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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRIAN GREGORY FIORI,
Plaintiff-Appellant,
v.
STATE OF IDAHO,
Defendant-Respondent.

NO. 46173-2018
KOOTENAI COUNTY NO. CV-2018-1153
APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI

HONORABLE SCOTT L. WAYMAN
District Judge

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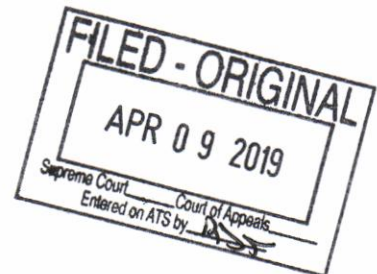


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STATEMENT OF THE CASE

Nature of the Case

Per I.A.R. 35(a) and the Uniform Post-Conviction Procedure Act, I.C. Sec. 19-4901 et seq., this is an appeal of the Kootenai County District trial court's District Judge, Scott L. Wayman's order dismissing Petitioner-Appellant Brian Gregory Fiori's (hereinafter Mr. Fiori) post-conviction relief petition (PCRP) and denying his request for post-conviction counsel.

Statement of the Facts and Course of Proceedings

At trial, Mr. Fiori's counsel acknowledged that Mr. Fiori had been under the influence of alcohol on the day in question, however was ineffective in arguing that the state failed to prove beyond a reasonable doubt that Mr. Fiori was not the driver of the car that day.

The jury determined that the state met its burden and found Mr. Fiori guilty of DUI. Mr. Fiori filed a timely direct appeal and PCRP. Mr. Fiori's PCRP was subsequently summarily dismissed in the Kootenai County District Trial Court by District Judge, Scott L. Wayman and is currently on timely post-conviction appeal (R., pp. 19-22; 23-26) respectfully awaiting this Court's review.

ISSUES

1. Did the district court err by summarily dismissing Mr. Fiori's post-conviction relief petition without first addressing the merits or substance of each of his claims?
2. Did the Kootenai County district court err by failing to grant Mr. Fiori post-conviction counsel to properly allege the necessary and supporting facts in his non-frivolous post-conviction relief petition?

ARGUMENT

I.

The District Court Erred By Summarily Dismissing Mr. Fiori's Post-Conviction Petition Without First Addressing The Merits Or Substance Of Each Of His Claims

A. Standard Of Review

"On appeal from summary dismissal of a post-conviction application, the court examines the entire record and construes all factual allegations in favor of the applicant to determine if a genuine issue of material fact exists which, if resolved in the applicant's favor, would entitle him to the requested relief." Dunlap v. State, 126 Idaho 901, 894 P.2d 134 (Ct. App. 1995). "It is not the courts role, nor of the trial court in a post-conviction relief action, to determine what the jury would have found, nor to make its own assessment of petitioner's guilt. The court needs only assess whether, despite the strong presumption or relieability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Milburn v. State, 130 Idaho 649, 946 P.2d 71 (Ct. App. 1997).

Under the Uniform Post-Conviction Procedure Act, I.C. Sec. 19-4901 to

19-4911, "an application for post-conviction relief under this section is a special proceeding, distinct from the criminal action which led to the conviction, and if the application raises issues of material fact, the district court must conduct an evidentiary hearing and make specific findings of fact on each such issue." Sanchez v. State, 127 Idaho 709, 905 P.2d 642 (Ct. App. 1995). "To survive summary dismissal, a defendant need only make a prima facie showing that the counsel's conduct fell below an objective standard, and a showing that the unreasonable conduct undermines confidence in the outcome of the trial." See Milburn, at 659.

Per I.C. 19-4901(a)(4), Mr. Fiori asserts that there exists substantial claims (R., pp. 6-10; Aug. R., pp. 10-30, 95-96, 162-165, 167-176, 178, 184-188, 190-228, 237-246, 254-256, 265-269, 273-287, 312-313, 323-335, 344-345) backed by corroborating and documented evidence (Aug. R., pp. 31-94, 97-161, 166, 177, 179-183, 189, 229-236, 247-253, 257-264, 270-272, 288-311) that would entitle him to the requested relief and requires vacation of the conviction or sentence in the interest of justice. The United States Supreme Court has defined "substantial" as a claim that has "some merit", see, Martinez v. Ryan, 132 S.Ct. at 1318 (comparing the standard for certificates of appealability from Miller-El v. Cockrell, 537 U.S. 322 (2003)).

Mr. Fiori argues that the Kootenai County district trial court made summary judgment (R., pp. 17-18) and dismissed his PCRCP (R., pp. 5-13; Aug. R., pp. 6-313, 325-335) calling it frivolous—arguably based on form errors and not its substance. "In considering the application the court shall take account of substance regardless of defects of form." See I.C. Sec. 19-4906(a). Even though Mr. Fiori included in his petition specific and substantial claims backed by corroborating and documented evidence, the trial court wholly ignored

and failed to address any of Mr. Fiori's claims.

Mr. Fiori argues that the court was required to have examined the claims and address each specific issue presented and if there was form errors, the court should have appointed counsel (Aug. R., pp. 319-322, 359-362, 387-398) to assist in re-developing his claims. "If an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts." State v. Ochieng, 147 Idaho 621, 213 P.3d 406 (Ct. App. 2009).

The court writes: "Petitioner does not explain what he means by "attached." To the extent that he might be referring in his petition to the 400-plus-page affidavit he filed on February 5, no page or paragraph numbers of that affidavit are referenced in his petition. Even if he attempted to refer in his petition to page or paragraph numbers in that affidavit, very little of the affidavit is paginated or otherwise numbered in any way." The court then concluded: "[t]he District Court [i]s not required to search the record looking for evidence to create a genuine issue of material fact." Vreeken v. Lockwood Eng'n, B.V., 148 Idaho 89, 103-104, 218 P.3d 1150, 1164 (2009). See also Barcella v. State, 148 Idaho 469, 475, 224 P.3d 536, 542 (Ct. App. 2009)(Aug. R., pp. 345-346).

Mr. Fiori concedes that his filing is large, inartful, and likely not in line with best legal practices, however, Mr. Fiori is indigent (Aug. R., pp. 359-386); not trained in the law and lacks the necessary skills and experience of a person who is trained in the law. Mr. Fiori did however make an attempt to create a table of contents (R. pp. 6-9)(Aug. R., pp. 344-345) by labeling each argument according to its corresponding letter in said table of contents (Aug. R., pp. 10-30, 95-96, 162-165, 167-176, 178, 184-188, 190-228, 237-246,

254-256, 265-269, 273-287, 312-313, 323-335, 344-345).

Moreover, Mr. Fiori argues that although his petition was not presented in proper "form", any reasonable person could have paged through his PCRП and would have observed that there exists well-grounded claims supported by corroborating and documented evidence.

"The Uniform Post-Conviction Procedure Act is an appropriate vehicle for considering claims of ineffective assistance of counsel." Hernandez v. State, 132 Idaho 352, 972 P.2d 730 (Ct. App. 1998). "To prevail on an ineffective assistance of counsel claim, the petitioner must show that his defense attorney's performance was deficient, and ordinarily the petitioner must also show that the defendant was prejudiced by the deficiency. To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different." Zepada v. State, 152 Idaho 710, 274 P.3d 11 (Ct. App. 2012).

Mr. Fiori submitted several arguments including due process and ineffective assistance of counsel claims to the best of his abilities. Mr. Fiori argues that, in violation of his right to effective assistance of counsel as guaranteed by I.C. Sec. 19-852; Idaho Const., Art. 1 Sec. 13 and U.S. Constitution Amendments Five, Six and Fourteen (due process and right to counsel); through substantial claims and documented evidence, Mr. Fiori can prove that his due process rights were violated; that trial, conflict and appellate counsels were ineffective, and that their fundamental errors and deficient performance caused prejudice and undermined the outcome of Mr. Fiori's trial.

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II.

The Kootenai County District Court Erred By Failing To Grant Mr. Fiori Post-Conviction Counsel To Properly Allege The Necessary And Supporting Facts In His Non-Frivolous Post-Conviction Relief Petition

A. Standard Of Refiew

"The Uniform Post-Conviction Procedure Act is an appropriate vehicle for considering claims of ineffective assistance of counsel." Hernandez v. State, 132 Idaho 352, 972 P.2d 730 (Ct. App. 1998). "In considering the application the court shall take account of substance regardless of defects of form." See I.C. Sec. 19-4906(a). "If an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts." State v. Ochieng, 147 Idaho 621, 213 P.3d 406 (Ct. App. 2009).

Mr. Fiori argues that the ineffective assistance of counsel (IAC) claims (R., pp. 6-9) (Aug. R., pp. 10-30, 95-96, 162-165, 167-176, 178, 184-188, 190-228, 237-246, 254-256, 265-269, 273-287, 312-313, 323-335, 344-345) presented in his PCRCP (R., pp. 5-13)(Aug. R., pp. 6-313, 325-335) are substantial and require the vacation of the conviction or sentence in the interest of justice, but have become too complex for Mr. Fiori to properly pursue. The United States Supreme Court has defined "substantial" as a claim that has "some merit." Martinez v. Ryan, 132 S.Ct. at 1318, (comparing the standard for certificates for appealability from Miller-El v. Cockrell, 537 U.S. 322 (2003)).

Although Mr. Fiori has submitted a PCRCP that contains issues of material fact backed by corroborating and documented evidence (Aug. R., pp. 31-94,

97-161, 166, 179-183, 229-236, 247-253, 257-264, 270-272, 288-311), the district court dismissed Mr. Fiori's PCRCP arguably due to defects of form— see I.C. Sec. 19-4906(a); and not the specific claims alleged.

Mr. Fiori lacks the legal knowledge and skills to properly develop and overcome the technical errors of his petition and further requires investigation into facts not already contained in the court record.

The trial court further determined that Mr. Fiori's PCRCP was not one "that a reasonable person with adequate means would be willing to bring at his own expense." See I.C. Sec. 19-852(b)(3); (Aug. R., p. 342). Mr. Fiori disagrees with the court's assumption and argues the fact that he borrowed \$ 267.15 to pay for the Clerk's Record which was the only way to proceed; shows that he is serious and seeks the equal and fair justice guaranteed by the United States Constitution.

Moreover, the right of access to courts is a very important right, since it theoretically protects all other rights. "Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most fundamental political right, because preservative of all rights." McCarthy v. Madigan, 503 U.S. 140, 153; 112 S.Ct. 1081 (1992) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

The district court's summary dismissal (R., pp. 14-16)(Aug. R., pp. 340-350) ignores the importance of legal representation in post-conviction relief. "An indigent defendant who is incarcerated in the penitentiary would most certainly be unable to conduct an investigation into facts not already contained in the record." Swader v. State, 143 Idaho 654; 152 P.3d 12, 15 (2007). Likewise, pro se petitioner's often require legal counsel to present sufficient facts to

show deficient performance and prejudice." Id. Thus, the pro se materials do not allow the district court to fully evaluate the merits of Mr. Fiori's PCRCP.

In its Notice of Intent to dismiss (Aug. R., pp. 340-350), the court all but states that it does not address Mr. Fiori's claims by writing: "Petitioner does not explain what he means by "Attached." To the extent that he might be referring in his petition to the 400-plus-page affidavit he filed on February 5, no page or paragraph numbers of that affidavit are referenced in his petition. Even if he attempted to refer in his petition to page or paragraph numbers in that affidavit, very little of the affidavit is paginated or otherwise numbered in any way." The court then concluded: "[T]he District Court [i]s not required to search the record looking for evidence to create a genuine issue of material fact." Vreeken v. Lockwood Eng'g, B.V., 148 Idaho 89, 103-104; 218 P.3d 1150, 1164 (2009). See also Barcella v. State, 148 Idaho 469, 475; 224 P.3d 536, 542 (Ct. App. 2009)(Aug. R., p. 345).

"Where the district court's notice of intent to dismiss did not address defendant's claims, only set forth general legal analysis for an ineffective assistance of counsel claim, did not address how the arguments in the application failed to support the claim, it was insufficient to allow defendant a meaningful opportunity to respond." Crabtree v. State, 144 Idaho 489; 163 P.3d 1201 (Ct. App. 2006). Similarly, the district court's notice of intent to dismiss (Aug. R., pp. 340-350) only set forth a general canned response to Mr. Fiori's PCRCP. While wholly ignoring and failing to address his specific claims that are backed by corroborating and documented evidence.

Mr. Fiori is indigent and incarcerated (Aug. R., pp. 319-322, 359-386)

with no law library and no legal assistant adequately trained in the law, thus frustrating his ability in bringing proper and meaningful claims regarding his criminal conviction and arguably meets the "actual injury" and non-frivolous claim requirements in Lewis v. Casey, 518 U.S. 343, 353; 116 S.Ct. 2174 (1996), because his PCRCP he filed was arguably dismissed for not properly formatting or labeling his petition which failed to satisfy a technical requirement, resulting "actual injury" because it caused his non-frivolous legal claims to be dismissed as frivolous (Aug. R., pp. 340-350) resulting in Mr. Fiori's requests for post-conviction counsel to be denied (Aug. R., pp. 319-322, 359-362, 386-398).

Finally, Mr. Fiori is incarcerated within the Idaho Department of Correction at the Idaho State Correctional Center (ISCC), under the care, custody and control of Warden Christensen. Mr. Fiori is indigent and has no funds to hire private counsel. He is without bank accounts, stocks, bonds, real estate or any other forms of real property. He is unable to provide any other form of security. He is untrained in the law and, if he is forced to proceed without counsel being appointed, he will be unfairly handicapped in competing with trained and competent counsel of the State of Idaho.

CONCLUSION

In the interest of equal and fair justice under the law, and for the foregoing reasons, Mr. Fiori respectfully asks this Court to vacate the district court's summary judgment and remand the case back to the trial court with instructions to appoint post-conviction counsel to assist Mr. Fiori in properly alleging his claims and order the trial court to make specific findings of fact on each of Mr. Fiori's claims.

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DATED this 8th day of April, 2019.

Respectfully submitted,



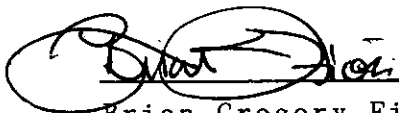
Brian Gregory Fiori
Plaintiff-Appellant, pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of April, 2019, I served a true and correct copy of APPELLANT'S BRIEF, on the following individual by the method indicated below:

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

- * By placing a copy of the same within the institutional mail system, U.S. Mail, first class postage prepaid.



Brian Gregory Fiori
Plaintiff-Appellant, pro se