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STATEMENT OF THE CASE

Nature Of The Case

Christopher Michael Conaty appeals from the district court's summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The state charged Conaty with aggravated battery while on the grounds of a correctional facility, with a persistent violator enhancement. (R., pp. 153, 155.) The case proceeded to a jury trial. (R., p. 155.) On the second day of trial, the state's last witness used the term "felony." (R., p. 155; State's Ex. 1, p. 38, Ls. 15-20; p. 43, Ls. 13-16.¹) The district court granted Conaty's motion for a mistrial. (R., p. 155.) Thereafter and pursuant to a plea agreement, Conaty entered a conditional guilty plea to aggravated battery on the grounds of a correctional facility and the state dismissed the persistent violator enhancement. (R., pp. 19-26, 155.) The district court sentenced Conaty to fifteen years, with three years fixed. (R., p. 156.)

Conaty filed a timely petition for post-conviction relief asserting, among other things, that he received ineffective assistance of counsel based on counsel's lack of communication.² (R., pp. 6-9.) Conaty asserted that his attorney "only met with me one time, ther[e]fore didn't have time to adequately prepare my case." (R., p. 8.) In his attached affidavit, Conaty stated: "I would call asking her to do things for my case. She said not to speak about it over the phone. Finally

¹ Exhibit 1, attached to the state's motion for summary disposition, contains the change of plea and sentencing transcripts and appears in the Clerk's Record on pages 85-103. Citations to State's Exhibit 1 will use the pagination in the transcript.

² Conaty raised several claims in his original and amended petitions for post-conviction relief. On appeal, he challenges only the summary dismissal of his claim for ineffective assistance of counsel based on counsel's alleged lack of communication. (See Appellant's brief, p. 1.)

we had an appointment she sent a letter cancelling it. By the time she came to see me we had less than 45 days until trial with deadlines due only a couple weeks to do anything for me.” (R., p. 11.) In his amended petition, Conaty again asserted that counsel was ineffective based on inadequate communication, that counsel had only met with him once prior to trial and refused to discuss the case over the phone. (R., pp. 52-53.) Conaty’s amended petition stated that Conaty “lost confidence that he would be adequately represented if he had proceeded to trial,” “pled guilty only out of concern that his attorney would be unprepared at the time of trial,” and “[h]ad Counsel provided adequate communication with [Conaty], he would have proceeded to trial.” (R., p. 53.) To support his claim, Conaty attached two letters from counsel in which she apologizes for not being able to meet with him one time because of inclement weather and another time due to illness. (R., pp. 66-67.) Both letters predate Conaty’s jury trial that ended in a mistrial. (Compare R., pp. 66-67 (letters dated December 22, 2016, and February 21, 2017) with R., p. 155 (district court order noting that “on April 24, 2017, a jury trial began” and “ended the second day”).)

The state answered the petition and moved for summary disposition, arguing that Conaty’s claims “fail to raise genuine issues of material fact, are bare and conclusory, and are disproven by the record.” (R., pp. 80-84.) Specifically, the state noted that Conaty had in fact proceeded to trial following the alleged lack of communication with counsel, and argued that he presented no admissible evidence related to his communications with counsel between the mistrial and his later guilty plea. (R., pp. 136-37.) Conaty’s guilty plea advisory form and answers during his entry of plea demonstrated that Conaty had enough time to discuss his options with counsel and that his plea was freely, intelligently, and voluntarily entered. (R., p. 136.) The state argued that Conaty’s bare assertion that he would have proceeded to trial (again) rather than

plead guilty if he had more communication with counsel was insufficient to show prejudice. (R., p. 137.)

After a hearing, the district court granted the state's motion for summary disposition. (R., pp. 153-73.)

Petitioner claimed that he did not feel confident to proceed to trial given his attorney's lack of communication. However, the record is clear that he did in fact proceed to trial, which ended in a mistrial. Petitioner answered under oath on the Guilty Plea Advisory Form that he had sufficient time to discuss the case with his attorney. Petitioner affirmed under oath at the change of plea hearing that he had the time and opportunity to ask his attorney any question that he might have had about anything he did not understand. [...] Petitioner failed to specifically set forth how more time with his attorney would have changed his decision to plead guilty given his statements made under oath that he believed he had sufficient time to discuss pleading guilty with his attorney.

(R., p. 167.) The district court found that Conaty failed to satisfy either prong of his ineffective assistance of counsel claim: "Petitioner's claim is contradicted by the record and even if [counsel] provided deficient performance in failing to communicate, Petitioner has failed to establish that the failure to communicate prejudiced the outcome of his case." (R., p. 168.) The district court entered judgment dismissing Conaty's post-conviction petition. (R., p. 191.) Conaty filed a timely notice of appeal. (R., pp. 193-96.)

ISSUE

Conaty states the issue on appeal as:

Did the district court err by summarily dismissing Mr. Conaty's petition for post-conviction relief because his claim that his trial attorney was ineffective for failing to communicate with him raised a genuine issue of material fact?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Has Conaty failed to show that the district court erred when it summarily dismissed his petition for post-conviction relief?

ARGUMENT

Conaty Has Failed To Show That The District Court Erred When It Summarily Dismissed His Petition For Post-Conviction Relief

A. Introduction

Conaty argues that the district court erred when it summarily dismissed his petition for post-conviction relief, in which he claimed ineffective assistance of counsel based on a lack of communication. Conaty failed to raise a genuine dispute of material fact and therefore the district court did not err in dismissing Conaty's claim without an evidentiary hearing. Conaty argued that he pled guilty instead of going to trial because counsel's lack of communication left him doubting her preparation of his case. However, his claim is contradicted by the record and based on bare, unsupported assertions. Conaty did proceed to a jury trial after the period of alleged inadequate communication; Conaty has neither specifically alleged nor supported with admissible evidence that counsel failed to adequately communicate between the mistrial and his guilty plea. Additionally, Conaty has failed to support his bare assertion that he would have proceeded to trial a second time if counsel had communicated with him more often.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” Charboneau v. State, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007).

C. The District Court Did Not Err When It Summarily Dismissed Conaty's Petition Because Conaty Failed To Raise A Genuine Dispute Of Material Fact

A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). A district court may summarily dismiss a petition for post-conviction relief if the petitioner “has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof.” Berg v. State, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998). Until controverted by the state, allegations in a verified post-conviction petition are, for purposes of determining whether to hold an evidentiary hearing, deemed true. Cooper v. State, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). However, the court is not required to accept mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); Roman v. State, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Moreover, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather, the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. Hayes v. State, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Further, allegations contained in a post-conviction petition are insufficient for granting relief when they are clearly disproved by the record of the original proceeding or do not justify relief as a matter of law. Workman, 144 Idaho at 522, 164 P.3d at 802.

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668,

687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). Under Strickland, a defendant must demonstrate both that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694; Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988). There is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). Where, as here, the petitioner was convicted upon a guilty plea, to satisfy the prejudice element the petitioner must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Plant v. State, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). Bare assertions and speculation, unsupported by specific facts, do not make out a prima facie case for ineffective assistance of counsel. Roman, 125 Idaho at 649, 873 P.2d at 903.

The district court properly summarily dismissed Conaty's petition, because he failed to make a prima facie case of ineffective assistance of counsel. Conaty's claim—that he pled guilty rather than take his case to trial because of counsel's inadequate communication—is contradicted by the record, lacks support, and is based on bare assertions.

Conaty's claim is contradicted by the record. Conaty claims that “[b]y the time that Counsel finally met with [him], he was only 45 days from trial.” (R., p. 53.) “Consequently, he had lost confidence that he would be adequately represented if he proceeded to trial” and “pled guilty only out of concern that his attorney would be unprepared at the time of trial, due to her established lack of communication.” (R., p. 53.) Conaty supports his claim with two letters from counsel, one sent in December 2016 and the other in February 2017. (R., pp. 66-67.) However,

the record directly contradicts Conaty's claim that he pled guilty because he lacked confidence in counsel's preparation if they went to trial—Conaty *did* proceed to trial in April of 2017. (See R., p. 155.)

Conaty has not alleged that counsel's communications were inadequate in the time between the mistrial and entry of plea, nor has he provided any admissible evidence that purports to show a lack of communication during that period. Conaty's petition relied only on his pre-trial communications with counsel. Because Conaty's petition challenged only counsel's pre-trial communication, and because Conaty thereafter proceeded to trial, he has failed to show that he was prejudiced by any alleged inadequate communication.

Even if Conaty's petition could be read as alleging that counsel's failure to communicate between the mistrial and entry of plea caused his guilty plea, the record contradicts his claim. On his guilty plea advisory form, Conaty answered affirmatively that he had sufficient time to discuss his case with counsel, told counsel everything he know about the crime, told counsel about any witnesses that could show he was innocent, discussed with counsel the fact the court would order a pre-sentence investigation, and discussed with counsel his right to remain silent during that investigation. (R., pp. 22-26.) At the change of plea hearing, counsel represented that she reviewed with Conaty the discovery, his rights, possible defenses, the plea agreement, and the consequences of his plea. (State's Ex. 1, p. 10, L. 5 – p. 11, L. 7.) Conaty confirmed that he reviewed the materials "to [his] full satisfaction," was able to ask counsel any questions he had, and understood the guilty plea form he completed. (State's Ex. 1, p. 11, L. 17 – p. 12, L. 7.) Conaty answered affirmatively when asked if he signed the form "freely, voluntarily and truthfully and after satisfactory assistance and consultation with [his] lawyer." (State's Ex. 1, p. 14, Ls. 15-18.) The district court asked Conaty if he told counsel "everything you know about

this case and the people and the facts and circumstances so that she can give you the best advice and counsel possible” and if he “believe[d] that she satisfactorily explained everything to you.” (State’s Ex. 1, p. 16, Ls. 4-8; p. 17, Ls. 3-5.) Conaty answered both questions: “Yes.” (State’s Ex. 1, p. 16, L. 3; p. 17, L. 6.) The district court offered Conaty more time and he declined, stating that he wished to proceed with his guilty plea. (State’s Ex. 1, p. 18, L. 23 – p. 19, L. 19.) By Conaty’s own indications, he communicated with counsel sufficiently to be able to intelligently and voluntarily enter his plea. Thus, the record demonstrates that Conaty’s decision to plead guilty was not based on poor communication with counsel.

Additionally, Conaty has failed to show that he would have proceeded to trial (again) if he had more communication with counsel. In his petition, Conaty makes only the bare assertion that he would have proceeded to trial if counsel provided adequate communication. (R., p. 53.) However, he does not state what difference more communication would have made or how it would have changed his decision. The district court properly determined that Conaty “failed to establish that the failure to communicate prejudiced the outcome of his case.” (R., p. 168.)

For the first time on appeal, Conaty attempts to use the fact that he proceeded to trial in April of 2017 to support his claim, stating that “seeing his attorney’s preparedness, or lack thereof, at the first trial could have certainly compounded Mr. Conaty’s concerns with going to trial the second time around.” (Appellant’s brief, p. 7.) However, Conaty made no such argument in his petition. There is no evidence in the record regarding counsel’s performance at trial and Conaty has never asserted that counsel’s performance impacted his decision to plead guilty. Conaty did not point to any alleged deficiency that occurred during the mistrial or anytime thereafter; instead, he relied only on the pre-trial communications. He cannot now, on appeal, try to spin the lack of evidence of counsel’s performance in his favor. After all, it is

Conaty's burden to show that counsel was deficient, not the state's burden to show that she wasn't.

Conaty also argues that the district court improperly concluded that the guilty plea advisory form and change of plea transcript contradict his claim. (Appellant's brief, p. 8.) Specifically, Conaty argues that the fact that he stated he had sufficient time to talk with counsel "doesn't mean that defense counsel actually communicated with him during that time." (Appellant's brief, p. 8.) First, Conaty bears the burden of making a showing that counsel failed to communicate, and he has failed to do so. Second, and as discussed above, the guilty plea advisory form and change of plea transcript demonstrate that Conaty and counsel were in communication before his plea. Both Conaty and counsel represented to the district court that they had discussed the plea agreement, the consequences of that plea, his wish that the plea be conditional, his post-conviction options, and his willingness to participate in the pre-sentence investigation. (See State's Ex. 1, p. 10, L. 5 – p. 19, L. 19.) The district court properly reviewed the evidence and determined Conaty's claim is contradicted by the record. (R., pp. 167-68.)

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing Conaty's petition for post-conviction relief.

DATED this 28th day of May, 2020.

/s/ Kacey L. Jones
KACEY L. JONES
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of May, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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KLJ/dd