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Roberts v. State Appellant's Brief Dckt. 44817

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVEN EUGENE ROBERTS, III,)	
)	
Petitioner-Appellant,)	NO. 44817
)	
v.)	Ada Co. CV-PC-2016-5792
)	
STATE OF IDAHO,)	
)	
Respondent.)	
)	

APPELLANT'S BRIEF

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

**HONORABLE STEVEN HIPPLER
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

Petitioner appeals from the summary dismissal of his petition for post-conviction relief. Petitioner asserts that the district court has essentially made a class of claims effectively unreviewable. This is because the court held as to some (unobjected to) claims, that they were forfeited because they could have been brought on appeal but were not, while at the same time holding that there is no claim of ineffective assistance of counsel for failure to raise an issue on appeal as fundamental error.

Statement of the Facts and Course of Proceedings

The Idaho Court of Appeals in its unpublished opinion from the direct appeal, *State v. Roberts*, docket 42535 (Idaho Ct. Appeals 9/17/2015 unpublished) explained the facts as follows:

Based upon evidence submitted at trial, on September 1, 2012, at 4:11 a.m., the Boise City Fire Department responded to a report of a fire at a residence and firefighters were on scene within three to four minutes. Boise firefighters extinguished the fire located on a patio in the back of the house and observed several canisters near the fire's origin that smelled of gasoline.

A fire investigator observed a broken window near the fire damage, which appeared to have been broken from outside the residence. The investigator also observed canisters containing gasoline placed around a flower pot with one of the canister's nozzles placed directly into the pot. The valve of a fire-damaged propane tank attached to a barbeque grill on the patio was turned to the "on" position. Based on these observations, the fire investigator concluded that an ignitable liquid was poured onto a part of the patio and the fire was intentionally set, but that the fire largely burned itself out

before it reached the interior of the house. He testified that the fire burned for approximately six to eight minutes before it was extinguished.

Boise police investigators found blood stains around the broken window. Several samples of the stains were collected and sent to the Idaho State Lab for testing, which presumptively matched the DNA of Steven Roberts. The officers then obtained a DNA sample from Roberts, which confirmed his DNA at the scene of the fire. Roberts was charged with one count of arson in the first degree, Idaho Code § 18-802; burglary, I.C. § 18-1401; and a persistent violator enhancement, I.C. § 19-2514. Roberts waived his right to a jury trial and requested a bench trial.

At trial, Roberts testified in his own defense. He testified that on the night in question, he took his girlfriend's car without her permission and met up with his friend, J.M., at a bar. After meeting up with J.M., he went to the residence in question with a woman he had met earlier that night and who told him the house was haunted. He testified that something frightened him while he was there so he ran, tripped, and fell through the window on the back porch, cutting his arm. He then returned to the bar to meet up with J.M. Roberts denied setting a fire or touching any gasoline cans while at the residence.

J.M. also testified at trial, stating that Roberts left the bar several times during the evening, including a couple of hours before closing time. He testified that Roberts last returned to the bar a few minutes before closing, around the time that everyone was leaving, and that the business closes at 4:00 a.m. He also testified that Roberts smelled of gasoline and had a cut on his arm. When asked, Roberts told him he had been in a fight. Roberts' girlfriend testified that he told her he cut his arm by falling against a dumpster.

The district court found Roberts guilty of burglary and arson in the first degree. Roberts then admitted to being a persistent violator. The district court imposed a unified thirty-year sentence with ten years determinate for arson in the first degree, and a concurrent unified ten year sentence with five years determinate for burglary.

State v. Roberts, p. 1-2 (footnote omitted).

The court's Memorandum Decision and Order Re: Motion for Summary Dismissal (hereinafter Decision) continues to explain the procedure:

Roberts appealed his arson conviction on grounds that the State presented insufficient evidence in support, namely, he relied on the time estimates provided by the responding firefighter, who opined that the fire was set between 4:07 and 4:11 a.m., and that provided by Jesse, who testified that Roberts re-appeared at the bar around 3:55 a.m. Thus, Roberts argued he could not have been present when the fire was started. The Court of Appeals affirmed the conviction, noting that the "minimal discrepancy in the witnesses' estimate is not so significant as to nullify the State's evidence of Roberts' guilt in light of the other evidence against him (i.e., being on the property and smelling of gasoline)." 2015 WL 5511096, *2.

Decision, p. 3. (R. p. 171.)

Thereafter, Mr. Roberts filed a timely pro se petition for post-conviction relief with affidavits in support. (R. p. 5-19.) At his request, counsel was appointed, but no amended petition was filed. (R. p. 169.) Mr. Roberts did file an additional pro-se affidavit in support which clarified, amended, and withdrew some of his claims. The state filed a motion for summary disposition, and a hearing was held. (R. p. 169.)

The court granted the state's motion and summarily dismissed the petition in a written decision. (R. p. 169-188.) A separate judgment was filed. (R. p. 189-190.)

Appellant timely appeals. (R. p. 191-193.)

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED THE POST-CONVICTION RELIEF PETITION BECAUSE THE EFFECT OF ITS RULINGS MAKE CERTAIN CLAIMS UNREVIEWABLE

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most

favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. Standard of Review Regarding a Claim of Ineffective Assistance of Counsel

The standard for evaluating a claim of ineffective assistance of counsel is well established, being set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

Strickland set forth a two-prong test which a defendant must satisfy in order to be entitled to relief. The defendant must demonstrate both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Id.* at 687-88; *State v. Charboneau*, 116 Idaho 129 (1989); *Gibson v. State*, 110 Idaho 631 (1986).

More specifically as to allegations of ineffective assistance of counsel based on tactical decisions, the Court of Appeals explained in *Stevens v. State*, 156 Idaho 396 (Ct. App. 2013):

This Court has long adhered to the proposition that tactical or strategic decisions of counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. There is a strong

presumption that counsel's performance fell within the wide range of professional assistance.

Id., p. 385-386 (internal citations omitted).

C. The Claims and the Court's Rulings

Petitioner made many claims, but only a few are at issue in this appeal. They involve claims that the court summarily dismissed because they could have been, but were not, raised on direct appeal. The court's Memorandum Decision dismissed them as follows:

A. Judicial Misconduct

1. Improper Inferences

Roberts contends that [the] Court improperly relied on its own scientific assumptions in rejecting Roberts' story that he broke the window by tripping and falling through it. Namely, the Court stated at sentencing:

[F]rankly I found your testimony ... pushing the limits of physical impossibility. Given where the window was broken at, the thickness of the window, how much running speed you could have gotten up to in those few feet from your chair to where your window was, you would have almost to have jumped on a trampoline and had a helmet on and tried to go through the window like a spear at a level well above what you would be at just running. It was clear that the physics of where the window was broken, how thick it was, the fact that you claim you broke the window by running and tripping headfirst into the window, I don't find that credible. I don't find it frankly practicable to have happened that way at all.

Tr., p. 693:8-23.

Roberts contends that there was no evidence presented at trial through which the Court could reasonably make this inference. Namely, there was nothing presented regarding the thickness of the window, Roberts' body weight, the speed required to break the window, or supporting the idea that the location of the break was incompatible with the law

of physics. Robert argues that this evidence is the type of "scientific, technical, or other specialized knowledge" that must be presented by an expert, not simply assumed.

The State argues the claim is barred as forfeited since it could have been raised upon direct appeal. *Bias v. State*, 159 Idaho 696, 702, 365 P.3d 1050, 1056-67 (Ct. App. 20 15). Roberts acknowledges that this is the general rule, but points out that there is an exception to this rule where "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." *Id.* Roberts contends that his claim falls under this exception because he was not aware of the Court's reliance on its own assumptions until sentencing. However while this may have precluded Roberts from objecting at trial, it in no way precluded him from being able to raise the issue on direct appeal. He filed the appeal after the sentencing hearing and, therefore, could have raised it. Consequently, the claim is summarily dismissed.

2. Denial of Right to Present Defense

Roberts also argues the Court erred by denying Roberts the opportunity to call an expert witness regarding how the window was broken and provide opinion that Roberts' body could not have broken the window. Along this same vein, Roberts further complains that the Court asked clarifying questions of State's witnesses regarding how the window broke, but did not ask similar questions of Roberts. Had the Court asked, Robert contends he could have responded to the Court's concerns.

Again, the State correctly argues that the claim is barred because it could have been raised on direct appeal. *Bias. supra.* Roberts has offered no reason why, in the exercise of due diligence, it could not have been raised at the time of appeal. Thus, it is summarily dismissed.

3. Prosecutorial Misconduct 6

Some of the photos disclosed by the State prior to trial included those from a prior murder/arson investigation at the Randolph Property. Roberts contends that the prosecutor's failure to identify prior to trial which photos would be used at trial prohibited Roberts' counsel from calling an expert witness and mounting an affirmative defense.

The State correctly argues that the claim is barred as forfeited since it could have been raised upon direct appeal. *Bias. supra.* Roberts has not established why the claim could not have been raised earlier; indeed, he does not address the State's argument at all. Consequently, it is summarily dismissed. 7

Footnotes

6 A second basis asserted by Roberts for "prosecutorial misconduct" was the prosecutor's act of "vouching" for Jesse McPhie's credibility at trial, despite the fact that Jesse had given conflicting testimony at the preliminary hearing. Roberts subsequently withdrew this claim.

7 In addition, while the Court does not rely on this ground for dismissal, there is no duty on the part of the prosecutor to reveal sequence of prosecution; if items were discovered, then defense has all notice it needs to defend against charges.

Decision, p. 5-6. (R. p. 173-174.)

Relevant to these claims are the court's rulings regarding appellate claims:

4. Appellate Errors

Recently, the Idaho Supreme Court commented on the duty of appellate counsel to criminal defendants, noting:

Appellate counsel is not required to raise every issue available to the defendant. This Court has recognized the United States Supreme Court precedent that appellate counsel does not have a constitutional duty to raise every non-frivolous issue requested by defendant. Rather, to demonstrate deficient performance of appellate counsel for failure to raise a claim on appeal, the defendant must show that counsel made an objectively unreasonable decision to omit the claim. Accordingly, appellate counsel is not deficient merely for omitting an argument as the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. When reviewing appellate counsel's performance, we determine whether, but for appellate counsel's errors,

a reasonable probability exists that the defendant would have prevailed on appeal.

Crawford v. State, 160 Idaho 586, 377 P.3d 400, 411 (2016), internal quotes and cites omitted.

In addition, the Court has noted:

Indeed, it is difficult to demonstrate that counsel was incompetent based on failure to raise a particular claim on appeal. Only when ignored issues are clearly stronger than those presented will the strong presumption of effective assistance of counsel be overcome.

Heilman v. State, 158 Idaho 139, 146, 344 P.3d 919, 926 (Ct. App. 2015), internal cites omitted.

Decision, p. 16 (R. p. 184.)

Later in the Decision the court stated:

b. Failure to raise issue of judicial abuse of discretion

Roberts contends his appellate counsel failed to challenge the Court's abuse of discretion by relying on its own application of subjective scientific standards to reject Roberts' account of his fall through the window. He contends that, even though his trial counsel did not object to the Court's statements, appellate counsel could have raised this issue as fundamental error. The State contends that Roberts may not raise this claim against appellate counsel. The State is correct.

In *Mintun v. State*, the Court of Appeals rejected the attempt by the petitioner to assert an ineffective assistance of counsel claim against appellate counsel for failure to raise a "fundamental error" on appeal. 144 Idaho 656, 662, 168 P.3d 40, 46 (Ct. App. 2007). The Court cited to four reasons for this decision. First, a rule deeming appellate counsel ineffective for failing to raise an issue of fundamental error would force appellate attorneys to raise on appeal nearly all possible errors, whether preserved by objection in the trial court or not, to avoid the risk of being declared ineffective. *Id.* Second, it is often not to a criminal defendant's advantage to raise an issue of fundamental error on direct appeal because the record in the criminal proceeding may not be adequately developed for a full presentation of the

defendant's claim. *Id.* Third, a trial attorney's failure to object to inadmissible evidence or other potential errors may be done for legitimate strategic or tactical purpose, and the record on appeal would rarely show this strategy. *Id.* Fourth, allowing such a claim against appellate counsel is unnecessary to protect a defendant's rights because the defendant can bring the same claim of impropriety in the trial proceedings as a claim of ineffective assistance of his *trial counsel* for failing to object to the alleged error in the trial court. *Id.*

Under *Mintun*, Roberts' claim against appellate counsel for failure to raise judicial abuse of discretion cannot proceed. The claim is dismissed.

Decision, p. 17-18. (R. p. 185-186.)

D. The Court's Rulings Create a Class of Claims Unable to be Reviewed and are, Therefore, Erroneous

The court has created a class of claimed error that is essentially unreviewable. First, the court held that various errors are forfeited by the failure to raise them on appeal. Then, the court's rulings on ineffective assistance of appellate counsel show that it is for all practical purposes non-existent. The combination of these two things whipsaws the petitioner, his claims are dismissed because they were not raised on appeal by appellate counsel, but he cannot challenge appellate counsel's failure to raise claims on appeal.

To further explain using the claim of judicial misconduct as an example, the court again ruled as follows:

. . . Roberts contends that his claim falls under this exception because he was not aware of the Court's reliance on its own assumptions until sentencing. However while this may have precluded Roberts from objecting at trial, it in no way precluded him from being

able to raise the issue on direct appeal. He filed the appeal after the sentencing hearing and, therefore, could have raised it.

Decision, p. 5-6 (emphasis in the original). (R. p. 173-174.)

So the court acknowledges that the error was not objected to in the trial court. Thus, it would have to be raised as fundamental error. But then, as to the claim that appellate counsel failed to raise the judicial misconduct as fundamental error, the court holds:

He contends that, even though his trial counsel did not object to the Court's statements, appellate counsel could have raised this issue as fundamental error. The State contends that Roberts may not raise this claim against appellate counsel. The State is correct.

Decision at p. 17. (R. p. 185.)

The same is true for the claims that Petitioner was deprived of the right to present a defense and prosecutorial misconduct. The court ruled they could have been brought on direct appeal and so dismissed them. However, they were not objected to and so appellate counsel's failure to raise them as fundamental error is not reviewable.¹

Further, even if the errors were objected to, as the district court explains, it is still exceptionally difficult to establish ineffective assistance of appellate counsel for failure to raise an issue on appeal. This is because it requires a showing that the omitted issue was *clearly* stronger than those raised.

¹ As an aside, it seems doubtful that these claims could have been brought on the direct appeal record.

Thus, the combination of the rulings is that for all practical purposes claims that could have been brought on direct appeal but were not cannot be brought in a post-conviction because they are forfeited, and then appellate counsel's failure to bring those claims cannot be reviewed, either expressly for unobjected to claims and for all practical purposes for preserved claims. Thus, the court has created an entire class of claims that are not subject to review and has therefore erred.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's order summarily dismissing his petition for post-conviction relief be reversed and remanded to the district court.

DATED this 11th day of September, 2017.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
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Dated and certified this 11th day of September, 2017.

/s/ Greg S. Silvey
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