favor.

Mr. Hickey alleged in his petition that he asked to leave the interview room, but was not allowed to do so. (R., p.151.) He also alleged he “clearly said he wanted to speak with an attorney,” but was not allowed to do so. (R., p.151.) The State did not present any evidence to the contrary in the district court, but now points to the police reports as being conclusive evidence that Mr. Hickey was not in custody. This disputed issue of fact should not have been resolved summarily.

C. The Claims Relating To Mr. Hickey’s Disability (Claims 3, 4 And 5) Should Not Have Been Summarily Dismissed

The State argues the district court properly dismissed Claims 3, 4 and 5 because Mr. Hickey “failed to prove his allegation that he had the understanding capacity of a ten-year-old.” (Respondent’s Br., p.21.) As an initial matter, a petitioner is not required to prove an allegation in order to avoid summary dismissal; instead, he must present admissible evidence

supporting the allegation. *See Schultz v. State*, 153 Idaho 791, 796 (Ct. App. 2012). With respect to the merits, Mr. Hickey presented admissible evidence supporting his claim that he has the understanding capacity of a ten-year-old, thus calling into question his confession and his guilty plea.

The State attempts to draw a distinction between “functional independence” and “intelligence or understanding capacity,” arguing that Mr. Hickey presented evidence that his functional independence is comparable to that of a ten-year-old, but his intelligence or understanding capacity is not. (Respondent’s Br., pp.22-23.) The State points to portions of the record that indicate Mr. Hickey has a “low average” or “low-normal” intellect. (Respondent’s Br., p.23.) The State also argues that a mental health assessment documenting that Mr. Hickey has borderline intellectual functioning includes it is a “rule out” diagnosis, meaning there is “the strong probability of a diagnosis that must be confirmed by a licensed professional.” (Respondent’s Br., p.24.)

Surely the strong probability that Mr. Hickey has borderline intellectual functioning, along with his demonstrated low intellect and functional independence of a ten-year-old, is sufficient to present a genuine issue of material fact for purposes of avoiding summary dismissal. This is especially true considering the fact that Mr. Hickey’s post-conviction counsel filed a motion for a mental health evaluation, which the district court denied. (R., pp.207-16.) Because there is conflicting evidence in the record regarding the nature and extent of Mr. Hickey’s developmental disability, the district court erred in summarily dismissing Mr. Hickey’s claims stemming from that disability.

1. Claim 3

The State argues the district court properly dismissed Claim 3 because Mr. Hickey did not present any evidence supporting his allegation that he was coerced or misled into making a false confession. (Respondent's Br., pp.25-26.) The State notes Mr. Hickey "has not provided any authority for the proposition that interviewing an individual with low-average intelligence is per se coercive conduct" (Respondent's Br., p.26.) To be clear, Mr. Hickey does not contend it is per se coercive, but does contend his low intelligence is a factor to be considered.

In *State v. Smith*, 162 Idaho 878 (Ct. App. 2017), the Court of Appeals cited United States Supreme Court and Idaho Supreme Court authority for the proposition that one of the factors to be considered in determining the voluntariness of a confession is "the accused's level of education or low intelligence." *Id.* at 881. The question is whether, "under the totality of circumstances, the defendant's free will was overborne by threats, through direct or implied promises or other forms of coercion" *Id.* at 882. The State bears the burden of proving voluntariness of a confession by a preponderance of the evidence. *Id.*

Here, there is admissible evidence in the record supporting Mr. Hickey's allegation that he was coerced into providing a false confession. In addition to the evidence regarding his low intelligence, the police reports contained in the presentence investigation report reflect that Mr. Hickey was not able to follow the instructions on the polygraph and seemed easily confused. (Conf. Exs., pp.38-40.) Mr. Hickey's lack of understanding, stemming from his developmental disability, may well have resulted in his free will being overborne by police coercion. This is not a claim that should have been summarily resolved in favor of the State.

2. Claim 4

The State argues the district court properly dismissed Claim 4 because the record of the original proceedings shows Mr. Hickey understood he would not have a trial if he entered a guilty plea. (Respondent's Br., pp.27-28.) The State asserts the transcript of the change of plea hearing "clearly disproves" Mr. Hickey's allegation that he believed he was going to have the opportunity for a jury trial because the district court specifically asked him if he understood he would not have a trial. (*Id.*) The plea colloquy may be determinative with respect to the district court's understanding, but it is not determinative with respect to Mr. Hickey's understanding.

Mr. Hickey alleged that, because of his developmental disability, he believed he was going to have the opportunity for a jury trial. (R., p.186.) He has, as discussed above, low-average intelligence and the functional independence of a ten-year-old. Mr. Hickey said, under oath, "When I went in front of [the] judge before I was released from jail, I did not understand that I was pleading guilty to a crime. I told my attorney I was not guilty and I wanted a trial. I thought I was just going to be released from jail and I would have a trial later." (R., p.152.) Mr. Hickey's sworn statement regarding his understanding is sufficient to create a disputed issue of fact making summary dismissal of Claim 4 improper.

3. Claim 5

The State argues the district court properly dismissed Claim 5 because Mr. Hickey's claim that he was not mentally capable of forming the *mens rea* necessary to commit the crime challenges the sufficiency of the evidence, and is thus not a viable post-conviction claim, and because it is not supported by the evidence. The State is incorrect on both fronts.

Mr. Hickey was convicted of felony injury to child, which "include[s] a requirement that the defendant acted willfully." *State v. Gonzales*, 158 Idaho 112, 117 (Ct. App. 2015). (R., p.36.)

The statute defines willfulness as “acting or failing to act where a reasonable person would know the act or failure to act is likely to result in injury or harm or is likely to endanger the person, health, safety or well-being of the child.” I.C. § 18-1501(5); *see Gonzales*, 158 Idaho at 118. Mr. Hickey presented evidence showing that, because of his developmental disability, he was not capable of knowing his actions would be likely to result in injury or harm. Thus, his developmental disability again calls into question the validity of his guilty plea, and Claim 5 should not have been summarily dismissed.

D. Mr. Hickey’s Ineffective Assistance Of Counsel Claims Should Not Have Been Summarily Dismissed

The State argues the district court properly dismissed Mr. Hickey’s ineffective assistance of counsel claim related to the police interview because “it is not properly before this Court.” (Respondent’s Br., p.31.) The State argues this claim was not included in Mr. Hickey’s post-conviction petition and was not argued to the district court. (*Id.*) The State is incorrect. In his post-conviction petition, Mr. Hickey alleged his trial counsel “refused to present the proper evidence” and alleged he “was not allowed to discontinue his interview with the police and leave when he indicated he wanted to do so.” (R., pp.186-87.) In his motion for reconsideration, Mr. Hickey asserted his statements regarding what occurred during the police interview “could be considered evidence” because he was present for the interview. (R., p.253.) He also pointed out that his statements regarding the police interview support his ineffective assistance of counsel claim—specifically his claim that his attorney refused to present the proper evidence. (R., p.253.) This claim is properly before this Court and should not have been resolved summarily.

The State argues the district court properly dismissed Mr. Hickey's ineffective assistance of counsel claim related to his counsel's failure to seek a competency evaluation because the State contends "there can be no doubt that any motion filed by Hickey's trial counsel seeking a competency evaluation would not have been granted because Hickey's post-conviction counsel filed a motion seeking a competency evaluation and the district court denied it." (Respondent's Br., p.33.) The fact that the district court denied Mr. Hickey's motion for a competency evaluation in post-conviction proceedings in June 2017 does not mean such a motion would have been denied if filed by trial counsel in the original proceedings back in 2015.

As an initial matter, it is not clear whether Idaho Code § 18-211 even applies in post-conviction proceedings, as the purpose of the examination procedure is to determine whether a person is competent to "be tried, convicted, sentenced or punished." I.C. § 18-210. A post-conviction proceeding is a civil proceeding, and there is no possibility that a post-conviction petitioner will be tried, convicted, sentenced, or punished as a result of a post-conviction proceeding. Moreover, the State is incorrect that the district court's denial of a mental health examination in 2017 necessarily means a motion for a mental health examination would have been denied in 2015. In denying Mr. Hickey's motion in post-conviction, the district court relied on Mr. Hickey's conduct at the entry of plea and sentencing hearings, but the district court would not have had that evidence before it if it was evaluating such a motion before those proceedings took place.

The State faults Mr. Hickey for failing to present expert opinion that he was incompetent at the time he pled guilty. (Respondent's Br., p.24.) But post-conviction counsel recognized, from the very beginning of his representation, that Mr. Hickey had intellectual deficits, and tried repeatedly to have Mr. Hickey evaluated. (R., pp.190-93.) The district court denied Mr. Hickey's

motion for an evaluation, and failed to grant him the time he requested to obtain an evaluation through the Canyon County Public Defender's Office. (R., pp.237-41.) As counsel stated in his motion for reconsideration:

Petitioner is frustrated because his purpose in seeking approval from the Court for an 18-211 examination was to show that he did not have the cognitive ability to knowingly, intelligently, and voluntarily enter his guilty plea. However, the Court denied him the opportunity to seek such evidence. When Petitioner attempted to obtain his own 18-211 evaluation using his own resources, the Court have him insufficient time to actually obtain the examination.

(R., p.255.) The State did not present any evidence to refute Mr. Hickey's allegations of incompetence. Even absent expert testimony, which Mr. Hickey attempted to obtain, there was a reasonable probability that Mr. Hickey was incompetent when he entered his guilty plea. This is sufficient to succeed on a claim of ineffective assistance of counsel in post-conviction. *See Ridgely v. State*, 148 Idaho 671, 677 (2010).

The State alleges the district court properly dismissed Mr. Hickey's claim that his trial counsel provided ineffective assistance by failing to present evidence of Mr. Hickey's developmental disability because, among other things, "in the district court, Hickey failed even to specify in what context he believes his trial counsel should have presented evidence of his developmental disability." (Respondent's Br., p.36.) This argument is easily disproved by the record. Mr. Hickey's developmental disability is central to almost all of the claims he raised in his post-conviction petition. It affects whether his plea was knowing, intelligent, and voluntary, and whether he was capable of committing the offense and competent to be tried, convicted, and punished for the offense.

Contrary to the State's argument on appeal, Mr. Hickey's claims do not stand alone. (*See* Respondent's Br., p.37.) Mr. Hickey argued, in his motion for reconsideration, that "Petitioner's trial attorney was ineffective because he should have discovered what Petitioner's subsequent

two post-conviction relief attorneys easily discovered—that Petitioner is developmentally disabled.” (R., p.256.) The district court erred in summarily dismissing Mr. Hickey’s ineffective assistance of counsel claims, which stem from his developmental disability. Mr. Hickey presented evidence to the district court which, if true, would have entitled him to relief. The district court thus erred in summarily dismissing his petition.

CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant’s Brief, Mr. Hickey respectfully requests that this Court (1) reverse the district court’s order dismissing his petition for post-conviction relief and/or reverse the district court’s order denying his motion for reconsideration of that order; (2) vacate the final judgment dismissing with prejudice his petition for post-conviction relief; and (3) remand this case to the district court for an evidentiary hearing.

DATED this 1st day of March, 2019.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st 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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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

AWR/eas