2-25-2015

Pentico v. State Appellant's Reply Brief Dckt. 42242

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	No. 42242
	)	
v.	)	
	)	
CHRISTOPHER PENTICO,	)	APPELLANT'S REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S REPLY BRIEF

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

HONORABLE MICHAEL MCLAUGHLIN
District Judge

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I. INTRODUCTION

The Brief of Respondent filed in this matter reflects a substantial and substantive failure to respond to the arguments which Petitioner has made in this post-conviction relief proceeding. The State has made erroneous and materially incomplete assertions about the relevant facts of this case which appear in its "Statement of Facts," its "Issue" and its "Argument." The State's Argument is comprised of a variety of legal arguments which are either erroneous, superfluous or relevant only to matters which have already been resolved in the criminal proceeding or to facts other than those in the record of this matter.

In hopes of providing a coherent response to Brief of Respondent, Mr. Pentico will first address the erroneous assertions about the facts without regard to where in the Brief of Respondent those assertions are made. Then, in a separate section of this response, Mr. Pentico will address the arguments made by the State.

II. RESPONSES RELATED TO RESPONDENT'S ERRONEOUS ASSERTIONS ABOUT THE RELEVANT FACTS.

The disconnection between this case and the case the State appears to prefer to debate first manifests within the State's version of the facts relevant to this appeal. There are two distinct and important instances of this disconnect within the Statement of Facts (one of which bleeds over into the State's incomplete framing of the "Issue") and two others within the Argument.[1]

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[1] Distinct but not so important is the fact that the State consistently refers to the visit to the Governor's Office as having occurred on April 6 when the record in both this case and in *State v. Pentico* makes it clear that the visit at issue occurred on April 2, 2008.

First, the State attempts to truncate the facts relevant to the resolution of this case by making reference within the Statement of Facts not to the Record of this case but to the Court of Appeals summary of the Record as it existed at the close of the criminal proceedings against Mr. Pentico. Brief of Respondent, p. 1. This attempt to narrow the relevant facts is foundational to a later argument that Pentico did not create an adequate record to preclude summary dismissal of his claim for post-conviction relief. The reality is that Pentico has put into the record the factual foundation which was not, as a result of ineffective assistance of counsel, part of the record in the appeal of *State v. Pentico*. Specifically, he has demonstrated that he was, on March 25, 2008, doing nothing more than entering the Capitol grounds on his way to meet with a legislator for the purpose of seeking her help in addressing a grievance he had with State government. While he had been to her office earlier that day seeking that meeting, he had not been to the Governor's office or the Department of Education that day.

While it had the opportunity to do so, the State did not make any attempt to controvert that factual foundation. The State offered no affidavits providing admissible evidence relevant to the circumstances which led up to the demand that Mr. Pentico leave the Capitol grounds and that he thereafter refrain from returning to those grounds or going to the Governor's office or the Department of Education.

Second, the State has, in its Statement of Facts, acknowledged the existence of more than one constitutionally based claim made in Mr. Pentico's petition for post-conviction relief but it only identifies one of them. Brief of Respondent, p. 1. The State apparently would prefer to focus the consideration of this Appeal only upon the constitutionality of the "ask to leave" which occurred on March 25. But this approach masks over the other properly raised and presented claims, both premised in the absolute absence of procedural due process.

Indeed, this March 25th centric focus carries over to the State's stated "Issue" which frames the issue in a manner so as to suggest that the only question the Court needs to consider is whether Mr. Pentico failed to show that the March 25th "ask to leave" was based upon the content of his speech. This framing of the issues ignores that Mr. Pentico has consistently claimed and amply demonstrated that the March 25th "ask to leave" impaired his efforts to exercise his right to petition the government for redress of grievances in a manner commonly employed by citizens. In addition, it fails to account for the fact that Mr. Pentico has also raised significant procedural due process challenges to the application, under the circumstances of this case, of the one year automatic exclusion.

In both regards, his attorney in the criminal matter failed to raise these constitutional challenges or to develop the record necessary to preserve them for appeal. However, now that the claims are raised and the record to support them is established, the State seeks to ignore them. The State never cites any authority or makes any argument in support of an application of the statute in a manner that absolutely deprives Mr. Pentico from access to traditional and designated public forums for one year without regard to the reason that he might seek to enter those properties and without any form of procedural due process. [2]

In the course of its Argument, the State, apparently in recognition that it has no factual basis for challenging Mr. Pentico's claims about the unconstitutionality of the "ask to leave" which occurred on March 25, 2008, attempts to draw into the record what it characterizes as

[2] The State does mention that Mr. Pentico challenges the "exclusion from certain State property for a year" but does so in the context of the erroneous assertion that Mr. Pentico premised this challenge upon an a claim of facial over breadth. Brief of Respondent, p. 9. The State also seems to claim that a re-entry ban is authorized by *Virgina v. Hicks,* 539 U.S. 113, 123 (2003) but that case does not consider the procedural due process issues and does not appear to have involved an initial exclusion form a traditional public forum for no apparent reason and subsequent entry upon a designated public forum for the purpose of using that property in conformance with its purpose.

"evidence" from the Court of Appeals' decision in *State v. Pentico,* Brief of the Respondent, p. 4. The problem with this attempt, other than the fact that it goes outside of the record in this matter, is that the Court of Appeals characterized this information only as "references" at sentencing to possibly relevant conduct. It is not even clear that these "references" were based upon sworn testimony capable of serving as "evidence" or merely prosecutorial argument based totally upon hearsay and potentially never capable of being evidence in any proceeding. Moreover, there is no way to tell from the Court of Appeals' articulation of these prior events whether the problems arose from the content of speech or from activities which warranted ejection and exclusion from a traditional public forum. In the end, if the State had evidence it thought relevant to this matter, it should have filed affidavits. As it did not, Mr. Pentico is entitled to have the summary dismissal proceed on the record as it exists in this action. As a consequence, the Affidavit of Mr. Pentico provides the unrebutted evidence which must be considered in determining if summary dismissal of Mr. Pentico's petition for post-conviction relief was warranted.

The final instance which demonstrates the apparent disconnect between the facts of this case and the facts as the State would prefer them to be also appears in the State's Argument. The State claims:

> "To show that his constitutional rights were violated on March 25, Pentico's trial counsel would have had to prove that the exclusion from the Governor's offices that day was based on the content of Pentico's speech as opposed to a content neutral decision or one based on non-communicative conduct, volume or active disruption of the activities of others."

Brief of Respondent at p. 7. This assertion obviously conflates two separate events but it does so in a way that suggests a foundational confusion about the issues actually presented in this case. Mr. Pentico claims and the facts demonstrate that on March 25th he was, for no apparent

reason interrupted in the course of seeking to speak to a legislator about a grievance he had with a governmental entity. There was no need for him to attempt to prove the negative (that the ejection from the Capitol grounds was premised upon non-content based grounds) because the right being obstructed was not "speech" but rather the right to "petition" and the unrebutted evidence clearly demonstrates that this occurred for no apparent reason. On the other hand, Mr. Pentico's trip to the Governor's office has already been determined not to have involved a constitutionally protected activity but this fact has nothing to do with a determination of the constitutionality of the "ask to leave" on March 25 or of Mr. Petico's claims based upon procedural due process. In sum, the two events are distinct and the issues related to them, at this point do not involve a question of whether Mr. Pentico's exclusion from the Governor's office was based upon the content of his "speech" that day, April 2, 2008.

III. RESPONSES RELATED TO RESPONDENT'S ERRONEOUS ARGUMENTS

Any consideration of the issues raised in this case must begin with a correct appreciation of the core issues and arguments and recognition of the lack of relevant decisional law. The Brief of Respondent reflects a failure in both respects.

Indeed, Mr. Pentico cannot identify a single argument set out in the Brief of Respondent which addresses either of the procedural due process claims asserted by Mr. Pentico (or the related ineffective assistance of counsel claim) relative to the automatic one year exclusion provided for in I.C. §18-7008(A)(8) which provides the foundation for criminalizing his April 2nd visit to the Governor's reception area. Apparently, the State has no response to these arguments. But, whether it does or it does not, the State has not stated a response and it has not even acknowledged that these procedural due process claims are an issue before the Court. As such, the State would appear to be precluded from addressing these due process claims or the

affiliated ineffective assistance of counsel claim during oral argument. *Rhead v. Hartford Ins. Co.,* 135 Idaho 446, 452 (2001). The Court and Mr. Pentico should not be required to speculate as to the specific issues and arguments that the State will raise at oral argument. Nor should the State be afforded the tactical advantage of argument-by-ambush which would result by allowing it to raise issues and present arguments that are not presented within its briefing. Accordingly, it is appropriate to conclude that the State has waived the opportunity to respond to Mr. Pentico's procedural due process challenges and to his claim of ineffective assistance of counsel premised upon those challenges.

As a starting point for an analysis of the issues presented in this case, one must appreciate that Mr. Pentico contends that, but for the events of March 25, 2008, his conduct on April 2, 2008, (visiting the reception area of the Governor's Office) could never be found to be a violation of any law of this State. On April 2, 2008, he went to a place which was open during office hours to all members of the public who wanted to communicate with the Governor or his staff. While he was there he delivered a letter expressing concerns and grievances, just as any member of the public would be free to do. There is no claim or evidence to support a finding that doing so is not a legitimate reason for going to the Governor's office. Once the letter was delivered, he turned and left. There is no claim or evidence that he did anything else. While he was there he did not violate any rules or regulations and he never refused to leave that office on that day after being asked to do so.

On these facts, the ruling in *State v. Korsen*, 138 Idaho 706, 69 P.3d 126 (2003) *abrogated in part upon other grounds, Evans v. Michigan,* 133 S.Ct. 1069, 1074 (2013), which the State relies upon, actually provides no authority for charging or convicting him with a violation of I.C. §18-7008(A)(8) based solely upon his conduct on April 2, 2008. Indeed,

Korsen, provides very limited guidance which is relevant to any of the issues presented in this post-conviction ruling proceeding. The Court held that the statute was not, as to its "ask to leave" portion, facially overbroad because, even as it could be applied to public property (specifically government owned, non-public forums, such as office building), there were many instances in which the statute could be enforced without adversely impacting a citizen's protected rights. *Korsen* at 715-716. But Mr. Pentico is not claiming in this proceeding that the statute is facially overbroad.

The *Korsen* Court did not hold that the statute could be applied to all citizens on government owned property without regard to their reason for being there, that it could be applied to citizens present on a traditional public forum or that the "one year exclusion" portion of the statute could be constitutionally applied to Mr. Korsen or any other citizen. Indeed, the Court specifically acknowledged that there were circumstances (such as presence on the Capitol grounds) as to which the statute could be overbroad and thus unconstitutional on an "as applied" basis.[3] Indeed, all that *Korsen* concluded was that the "ask to leave" portion of the statute was not facially overbroad and that it could constitutionally be applied to Mr. Korsen where at the time he was asked to leave he had completed his legitimate business at that government building. Thus, to the extent that *Korsen* has any relevance to the claims at issue in this case, it teaches only that standing alone nothing Mr. Pentico did on April 2, 2008, could be the basis for a criminal prosecution founded upon I.C. §18-7008(A)(8). Thus, if he was not otherwise legally

[3] Here it is worth noting that the State claims, without citation of authority, that the assertion that statutory overbreadth can be considered and dealt with only as a "facial" or "as applied" basis is "an erroneous legal assertion" and that any argument premised upon "as applied" overbreadth can be disregarded. Respondent's Brief at pp. 8-9. Clearly, the Idaho Supreme Court recognizes the concept that a statute may be overbroad as applied and does so with the expectation that any over-reaching effect of the statute can be cured on a case-by-case basis. *State v. Korsen*, at 715, *see also*, *Broadrick v. Oklahoma*, 413 U.S. 601, 614-615 (1973).

barred from going to the Governor's office, his visit to that office on April 2, 2008, could not be treated as a trespass pursuant to I.C. §18-7008(A)(8).

Virginia v. Hicks, 539 U.S. 112 (2003) which is also cited by the State is no more helpful to the resolution of this case than is *Korsen.* In *Hicks*, the Court upheld, against a facial overbreadth challenge, a criminal trespass prosecution of an individual who had returned to a housing development owned and operated by a governmental entity after having been previously ordered to leave and to not return; the similarities between that case and this end there. In *Hicks,* the streets on which Mr. Hicks trespassed had been abandoned by the City and were clearly posted so as to identify them as private streets and to announce the intention to pursue trespass charges against anyone who entered them without authorization. The controlling governmental entity had adopted a specific policy regulating the use of the streets and to authorize the police to issue ejection/exclusion notices to any person who used the streets without being able to demonstrate a "legitimate business or social purpose." Obviously, there is no similar posting or regulating of the Capitol grounds where Mr. Pentico was initially confronted or of the Governor's office reception area.

Moreover, the evidence pertaining to Mr. Hicks' specific conduct and to the impact of the exclusion was materially different from the record in this case. Mr. Hicks was known to the regulating entity as a habitual trespasser and vandal. While Mr. Hicks had requested that the property administrator grant him permission to re-enter and he had been denied that permission there was no showing that he would have been denied that permission if he had shown that he had a legitimate business or social purpose or if he had made the request in order to engage in a constitutionally protected activity. Here there is no evidence that Mr. Pentico was a habitual trespasser or vandal. There was no regulation, no posting and no need for him or any other

citizen to seek permission to enter the Capitol grounds to speak to a legislator or the reception room of the Governor's office to deliver a letter to the Governor. Even if the State could constitutionally regulate access to the Capitol building to those with legitimate business, social or constitutional purposes, Mr. Pentico's desire to elicit the help of a legislator is consistent with what happens every day during the legislative session. In addition, it is evident that in the *Hicks* case there was an administrator who could be approached for permission - hence some minuscule procedural due process – here Mr. Pentico could not even find out who had issued the order that he be excluded. In the end, the only bearing that the decision in *Hicks* has upon this case is that it provides at least a basis for the argument that the *Korsen* Court was correct in concluding that I.C. §18-7008(A)(8) is not facially overbroad. But that is not an issue presented in this case.

Thus, the case law relied upon by the State fails to provide a foundation for a determination that the "ask to leave" on March 25th was a constitutionally valid application of I.C.§18-7008(A)(8). Moreover, there is no showing that if the "ask to leave" was itself invalid that the "one year exclusion" could lawfully follow from that invalid "ask to leave." Hence, the asserted wrongfulness of his conduct on April 2, 2008, turns, not upon what Mr. Pentico did or did not do while in the reception area of the Governor's office, but rather upon the claim that he could be, based on the events of March 25, 2008, barred from being there altogether on April 2, 2008. Mr. Pentico's Trial Counsel failed to appreciate this fact. As a result, he failed to appreciate the substantial and heretofore unresolved constitutional challenges which arise from a prosecution based upon Mr. Pentico's visit to a public space in the Governor's office on April 2, 2008, because of events which occurred eight days earlier.

In particular Trial Counsel failed to recognize that:

1. He had available to him, what is thus far, unrebutted evidence that Mr. Pentico was, on March 25, 2008, peacefully entering the Capitol grounds for the purpose of speaking to a legislator to seek help in addressing a grievance with a governmental entity. As a consequence, he did not realize that *Korsen* provided him with authoritative argument that the "ask to leave" was unconstitutional and the accompanying "one year exclusion" was not premised on a lawful "ask to leave" and had no lawful effect. In this regard, that Idaho Supreme Court specifically recognized that:

> Assuming that a criminal trespass prosecution is filed pursuant to I.C. §18-7008(8) *sic.* against a person on public property who is exercising his or her free speech rights, the statute could be attacked as applied to that constitutionally protected conduct.

Korsen, Id.

2. Even if there was a lawful basis to ask Mr. Pentico to leave the Capitol grounds as he was peacefully entering upon them and heading to a meeting with a Legislator, the seemingly life-time exclusion (or even the one year exclusion set out in I.C. 18-7008(A)(8)) from the Capitol grounds and other identified State properties where citizens regularly interface with elected officials and governmental administrators presented compelling and invalidating procedural due process issues.

Ultimately, the two pronged constitutional challenge which needed to be raised and which was not raised is: "Can a citizen, who is doing nothing more than entering the Capitol building in order to speak to a legislator, lawfully be told to leave that property and to stay off of others and, if so, can he lawfully be automatically barred thereafter from entering identified State properties for a year." Mr. Pentico has demonstrated a criminal prosecution premised upon the

claim that I.C. §18-7008(A)(8) validates such an "ask to leave" and a subsequent "one year exclusion" has fatal constitutional defects and he has asserted that these defects have never been addressed or resolved in any decisional law. The State has made no attempt to respond directly to these arguments and it has failed to direct the Court's attention to any relevant decision which resolves the constitutional challenges which should have been but were not raised. Instead, the State offers a number of irrelevant, obtuse and erroneous arguments.

The State seeks to treat this as a "speech" case and to have the Court conclude that Pentico cannot prevail because he has not shown that he was ordered off of a traditional public forum based upon the content of his speech as opposed to his conduct. Brief of Respondent pp. 6-7. This contention ignores both the fact that the First Amendment affords protection to activity beyond free speech – to petition the Government for redress of grievances – and the unrebutted evidence that at the time he entered the Capitol grounds Mr. Pentico was on his way to do just that – in a normal and commonly accepted manner – to speak to a legislator in person. While this point is important to keep in mind, it does not invalidate the State's argument that the exercise of First Amendment rights are subject to reasonable time, place and manner, restrictions.

While such restrictions can be upheld, the State has provided this Court with no evidence of the existence of any time, place and manner restrictions (let alone reasonable ones) which are relevant to this case. Indeed, from the record it appears that the State thinks that it is permissible for State police to order citizens on their way to speak to a legislator about a grievance to leave State property for any reason or no reason at all. The State has provided this Court with no authority for such an application of I.C. §18-7008(A)(8) and no evidence of any conduct which would warrant ejection from a traditional public forum (the very government-owned property

which the Court in *Korsen* acknowledged would require a different approach than was taken in that decision).

The State argues that the unrebutted evidence of Mr. Pentico's mission is insufficient because he has not proven that the "ask to leave" was premised upon his protected conduct as opposed to unprotected conduct, Brief of Respondent p. 8. Other than unreasonably expecting him to prove a negative when, if any relevant evidence exists it is in possession of the State (though not disclosed to the Court), this assertion ignores the clear import of the evidence in the records. And in summary dismissal proceedings Mr. Pentico is entitled to the benefit of the reasonable inference that he did not engage in any unprotected conduct. Given that the State has failed to put any evidence in the record which could rebut this inference, there is no basis upon which to conclude that there was a reasonable basis for asking him to leave a traditional public forum or directing him to thereafter stay off of traditional and designated public forums. Thus, there is not only a question of fact which could be resolved in favor of Mr. Pentico and which justifies the requested relief, there is a question of fact which must be resolved in his favor. On this record there is no merit to the claim that he has failed to satisfy his burden of demonstrating a prima facie case in support of his claim that he was unconstitutionally ejected from a traditional public forum and excluded from both that traditional public forum but also a designated public forum.

Similarly, the State appears to contend that Mr. Pentico cannot prevail in this matter because he has not shown that the instruction that he not return to the Capitol and that he stay off of identified government owned properties was a response to his speech as opposed to his conduct. Brief of Respondent p. 8. This argument continues the attempt to make Mr. Pentico responsible to prove the negative when the State possesses any evidence that the order was

premised upon conduct subject to regulation but it also ignores Mr. Pentico's assertion that given the clear and expressed structure of the unambiguous statute (which the courts of this State are obligated to accept without regard to whether the result seems rational, *Verska v St Alphonsus RMC,* 151 Idaho 889, 895-896, 265 P.3d 502, 508-509(2011)) the validity of the exclusion turns upon whether a valid "ask to leave" occurred. As no valid and enforceable "ask to leave" occurred in this case there could be no ongoing exclusion.

Moreover, this argument ignores that Mr. Pentico's primary challenge to the "one year exclusion" is based upon the forfeiture without any form of procedural due process of his right to proceed as any other citizen to move about and to petition the government. The closest that the State comes to even acknowledging that the procedural due process issue has been an issue since the filing of the petition for post-conviction relief is an attempt to deflect the argument by claiming that Mr. Pentico has not shown that the one year exclusion actually curtailed his access to a public forum or his exercise of "his right to free speech." Brief of Respondent pp. 10-11. The facts of this case demonstrate that Mr. Pentico was arrested while in the process of pursuing his right to petition the Government for the redress of grievances in a designated public forum and in a fashion available to all other citizens. Clearly his access was, by the State Police, seen as being curtailed. The fact that he did not thereafter go onto the Capitol grounds carrying a sign protesting his exclusion from those grounds in order to show that he would have been arrested should not be held against him as the failure to do so is a rational response to having been stopped, cuffed and cited after merely delivering a letter to the Governor's office.

The State seeks to capitalize on the fact that Mr. Pentico did not disprove or deny matters which are not in the record, which are not demonstrated by any evidence offered by the State, which are not even clearly based upon evidence as opposed to argument and which are not

clearly conduct issues as opposed to content issues. Brief of Respondent p.8. It would appear that the State is attempting to avoid the existence of a question of fact in a situation in which it made no attempt to properly raise one by urging the Court to require Mr. Pentico to prove negatives. Mr. Pentico contends that there is no evidence in this record and indeed no "evidence" that his "no reason at all" ejection on March 25, 2008, was based on anything other than the fact that he entered the Capitol grounds on that day to seek assistance of a legislator in an attempt to redress his grievance with government. If such evidence exists, it was the State's responsibility to present it, not Mr. Pentico's responsibility to rule out its existence.

The State attempts to frame Mr. Pentico's challenge to the exclusion as an overbreadth claim. Brief of Respondent pp. 8-9. Then it attacks that claim as being based on an erroneous legal argument (that there is no "as applied" overbreadth claim), Brief of Respondent p.9 and as lacking an evidentiary foundation (no evidence Pentico was "exercising any constitutional rights on April 6" (sic), Brief of Respondent p.9). While there are issues with both of these assertions, neither, even if completely accurate, is relevant to the claims stated in the petition for post-conviction relief or in any of the briefing. Mr. Pentico's challenge to the exclusion portion of the statute, without which his visit to the Governor's reception room would not have been a trespass, is not based upon an overbreadth claim.

Mr. Pentico has claimed the one year exclusion is an impermissible prior restraint upon his exercise of his First Amendment Rights (speech and protest) and therefore works as a forfeiture of these rights. He has also claimed that this forfeiture of rights as well as the exclusion itself (preventing him from going where other citizens can freely go to conduct business with the government) are both impermissible because the statute mandates the exclusion without regard to the circumstances and justifications for the "ask to leave" and makes no

provision for any form of pre-ejection or post-ejection procedural due process. Without a procedure that affords him the opportunity to challenge the basis for the exclusion or the scope or duration of the exclusion he is left with no protection against completely arbitrary and unreasonable enforcement.[4] The State's argument regarding overbreadth simply does not address either of these issues.

IV. CONCLUSION

For the forgoing reasons it is respectfully submitted that the Court should reverse the Order Granting Summary Dismissal and remand the matter to the Trial Court for further proceedings in accordance with this Courts determination of the issue raised herein.

DATED, this 25 day of February, 2014.

HEIDI JOHNSON
Attorney for Defendant

[4] It is worth noting that while a challenge based upon the lack of procedural due process does not seem to require a specific showing that the exclusion would have been removed if there has been some form of due process proceeding, the record in this case, as it currently stands, demonstrates that in Mr. Pentico's case the one year exclusion was triggered by a baseless and unconstitutional "ask to leave." Hence, on this record there is every reason to believe he would have benefitted from a due process procedure.

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that on this 25th day of February 2015, I caused to be served a true and correct copy of the foregoing document in the above-captioned matter to:

KENNETH K. JORGENSEN
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Hand delivered to Attorney General's mailbox at Supreme Court.

Tracy Stenberg