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Cuc Phuoc Ho v. State Appellant's Reply Brief Dckt. 44415

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CUC PHUOC HO,)
) No. 44415
)
) Petitioner-Respondent,)
)
) Blaine County Case No.
 v.) CV-2016-294
)
)
) STATE OF IDAHO,)
)
)
) Respondent-Appellant.)
)
)
)

REPLY BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BLAINE**

**HONORABLE ROBERT J. ELGEE
District Judge**

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ARGUMENT IN REPLY

The District Court Erred In Denying The State's Motion For Summary Dismissal And In Granting Ho Any Relief On His Untimely, Unverified Petition

A. Introduction

In 2004, Ho pled guilty to distribution of marijuana and, in 2013, in a separate criminal case that was filed in 2012, Ho pled guilty to unlawful possession of a firearm. (See R., p.4; Exhibits 1, 3.) In 2016, Ho filed a single untimely, unverified post-conviction petition requesting relief in relation to both his 2004 and 2012 cases. (R., pp.4-8.) The same day Ho filed his petition, Ho also filed a Motion for Expedited Hearing. (R., pp.11-12.) The district court granted Ho's request for an expedited hearing and ultimately denied the state's motion for summary dismissal (R., pp.47-58), and entered a "Judgment" granting the following relief:

- 1) Mr. Ho's plea of guilty entered on February 11, 2013 to the charge of Unlawful Possession of a Firearm pursuant to Idaho Code § 18-3316 in Blaine County case no. CR-2012-2219 is hereby SET ASIDE AND WITHDRAWN.
- 2) Mr. Ho's conviction and sentence in Blaine County Case no. CR-2012-2219, entered and filed on the 16th day of April, 2013, is hereby VACATED.

(R., p.60 (capitalization original)).

The state appealed, asserting the district court erred in considering the merits of any of the claims raised in Ho's untimely, unverified petition, and erred in granting Ho any relief. (See generally Appellant's brief.)

In response, Ho contends (1) "the State's motion to summarily dismiss [his] post-conviction petition should never have been heard to begin with"

because it was “time barred pursuant to I.C. § 19-4906”; (2) he was not required to verify his petition because “the entire historical proceeding of the case was a matter of record”; (3) claims raised pursuant to I.C. § 19-4901(a)(1)-(5) “are not subject to any time bar”; (4) a joint petition was proper because the cases are “inseparably connected, and relief could not have been granted in one case without looking at the other”; (5) he is entitled to relief in relation to his 2004 case regardless of whether he had a Sixth Amendment right to counsel on a post-judgment motion; and (6) he was entitled to relief because counsel’s advice regarding the immigration consequences of his guilty plea was deficient and it was “unnecessary” for him to present evidence of prejudice. (Respondent’s brief, pp.14-35.) All of Ho’s arguments lack merit.

B. The District Court Did Not Abuse Its Discretion By Considering The State’s Motion For Summary Dismissal

Ho filed his post-conviction petition and a Motion for Expedited Hearing on June 20, 2016. (R., pp.4-8, 11-12.) On that same day, the district court entered an order granting an “expedited hearing,” finding “good cause” to “shorten[]” “the statutory fourteen (14) day notice requirement for Motions” and scheduled a hearing on Ho’s petition for June 23, 2016. (R., p.9.) At the June 23 hearing, the court advised the state it was not giving it “time to file for a summary [dismissal],” but stated it would give the state “30 days to answer,” even though the court did not think it was “going to matter much here.” (Tr., p.21, Ls.19-22, p.22, Ls.16-18.) Following the June 23, 2016 hearing, the court entered a “scheduling order” requiring the parties to “complete discovery by 5:00 p.m. on

July 21, 2016,” and setting “the final hearing in this matter” for July 28, 2016. (R., p.15.)

On July 26, 2016, the state filed its Answer, an Objection to Unverified Petition for Post Conviction and Commingling Separate Criminal Cases Into a Single Petition for PostConviction (“Objection”), and a Motion for Summary Dismissal (“Motion”). (R., pp.26-35.) The state also filed a motion to shorten time to have its motion for summary dismissal and objection considered at the scheduled July 28 hearing. (R., p.37; see also p.39.)

The same day the state filed its Answer and Motion, Ho filed an Objection and Motion to Strike and/or Dismiss the State’s Answer, Motion for Summary Dismissal, and Motion to Shorten Time, contending the state’s answer was “time bared” [sic], and complaining that the state filed its Motion “not even two days before the final hearing.” (R., p.42.) Ho asked the court to either dismiss or strike the state’s Answer and Motion. (R., pp.41-43.)

At the July 28 hearing, the state explained that the deadline for filing was “mis-calendared for the 26th,” which was the reason it was “late.” (Tr., p.30, Ls.20-24.) Ho again objected to “everything the State has filed” based on timeliness. (Tr., p.81, Ls.16-21.) The court overruled Ho’s objections. (Tr., p.81, Ls.22-24.)

On appeal, Ho contends the state’s Motion “should never have been heard to begin with” because it was not filed within “30 days after docketing the application,” as required by I.C. § 19-4906. (Respondent’s brief, p.15.) Ho has failed to show error in the district court’s consideration of the defenses set forth

in the state's Answer, Motion, or Objection. Idaho Code Section 19-4906(a) provides, in relevant part: "Within 30 days after the docketing of the application, or within any further time the court may fix, the state shall respond by answer or by motion which may be supported by affidavits." Thus, under the plain language of the statute, a district court has discretion to modify the 30-day response time. Ho has offered no argument or authority to support his claim that the district court erred in doing so in this case. Instead, Ho only notes that the documents were untimely and claims he was "severely prejudic[ed]" as a result, but he never explains how he was allegedly prejudiced. (Respondent's brief, p.15.) Indeed, it is difficult to imagine what prejudice Ho suffered given the court's decision to grant him relief.

Because Ho has failed to present any argument or cite any authority supporting his assertion that the district court "should never have" considered the state's defenses to Ho's petition, Ho's timeliness claim is waived.¹ State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.")

¹ Ho also contends: "Counsel further argued that the State failed to comply with IRCP 12(c) and (l), the State failed to comply with the Court's scheduling order outlined in IRCP 37(b)(2) and also failed to set their motion for hearing 14 days prior to the evidentiary hearing. For any number of the reasons Stated [sic], the State's answer should have been denied and stricken from the record, and the State's motions to dismiss and shorten time should have also been denied." (Respondent's brief, p.15.) These complaints are even less clear than Ho's I.C. § 19-4906 argument. Other than noting that "[c]ounsel" made such arguments, Ho has failed to articulate how any ruling with respect to these arguments was error. (Respondent's brief, p.15.)

C. Ho's Contention That Verification Is Not Required Is Contrary To The Plain Language Of I.C. §§ 19-4902(a) And 19-4903

Idaho Code Section 19-4902(a) provides that a post-conviction "proceeding is commenced by filing an application verified by the applicant with the clerk of the district court in which the conviction took place." Idaho Code Section 19-4903 further provides: "Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in section 19-4902." Consistent with these requirements, the appellate courts in this state have held:

An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Self v. State, 145 Idaho 578, 579, 181 P.3d 504, 505 (Ct. App. 2007).

Ho's petition was not verified. (R., pp.4-6.) Despite the verification requirement plainly stated in I.C. § 19-4902(a), the district court, relying on the Court of Appeals' decision in State v. Goodrich, 103 Idaho 430, 649 P.2d 389 (Ct. App. 1982), concluded "Ho did not need to verify his petition" because "the entire historical proceeding of this case is a matter of record." (R., p.54.) As noted in the Appellant's brief, the district court's reliance on the Court of Appeals' opinion in Goodrich was improper because that opinion was vacated once the

Idaho Supreme Court granted review. See State v. Goodrich, 104 Idaho 469, 660 P.2d 934 (1983).

Ho argues that the Court of Appeals' opinion in Goodrich still applies because, on review, the Supreme Court did not make any "findings overturning the trial Court or the Court of Appeals [sic] decisions regarding verification." (Respondent's brief, p.17.) Ho's argument misunderstands the nature of Supreme Court review. The Idaho Supreme Court does not "overturn" the Court of Appeals. Rather, on review, the Supreme Court reviews the decision of the district court in light of the issues presented on review. State v. Ostler, 161 Idaho 350, 386 P.3d 491 (2016) ("On review of a case from the Court of Appeals, this Court gives due consideration to the Court of Appeals' decision, but directly reviews the decision of the trial court.") (quotations and citation omitted). On review in Goodrich, the Supreme Court only held that summary judgment in favor of the petitioner was improper because there were "[n]umerous factual disputes" requiring an evidentiary hearing. State v. Goodrich, 104 Idaho 469, 472, 660 P.2d 934, 937 (1983). Even if the Court's determination that an evidentiary hearing was required constitutes an implicit rejection of the state's argument at the trial level that the lack of a verification deprived the court of jurisdiction, the state submits, as it did in its opening brief, that even if a verified petition is not a jurisdictional prerequisite, the failure to verify a petition or provide an affidavit of facts in support of the petition should preclude a finding that there is a genuine issue of material fact warranting an evidentiary hearing.

Ho appears to contend otherwise, arguing that “logic and common-sense dictates [sic] that if a petition for post-conviction [sic] is based entirely on the record of proceedings, and the affidavit of prior counsel; verification would not only be unnecessary, but would further the manifest injustice that the petition seeks to correct.” (Respondent’s brief, p.17 (punctuation original).) The “manifest injustice” to which Ho refers appears to be that if verification or an affidavit is required, he will have “to sit in jail for additional time, and pay thousands of dollars to obtain a verification of something that [he] does not understand or could possibly add anything to, which further punishes [him].” (Respondent’s brief, pp.17-18.) This argument ignores the procedural and substantive law that applies to Ho’s petition and the claims he raised therein.

Procedurally, the law required Ho to file a timely verified petition. Idaho Code Section 19-4902(a) states: “Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.” (Emphasis added.) It is unclear why this requirement would compel Ho to “sit in jail for additional time” or “pay thousands of dollars.” It is equally unclear why verification compels “something that [he] does not understand.” It was Ho who pled guilty to the crimes at issue, and it is Ho who knows the reasons he did so.

Substantively, in order to succeed on any claim that his guilty plea was the result of erroneous advice from counsel, Ho must present evidence that his guilty plea was the product of that advice. See Icanovic v. State, 159 Idaho 524, 529-530, 363 P.3d 365, 370-371 (2015). Since Ho did not verify his petition or

submit an affidavit, he was not entitled to an evidentiary hearing, and because he did not testify at the evidentiary hearing, he failed to meet his burden and was not entitled to any relief.

D. Ho's Assertion That There Is No Statute Of Limitation Applicable To His Post-Conviction Claims Is Contrary To Law

Ho's 2016 post-conviction petition was not timely from Ho's 2004 judgment of conviction, from the court's orders on any of the post-judgment motions Ho filed in his 2004 case, or from the judgment entered in Ho's 2012 case. (See Appellant's brief, pp.18-21.) Ho claims otherwise, arguing his petition is timely because it "falls squarely within I.C. section 19-4901(a)(4)" and "Section(a)(1-5) [sic] are not subject to any time bar." (Respondent's brief, pp.23-25.) These arguments are contrary to law.

Idaho Code Section 19-4901(a) sets forth the grounds upon which a petitioner may pursue post-conviction relief. The ground articulated in subsection (a)(4) reads: "That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." Ho's claims that counsel was ineffective are based on the Sixth Amendment and fall within the purview of subsection (a)(1), which authorizes relief when "the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state." I.C. § 19-4901(a)(1). Regardless, whether within the purview of subsection (a)(1) or (a)(4), Ho's claims are subject to the one-year post-conviction statute of

limitation. Ho's argument to the contrary is based on his interpretation of I.C. § 19-4901(b), which is irrelevant to the statute of limitation.

Idaho Code Section 19-4901(b) provides that any claim "which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless . . . the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier." By its plain language, Section 19-4901(b) addresses the general bar to raising claims in post-conviction that could have been raised on direct appeal; it does not govern the statute of limitation. Idaho Code Section 19-4902(b) governs the statute of limitation and requires a petition to "be filed at any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following appeal, whichever is later." Nothing in this section modifies the statute of limitation based upon the nature of the claim as described by Section 19-4901(a). Ho's argument that claims based on Idaho Code "Section [19-4901](a)(1-5) are not subject to any time bar" is contrary to law and without merit.

E. A Single Post-Conviction Petition For Two Underlying Criminal Cases Is Improper

In response to the state's assertion that it is improper to file a single petition relating to two underlying criminal cases, Ho contends that doing so was proper because his "case is unique in that you could not make a finding by looking at any one case by itself." (Respondent's brief, p.25.) Ho's argument

misunderstands the state's position. The state's position is not that a court cannot "look" at another case; the state's position is that separate petitions must be filed pursuant to the language of the statute and because each petition is governed by a separate statute of limitation. Filing separate petitions does not foreclose the court, in ruling on the individual petitions, from "look[ing]" at all relevant evidence, which may include evidence as to what occurred in a prior case.

Ho also asserts that because "the Idaho State legislature gave the Courts power to correct a 'manifest injustice' as outlined in I.C.R. 33, and also vacate a sentence 'in the interest of justice' as noted in 19-4901(4)," the law cannot prevent the court from reaching the result it reached in this case. (Respondent's brief, pp.25-26 (verbatim).) This argument lacks merit for at least two reasons. First, I.C.R. 33 has no bearing on this case. Although the district court purported to "set aside" and "withdraw" Ho's guilty plea in the 2012 case, it did not do so pursuant to I.C.R. 33, nor could it because any request pursuant to I.C.R. 33 would be untimely. State v. Jakoski, 139 Idaho 352, 79 P.3d 711 (2003) (holding that a district court lacks jurisdiction to consider an I.C.R. 33 motion to withdraw a guilty plea filed after judgment becomes final).

Second, the "interest of justice" language set forth in I.C. § 19-4901(a)(4) does not exist in a vacuum. Beyond the fact that Ho's claims are not based on subsection (a)(4), the procedural requirements of the Uniform Post-Conviction Procedure Act ("UPCPA"), including the statute of limitation, govern resolution of post-conviction claims. Ho is not entitled to relief just because he (or the district

court) believe “justice” so requires. Although Ho thinks the state is “attempting to skirt the real issue,” which he claims is “the fact that an immigrant to the United States, who came here as a refugee, was failed by the system” (Respondent’s brief, pp.35-36), the reality is that Ho originally entered “the system” by distributing a controlled substance, and the “real issue” is whether the district court’s resolution of Ho’s petition comported with the law; it did not.

F. Ho’s Claim That The Sixth Amendment Is Irrelevant To His Post-Conviction Claims Is Contrary To Law

Ho’s claim that counsel was ineffective in pursuing his I.C. § 19-2604 motion to set aside the judgment fails because he had no Sixth Amendment right to counsel with respect to that motion. See State v. Hartshorn, 149 Idaho 454, 458, 235 P.3d 404, 408 (Ct. App. 2010) (Because “a post-judgment hearing upon a motion to withdraw a guilty plea is not a critical stage for purposes of the Sixth Amendment,” “Hartshorn has failed to show that he was deprived of his Sixth Amendment right to counsel at the post-judgment hearing on his motion to withdraw his guilty plea.”). Ho apparently agrees, arguing “[t]his case is not about whether a defendant had a 6th amendment right to counsel.” (Respondent’s brief, p.27.) Rather, Ho contends, this case is about negligence. (Respondent’s brief, p.27.) The UPCPA does not, however, authorize negligence actions. See I.C. § 19-4901(a). Ho asks, “What other standard would the State have the Court use[?]” (Respondent’s brief, p.28.) The answer to that question is the standard governing Sixth Amendment claims, which is the only type of challenge to attorney performance authorized by the UPCPA. If Ho

wishes to sue his attorney based on negligence, he must choose a different procedural vehicle.

G. The District Court Erred In Granting Ho Relief On His Claim That Counsel Was Ineffective In Failing To Inform Ho Of The Consequences Of Pleading Guilty To Unlawful Possession Of A Firearm

In response to the state's assertion that the district court erred in granting him relief on his claim that counsel was ineffective in failing to inform him of the consequences of pleading guilty to unlawful possession of a firearm (Appellant's brief, pp.24-30), Ho contends, in part,² that "[p]resentation of evidence of whether he would have pled guilty or not is unnecessary, because he should have never been put in that position to begin with." (Respondent's brief, pp.34-35.) This argument is contrary to law.

A defendant alleging ineffective assistance of counsel must show both deficient performance by counsel and prejudice from that deficiency; failing to prove either prong individually or both will defeat a claim of ineffective assistance of counsel. To establish prejudice resulting from his or her attorney's performance, a defendant must show that as a result of counsel's deficient performance 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. Such a defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.

Icanovic, 159 Idaho at 529, 363 P.3d at 370 (quotations, citations, and brackets omitted). See also Lee v. United States, 2017 WL 2694701 *6, --- S.Ct. --- (2017) (quotations and citation omitted) ("when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept

a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial").

Ho was required to properly allege and prove prejudice. He did not. As a result, he was not entitled to relief.

CONCLUSION

The state respectfully requests this Court reverse the district court's Findings and Conclusions on Petition for Post-Conviction Relief, and its Judgment granting Ho post-conviction relief.

DATED this 11th day of July, 2017.

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

² The state declines to address Ho's other arguments regarding the merits of his ineffective assistance of counsel claims because the merits of those claims are covered in the state's opening brief.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 11th day of July, 2017, served two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT by placing the copies in the United States mail, postage prepaid, addressed to:

NATHAN D. RIVERA
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P. O. Box 700
Blackfoot, Idaho 83221

/s/ Jessica M. Lorello
JESSICA M. LORELLO
Deputy Attorney General

JML/dd