6-24-2019

Ponting v. State Appellant's Brief Dckt. 46460

Electronically Filed
6/24/2019 10:50 AM
Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

MITCHELL JAMES PONTING,	
Petitioner-Appellant,	**NO. 46460-2018**
	ADA COUNTY NO. CV01-17-17063
v.	
STATE OF IDAHO,	**APPELLANT'S BRIEF**
Respondent.	

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 LYNN G. NORTON
District Judge

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

MAYA P. WALDRON
Deputy State Appellate Public Defender
I.S.B. #9582
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

ATTORNEYS FOR DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Mitchell Ponting appeals from the district court's final judgment dismissing his post-conviction petition. The district court erred in summarily dismissing two of Mr. Ponting's claims because it did not first give him notice and an opportunity to respond to its reasons for dismissal. Therefore, this Court should vacate the final judgment and the district court's order granting the State's motion for summary dismissal in part, and remand Mr. Ponting's case to the district court for further proceedings.

Statement of Facts and Course of Proceedings

The State charged Mr. Ponting with two counts of possession of a controlled substance and one count of possession of drug paraphernalia in Ada County Case No. CR-FE-2016-1253, after officers found a syringe of heroin inside a bag in his car. (R., p.44.) He later pled guilty to one count of possession of a controlled substance. (R., pp.34–42.) In exchange, the State agreed to recommend a unified term of four years, with one year fixed, to dismiss the remaining charges, and not to charge Mr. Ponting with a persistent violator enhancement. (R., pp.34–37.) The district court later imposed the sentence recommended by the State. (R., pp.44–45.)

Mr. Ponting then filed a timely petition for post-conviction relief. (R., pp.5–11.) Among other things, he argued that his trial attorney was ineffective for refusing to test the syringe and the bag in which the syringe was found for fingerprints and DNA. (R., pp.7 (original petition), 57–58 (amended petition).) He asserted in his amended verified petition that he asked his attorney to have the bag and syringe tested, but his attorney refused; if the bag and syringe had been tested, the result would have shown that Mr. Ponting's fingerprints and DNA were not present but may have shown the fingerprints and DNA of another person; that evidence would be

exculpatory; and if Mr. Ponting had that exculpatory evidence, he would have chosen to go to trial rather than plead guilty. (R., pp.57–59.)

The State moved for summary dismissal, arguing that Mr. Ponting failed to raise a genuine issue of material fact regarding (1) deficient performance, because the record contradicted his claim that he asked his attorney to have the bag and syringe tested but his attorney refused (*see, e.g.*, R., p.101), and (2) prejudice because, when he pled guilty, the bag and syringe had not been tested, so the State could not have presented any evidence at trial that his fingerprints or DNA were on the syringe or the bag (*see, e.g.*, R., p.88).

After a hearing, the court summarily dismissed all but one of Mr. Ponting's claims. (R., pp.117–31.) As for the claims regarding counsel's refusal to test the bag and syringe, the district court explained its reason for dismissal as follows:

> Defendant made a voluntary unconditional plea, where he indicated he understood that a guilty plea would waive challenges to the sufficiency of the evidence and that he was admitting the truth of the charge as alleged in the Information.
> . . . .
> Because the heroin was present in his car, and he was aware it was there, Petitioner has established facts to show a violation of Idaho Code § 37-2732(c)(1) for felony possession of heroin. Thus, whether his fingerprints or DNA were on the bag or syringe is immaterial.
> Based on a review of the record, the Court finds Petitioner has failed to show he would not have plead guilty had trial counsel tested the evidence and, therefore, has failed to show prejudice.

(R., pp.127–28.) The court dismissed the remaining claim after an evidentiary hearing (R., pp.146–57; *see generally* 9/7/18 Tr.), and issued a final judgment in favor of the State (Aug., pp.1–2). Mr. Ponting timely appealed. (R., pp.159–61.)

ISSUE

Did the district court err by summarily dismissing two of Mr. Ponting's claims without giving him notice and an opportunity to respond to its reasons for dismissing those claims?

ARGUMENT

The District Court Erred By Summarily Dismissing Two Of Mr. Ponting's Claims Without Giving Him Notice And An Opportunity To Respond To Its Reasons For Dismissing Those Claims

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). In Idaho, claims of ineffective assistance of counsel are generally brought in a post-conviction petition. *See State v. Saxton*, 133 Idaho 546, 549 (Ct. App. 1999). A post-conviction petition initiates a civil action in which the petitioner prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based. *State v. Dunlap*, 155 Idaho 345, 361 (2013); *Charboneau v. State*, 144 Idaho 900, 903 (2007). To succeed on an ineffective assistance of counsel claim, the petitioner must generally show that (1) his attorney's performance did not meet "an objective standard of reasonableness," and (2) his attorney's deficient performance prejudiced him. *Strickland*, 466 U.S. at 687–88.

The district court can summarily dismiss or grant a petition for post-conviction relief if "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(b), (c). However,

> The district court cannot dismiss claims on its own motion if it does not give the parties a twenty-day prior notice stating its reason for doing so as required by Idaho Code § 19-4906(b). Likewise, if the State moves to dismiss a petition under Idaho Code § 19-4906(c), the court cannot dismiss a claim on a ground not asserted by the state in its motion unless the court gives the twenty-day notice required by Section 19-4906(b).

DeRushe v. State, 146 Idaho 599, 602 (2009); *see also* I.C. § 19-4906(b) ("When a court is satisfied . . . that the applicant is not entitled to post-conviction relief and no purpose would be

served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. . . ."); *Mallory v. State*, 159 Idaho 715, 721 (Ct. App. 2015) (finding Mallory was not provided notice and an opportunity to respond to the grounds for dismissing his claim by either the State or the district court as required by I.C. § 19-4906).

This Court reviews the district court's decision to summarily dismiss a petition de novo. *Muchow v. State*, 142 Idaho 401, 402–03 (2006).

The district court erred by summarily dismissing Mr. Ponting's claims that his attorney was ineffective for refusing to test the bag and syringe for fingerprints and DNA because the State requested dismissal for different reasons than those ultimately adopted by the district court. As a result, Mr. Ponting was not given notice and an opportunity to respond to the district court's reasons for dismissal.

The entirety of the State's arguments in favor of summarily dismissing Mr. Ponting's claims are as follows:

> Ponting has failed to raise a genuine issue of material fact that he would not have pled guilty if the syringe or bag were tested. When Ponting pled guilty, the syringe and bag had not been tested so the State had no evidence to present at a trial that his fingerprints or DNA were present on the syringe or the bag. Ponting knew the State had no evidence his fingerprints or DNA were present on the syringe or bag before he pled guilty. *Test results could not have played any role in Ponting's decision to plead guilty because the circumstances before any testing were the same as he believed they would be after it was done.*

(R., p.88 (emphasis added).)

> Ponting claimed his attorney was ineffective for failing to have the syringe of heroin tested for his fingerprints and DNA and the bag tested for fingerprints. The State moved for judgment because Ponting failed to raise a genuine issue of material fact he was prejudiced: he failed to show a reasonable probability that he would not have pled guilty if his attorney had the syringe and bag tested to show his fingerprints were not there. Counsel responded that the State's assertion that

"no testing" was the same as "testing to show no fingerprints" was not the same and counsel's refusal to test prejudiced Ponting.

The State's motion for disposition of the claims was based solely on whether Ponting was prejudiced by his attorney's actions. The State argued, at the time Ponting pled guilty, the circumstances were that he knew the bag and syringe had not been tested. Ponting would therefore have known, the State would not have been able to present testimony or evidence his fingerprints were not on the bag or syringe and that his attorney could have argued at a trial his fingerprints were never found on the syringe or bag. Despite this knowledge that the State had no evidence his fingerprints were on the bag or syringe, Ponting pled guilty anyway. *Ponting can't now allege that evidence his fingerprints weren't on the bag or syringe would have in anyway impacted his decision because the state of the evidence when he pled guilty was his fingerprints weren't on the bag or syringe.*

Counsel's further response was to address whether having the syringe and bag tested was deficient performance under the first prong of *Strickland* which was not analyzed by the State. The State will now address the deficiency prong in *Strickland*. Ponting has also failed to raise a genuine issue of material fact that his attorney was deficient. Ponting claims he asked his attorney to have the bag and syringe tested forensically for DNA and fingerprints. Ponting's claim is disproven by the record. In his guilty plea form, Ponting was asked:

17. Is there anything you have requested your attorney to do that has not been done? Ponting indicated "no" under oath.

49. Are you satisfied with your attorney? Ponting indicated "yes" under oath.

(R., pp.100–01 (citations omitted).)

[T]he analysis is . . . not what a trial attorney would think is different, but it's what the subjective belief of Mr. Ponting was, and my point is, you can't come before the court now and say that it would have mattered because there was no evidence that your fingerprints were on that bag anyway, or the syringe. The state wasn't going to be able to prove that, you're not alleging that your lawyer told you that, so you can't show a reasonable probability that, but for that testing being done, you wouldn't have pled guilty.

The second piece of that is to say, well, if they would have tested it and shown someone else's fingerprints were on there, I wouldn't have pled guilty, but you don't have any evidence that other people's fingerprints were on there. He didn't come to court with admissible evidence, and that's what you're required to show in post-conviction. It's a really high standard for a reason. It's not equal footing. There's a strong presumption on behalf of counsel that he acted appropriately, so from the state's perspective, your starting point is that counsel was competent, and that it's their responsibility to show admissible evidence that, in fact, he wasn't.

I didn't even analyze—or that it wouldn't have mattered. I didn't analyze initially in my first motion the deficiency prong in Strickland, but I went ahead

> and did that because counsel included it in his response. He claimed in his response, it was deficient performance to not have it analyzed, and my reply on that was, you failed to raise a genuine issue of fact that the attorney was defiant [sic] because your client's claim that he asked his lawyer to do this, is disproven by the record.
>
> And I point out that in the transcript, State's Exhibit No. 1, and then under oath, he says—there's a question—"Is there anything you requested your attorney to do that hasn't been done?" He says, "No." That's under oath. That's the record. Then when you're inquiring of him, you ask, "Are you satisfied with your attorney?" And, he says, "Yes," on page 8.
>
> So even moving forward at an evidentiary hearing, they can't even show that he asked his attorney. I mean, that's the state of the record. That's what they're stuck with at this point, so from the state's perspective, we would ask that the court grant the motion and issue a written opinion.

(3/28/18 Tr., p.17, L.2–p.19, L.2.) Those were not, however, the reasons the district court gave when it ultimately dismissed Mr. Ponting's claims. The district court explained:

> In the Guilty Plea Advisory Form, Petitioner answered pertinent questions as follows:
>
> > 16. Have you told your attorney everything you know about the crime? **YES** NO
> > 17. Is there anything you have requested your attorney to do that has not been done? YES **NO**
> > 18. Your attorney can get various items from the prosecutor relating to your case. . . . This is called discovery. Have you reviewed the evidence provided to your attorney during discovery? **YES** NO
> > . . . .
> > 20. Do you understand that by pleading guilty you waive any defenses, both factual and legal, that you believe you may have in this case? **YES NO**
> > 21. Are there any motions or other requests for relief that you believe should be filed in this case? YES **NO**
> > 22. Do you understand that if you enter an unconditional guilty plea in this case you will not be able to challenge any rulings that came before the guilty plea. . . . **YES** NO
> > 23. Do you understand when you plead guilty, you are admitting the truth of each and every allegation contained in the charge(s) to which you plead guilty? **YES** NO
>
> Thus, Defendant made a voluntary unconditional plea, where he indicated he understood that a guilty plea would waive challenges to the sufficiency of the evidence and that he was admitting the truth of the charge as alleged in the Information.

> Additionally, during the guilty plea, Petitioner did not allege that he was unaware that heroin was in his car:
>
> > THE COURT: How is it that you think you committed [the] crime?
> > THE DEFENDANT: It was in my car.
> > THE COURT: Okay, by "it," do you mean heroin?
> > THE DEFENDANT: The heroin was in my car; yes. . . .
> > THE COURT: And did you know it was in your car?
> > THE DEFENDANT: Yes, Ma'am.
> > THE COURT: And did you know it was heroin?
> > THE DEFENDANT: Yes, ma'am.
>
> Because the heroin was present in his car, and he was aware it was there, Petitioner has established facts to show a violation of Idaho Code § 37-2732(c)(1) for felony possession of heroin. Thus, whether his fingerprints or DNA were on the bag or syringe is immaterial.
>
> Based on a review of the record, the Court finds Petitioner has failed to show he would not have plead [sic] guilty had trial counsel tested the evidence and, therefore, has failed to show prejudice. Therefore, the Court GRANTS the State's Motion and summarily dismisses Petitioner's Second and Third Causes of Action.

(R., pp.127–28.)

In short, the State argued and the district court found that Mr. Ponting had failed to show prejudice for different reasons. The State argued that Mr. Ponting failed to prove prejudice because the state of the evidence was the same when Mr. Ponting pled guilty as it would have been if the items were tested—there was no evidence that Mr. Ponting's fingerprints and DNA were on the bag and syringe. (R., pp.88, 100–01; 3/28/18 Tr., p.17, L.2–p.19, L.2.) The court, on the other hand, dismissed the claims because, as Mr. Ponting admitted at his change of plea hearing, "the heroin was present in his car, and he was aware it was there" and so "whether his fingerprints and DNA were on the bag or syringe is immaterial." (R., pp.127–28.) Because Mr. Ponting did not have notice and an opportunity to respond to the court's stated reasons for dismissal, the district court erred by dismissing his claims regarding his attorney's refusal to test

the bag and syringe for fingerprints and DNA. *See* I.C. § 19-4906(b); *DeRushe*, 146 Idaho at 602; *Mallory*, 159 Idaho at 721.

CONCLUSION

Mr. Ponting respectfully requests that the Court vacate the district court's order granting in part the State's motion for summary dismissal and remand his case to the district court for further proceedings.

DATED this 24th day of June, 2019.

/s/ Maya P. Waldron
MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

MPW/eas