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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL R. OSBORN,)	
)	NO. 46504-2018
Petitioner-Appellant,)	
)	ADA COUNTY NO. CV01-17-17250
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

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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 the Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL.....	5
ARGUMENT.....	6
The District Court Erred In Summarily Dismissing Mr. Osborn’s Claim That His Guilty Plea Was Involuntary As It Was The Product Of His Trial Counsel’s Threat To Withdraw	6
A. Introduction	6
B. Relevant Jurisprudence And Standards Of Review	6
C. The District Court Erred In Summarily Dismissing Mr. Osborn’s Claim That His Guilty Plea Was The Involuntary Product Of His Trial Counsel’s Threat To Withdraw If Mr. Osborn Did Not Acquiesce To The Plea Agreement Counsel Negotiated.....	8
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10

TABLE OF AUTHORITIES

Cases

Aragon v. State, 114 Idaho 758 (1988).....7

Hill v. Lockhart, 474 U.S. 52 (1985)7

Hollon v. State, 132 Idaho 573 (1999)9

McMann v. Richardson, 397 U.S. 759 (1970).....7

Rhoades v. State, 148 Idaho 247 (2009).....7

Ricca v. State, 124 Idaho 894 (Ct. App. 1993).....7

Ridgley v. State, 148 Idaho 671 (2010).....9

State v. Gonzalez, 165 Idaho 95 (2019)9

State v. Yakovac, 145 Idaho 437 (2008).....6, 7

Strickland v. Washington, 466 U.S. 668 (1984)7

Thomas v. State, 145 Idaho 765 (Ct. App. 2008).....6

Vavold v. State, 148 Idaho 44 (2009).....8

Additional Authorities

Black's Law Dictionary, 991 (7th Ed.1999)7

STATEMENT OF THE CASE

Nature of the Case

Michael Osborn pled guilty to five felonies and one misdemeanor, and he was sentenced to a total unified term of 36 years, with 17 years fixed. Mr. Osborn filed a timely petition for post-conviction relief asserting, in part, that his guilty pleas were not knowingly, intelligently, and voluntarily entered into, as they were induced by his attorney's threat to withdraw as counsel if he did not go along with the plea agreement. The district court granted the State's motion for summary dismissal on this issue based upon the court's review of the answers Mr. Osborn provided in his guilty plea advisory form and during his entry of plea hearing, wherein Mr. Osborn did not reveal his trial counsel's threats. Mr. Osborn asserts that the district court erred when it granted the State's motion because there is a genuine issue of material fact as to whether Mr. Osborn's guilty plea was knowingly, intelligently, and voluntarily entered into.

Statement of the Facts and Course of Proceedings

In August of 2016, the State filed an Information charging Mr. Osborn with robbery, aggravated assault on a law enforcement officer, use of a firearm during the commission of a crime, unlawful possession of a firearm, two counts of intimidating a witness, and misdemeanor resisting and obstructing a law enforcement officer. (R., pp.151-54.) Pursuant to an agreement with the State involving both this case and a separate robbery case, Mr. Osborn plead guilty to burglary, aggravated assault on a law enforcement officer, unlawful possession of a firearm, two counts of intimidating a witness, and petit theft, and he was sentenced to a unified term of 36 years, with 17 years fixed. (R., pp.332-53.)¹

¹ In the companion case, Mr. Osborn was originally charged with robbery but he pled guilty to amended charges of burglary and grand theft, and he was sentenced to a total unified term of 24

Mr. Osborn filed a timely pro se petition for post-conviction relief asserting various grounds for relief, including a claim that his guilty plea was induced by his retained attorney's threat to withdraw without refunding his money. (R., pp.7-13.) The district court granted Mr. Osborn's request for counsel and Mr. Osborn filed an amended petition for post-conviction relief, substituting for Mr. Osborn's original pro se filing. (R., pp.14-17, 47, 197-204.) Mr. Osborn alleged that his retained attorney was ineffective "in that he acquiesced to a plea of guilty in this matter knowing Petitioner was not making his plea knowingly, intelligently and voluntarily." (R., p.199.) Mr. Osborn explained that he had "potential defenses in this case that were ignored due to Trial Counsel's desire to resolve both cases at the same time," that he "expressed significant reservation moving forward with his guilty plea in this case," and that "Trial Counsel responded by threatening to withdraw as counsel of record if Petitioner did not go along with the plea agreement." (R., p.200.) Mr. Osborn further asserted that his "plea colloquy and guilty plea form did not accurately reflect his state of mind at the time of his plea." (R., p.201.)²

The State filed an answer, a motion for summary disposition, and a brief in support of their motion for summary disposition.³ (R., pp.139-42, 156-71.) The State recognized that

years, with 17 years fixed, to run concurrently with the sentence imposed in the case that resulted in this post-conviction appeal. (R., pp.354-77.)

² Mr. Osborn raised additional claims of ineffective assistance of counsel that were summarized by the State as counsel misinforming Mr. Osborn about what one of his witnesses was prepared to testify to; that counsel failed to disclose that the burglary victim faced a pending charge of violence; that a witness was prepared to testify that Mr. Osborn had no intent to steal; that trial counsel "never acknowledged his statement that he did not aim or fire the weapon"; and that his counsel "did not discuss the 'facts of the assault charge relating to proof.'" (R. p.157.) Mr. Osborn does not challenge the district court's order granting summary dismissal of these claims in this appeal.

³ Mr. Osborn filed a motion for leave to amend his petition for post-conviction relief along with his amended petition, and the State filed an answer, a motion for summary disposition, and a brief in support of summary disposition. (R., pp.58-68, 139-42, 156-71.) However, the district

Mr. Osborn asserted ineffective assistance of counsel based upon his claim that “his attorney threatened to withdraw from representing him if he did not plead guilty.” (R., p.157.) The State argued that this claim is disproven by statements Mr. Osborn made in his guilty plea advisory form and during his entry of plea hearing, wherein he indicated that “no one had threatened him or done anything to make him enter the plea against his will.” (R., pp.163-65.)

Mr. Osborn filed an objection to the State’s motion for summary dismissal in which he noted that in the guilty plea advisory form, next to the question “[h]as any person including a law enforcement officer threatened you or done anything to make this plea against your will?”, Mr. Osborn “made a mark over the yes answer but he circled the no answer.”⁴ (R., p.219.) In response, the State filed a reply (R., pp.259-65) asserting that Mr. Osborn’s post-conviction counsel’s only response to its motion for summary dismissal of this issue “was to request the court [to] look beyond the record that disproves the claim,” and argued dismissal is required (R., p.261). The State later filed an amended reply responding to additional evidence Mr. Osborn presented in support of his motion, again arguing that his attorney-coercion claim was disproven by the record. (R., pp.283-99.)

After holding a hearing (Tr. 9/20/18), the district court granted the State’s motion for summary disposition (R., pp.378-401). The Court acknowledged that Mr. Osborn asserted that his “trial counsel threatened to withdraw to coerce Petitioner to plead guilty.” (R., p.388.) The Court agreed with the State, finding that this claim was “disproven by Petitioner’s written and oral statements under oath to this Court” in which he indicated that he understood that he could

court did not grant Mr. Osborn’s request to file an amended petition until after the State filed its answer, motion for summary disposition, and memorandum in support, although the parties agreed that State would not be required to re-file their documents. (R., pp.191-94; Tr. 6/13/18.)

⁴ The district court took judicial notice of the guilty plea advisory form filled out and signed by Mr. Osborn in the underlying case. (R., pp.222-34.)

not be forced to plead guilty through threats, and that he was satisfied by his counsel's assistance. (R., pp.388-90.) The Court concluded, "[t]he Petitioner fails to show there is a genuine issue of material fact that he was threat[ed]ed or coerced to plead guilty." (R., p.390.) Mr. Osborn filed a timely notice of appeal from the district court's Final Judgment, granting the State's motion for summary dismissal. (R., pp.402-08.)

ISSUE

Did the district court err in summarily dismissing Mr. Osborn's claim that his guilty plea was involuntary as it was the product of his trial counsel's threat to withdraw?

ARGUMENT

The District Court Erred In Summarily Dismissing Mr. Osborn's Claim That His Guilty Plea Was Involuntary As It Was The Product Of His Trial Counsel's Threat To Withdraw

A. Introduction

Mr. Osborn asserts that there exists a genuine issue of material fact as to whether his guilty plea was voluntary. While the statements he made through his guilty plea advisory form and during the entry of plea hearing indicate that his plea was voluntarily entered into, Mr. Osborn's verified claim that his plea was the product of his trial counsel's coercive tactic of threatening to withdraw from representing Mr. Osborn if he did not accept the plea agreement, raises a genuine issue of material fact as to whether his guilty plea was, in fact, voluntary. Therefore, the district court erred in granting the State's motion for summary dismissal of this claim.

B. Relevant Jurisprudence And Standards Of Review

A post-conviction petition initiates a proceeding that is civil in nature and, like a plaintiff in a civil action, the applicant must prove his or her allegations upon which the requests for relief are based by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008). However, unlike a plaintiff in other civil cases, the original post-conviction petition must allege more than merely "a short and plain statement of the claim." *Id.* at 443-44. The application must present or be accompanied by admissible evidence supporting the allegations contained therein, or else the post-conviction petition may be subject to dismissal. *Id.*

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Thomas v. State*, 145 Idaho 765, 769 (Ct. App. 2008). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel's

performance was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760 (1988). Where a defendant shows that his counsel was deficient, prejudice is shown if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694; *Aragon*, 114 Idaho at 760. Where a defendant enters a guilty plea based upon the advice of counsel, “the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). In order to meet *Strickland*’s prejudice prong, a petitioner who entered a guilty plea on the advice of counsel must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59.

A district court may summarily dismiss a post-conviction petition only where the petition and supporting evidence fail to raise a genuine issue of material fact that, if resolved in the petitioner’s favor, would entitle him or her to the relief requested. *Yakovac*, 145 Idaho at 444. “A material fact has ‘some logical connection with the consequential facts[.]’ *Black’s Law Dictionary*, 991 (7th Ed.1999), and therefore is determined by its relationship to the legal theories presented by the parties.” *Id.* On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the appellate court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions, together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993). The underlying facts alleged by the petitioner “must be regarded as true” for purposes of summary dismissal. *Rhoades v. State*, 148 Idaho 247, 250 (2009). Any disputed facts are construed in favor of the

non-moving party, and “all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” *Vavold v. State*, 148 Idaho 44, 45 (2009).

C. The District Court Erred In Summarily Dismissing Mr. Osborn’s Claim That His Guilty Plea Was The Involuntary Product Of His Trial Counsel’s Threat To Withdraw If Mr. Osborn Did Not Acquiesce To The Plea Agreement Counsel Negotiated

Mr. Osborn asserted in his verified petition that his guilty plea was involuntary due to his trial counsel’s threat to withdraw from representing him if he did not accept the plea agreement counsel negotiated, and plead guilty. (R., pp.199-201.) The State moved for summary dismissal of this claim arguing that Mr. Osborn did not claim his guilty plea was coerced in his guilty plea advisory form or during his entry of plea hearing, asserting that the record affirmatively disproves Mr. Osborn’s claim. (R., pp.163-65.) The district court granted the State’s motion on this basis. (R., pp.388-90.)

Contrary to the State’s assertion and the district court’s finding, Mr. Osborn’s answers in his guilty plea advisory form and during his entry of plea hearing, do not disprove Mr. Osborn’s verified post-conviction claim that his attorney coerced his plea through his threat to withdraw. Instead, the State’s reliance upon those pre-conviction statements creates a genuine issue of material fact as to whether Mr. Osborn’s post-conviction claim of coercion is true. The fact that Mr. Osborn did not reveal his attorney’s threat to withdraw during the entry of plea process does not mean it did not happen – it simply means he did not reveal that it happened at the time he entered his guilty plea. A defendant’s failure to reveal ineffective assistance of counsel during the proceedings in which counsel acts ineffectively does not disprove its existence, any more than a domestic violence victim’s failure to reveal the domestic violence during the time period in which the domestic violence occurs disproves its existence. Thus, there exists a genuine issue

of material fact requiring an evidentiary hearing, and the district court's order granting summary dismissal of this claim was in error.⁵

CONCLUSION

Mr. Osborn respectfully requests that this Court reverse the district court's order granting the State's motion for summary dismissal of Mr. Osborn's claim that his guilty plea was involuntary due to his trial counsel's threat to withdraw if Mr. Osborn did not plead guilty, and to remand his case to the district court for an evidentiary hearing on this issue.

DATED this 21st day of June, 2019.

/s/ Jason C. Pintler
JASON C. PINTLER
Deputy State Appellate Public Defender

⁵ Mr. Osborn acknowledges the Idaho Supreme Court's holding in *Hollon v. State*, 132 Idaho 573 (1999), in which the Court rejected the petitioner's claim that his counsel was ineffective by threatening to withdraw as counsel if the petitioner did not plead guilty pursuant to a negotiated plea agreement. Mr. Osborn asserts the *Hollon* decision does not control the outcome of this appeal for two reasons. First, in *Hollon*, the petitioner was afforded the opportunity to prove his claim through an evidentiary hearing, and the Court found that he failed to present any evidence that "there was insufficient time for a new attorney to be appointed who could adequately represent him at trial or that [trial counsel] did not make him aware that new counsel could be appointed." *Id.* at 576-77. More importantly, the State did not move, and the district court did not grant summary dismissal of this claim on this basis. Because Mr. Osborn has a right to notice of the purported basis for summary dismissal and the opportunity to respond (*see Ridgley v. State*, 148 Idaho 671, 676 (2010)), and because "both the issue and the party's position on the issue must be raised before the trial court for it to be properly preserved for appeal" *State v. Gonzalez*, 165 Idaho 95, ___, 439 P.3d 1267, 1271 (2019)), Mr. Osborn asserts that the district court's summary dismissal of this claim cannot be affirmed based upon the holding in *Hollon*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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

JCP/eas