4-16-2018

Rome v. State Appellant's Reply Brief Dckt. 45140

IN THE SUPREME COURT OF THE STATE OF IDAHO

SONNY ROME,	)	
	)	**NO. 45140**
Petitioner-Appellant,	)	
v.	)	**KOOTENAI COUNTY NO.**
	)	**CV 2016-2158**
STATE OF IDAHO,	)	
	)	**APPELLANT'S**
Respondent.	)	**REPLY BRIEF**
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE LANSING L. HAYNES
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Sonny Rome contends the district court made two errors in addressing his petition for post-conviction relief. First, it failed to recognize that he had requested it take judicial notice of documents from the record of the underlying criminal case, and its resulting decision to not take judicial notice of those documents adversely impacted its subsequent rulings on the claims in Mr. Rome's petition. Second, because the evidence he had presented was sufficient to establish, by a preponderance of the evidence, that trial counsel had been ineffective for not requesting an appropriate lesser-included-offense instruction, the district court erroneously denied him relief on that claim.

In response to the judicial notice issue, the State has built a fine-looking strawman argument, attempting to recast Mr. Rome's argument as a challenge only to the district court's decision to deny relief on Mr. Rome's claim regarding counsel's failure to argue cumulative error in his direct appeal. Furthermore, in its attempt to slay that strawman, the State has improperly invited this Court to weigh facts not in the record for the first time on appeal. Neither of the State's arguments is appropriate.

The State's response to the lesser-included instruction issue is similarly meritless. While the State calls for application of the "proper" standard of review, its argument ignores fully half of the applicable standards. Actually applying the proper standards reveals the State's arguments to be meritless, and so, this Court should reverse the district court's decision to deny Mr. Rome's post-conviction petition and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Rome's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

I. Whether the district court erred by not taking judicial notice of the documents in the underlying criminal case record as requested by Mr. Rome based on its clearly erroneous determination that he had not requested it take judicial notice.

II. Whether the district court's decision to deny Mr. Rome's lesser-included instruction claim fails to apply the proper standards for evaluating a claim of ineffective assistance of counsel at an evidentiary hearing.

ARGUMENT

I.

The District Court Erred By Not Taking Judicial Notice Of The Documents In The Underlying Criminal Case Record As Requested By Mr. Rome Based On Its Clearly Erroneous Determination That He Had Not Requested It Take Judicial Notice

The State has built a strawman argument in response to Mr. Rome's contention regarding the district court's failure to recognize that Mr. Rome had repeatedly requested it to take judicial notice of documents from the underlying criminal case. While Mr. Rome argued that the district court resulting failure to take judicial notice affected its subsequent rulings on all the issues he had raised in his petition, the State has attempted to recast this issue as an argument that the district court erroneously denied his singular claim regarding counsel's failure to argue cumulative error on the direct appeal. (*Compare* App. Br., pp.6-9; *with* Resp. Br., pp.5-7.)

The State's strawman argument is revealed for what it is by the fact that the term "cumulative error" does not appear in the Appellant's Brief at all. (*See generally* App. Br.) Thus, it is clear that Mr. Rome's argument has always been broader than the district court's decision on any one of his claims for relief. In fact, he specifically explained how the district court's erroneous decision to not take judicial notice adversely impacted its decision on his claim regarding trial counsel's failure to present certain mitigating evidence at sentencing and his claim regarding trial counsel's failure to request the lesser-included instruction. (App. Br., pp.6-8.) Therefore, this Court should reject the State's strawman argument, since it does not address the issue Mr. Rome actually raised in this appeal.

Even considering the merits of the State's strawman argument, though, it is baseless because the State's argument is inconsistent with the applicable standard of review. The decision of whether or not to take judicial notice is reviewed for an abuse of discretion.

Newman v. State, 149 Idaho 225, 227 (Ct. App. 2010); *cf. State v. Hedger*, 115 Idaho 598, 600 (1989) (explaining that a district court abuses its discretion by not appreciating the issue is one of discretion, by making its decision outside the bounds of that discretion or inconsistent with the applicable legal standards, or by reaching its decision without exercising reason). In conducting that review, the appellate courts do "not simply focus upon the results of a discretionary decision below, but rather upon the process by which the trial court reached its discretionary decision." *Quick v. Crane*, 111 Idaho 759, 772 (1986). That is because the ultimate decision, however proper it might appear, is tainted by the abuse of the district court's discretion in reaching that decision. *See id.*

Nevertheless, the State's argument focuses on the results of the district court's analysis, not the process by which it reached that decision. (*See* Resp. Br., pp.6-7, 7 n.1 (arguing "[t]here is no evidence in this record that counsel's performance was deficient for failure to claim cumulative error" and, even considering the information from the underlying criminal case, "[t]he claim of ineffective assistance of appellate counsel for failing to claim cumulative error is frivolous").) Therefore, this Court should reject that argument, and instead, should remand this case so the district court can make the discretionary decision under the proper standards in the first instance. *See Quick*, 111 Idaho at 772; *State v. Hansen*, 130 Idaho 845, 848 (Ct. App. 1997); *see also Carrillo v. Boise Tire Co., Inc.*, 152 Idaho 741, 749 n.1 (2012) (reiterating that, while appellate courts may review the facts on appeal, they do not weigh the facts; that is the province of the district court).

The district court's abuse of discretion in reaching its decision in this case is clear because, as the State acknowledges, Mr. Rome repeatedly requested the district court take judicial notice of certain documents from the underlying criminal case. (*See* Resp. Br., p.7.) The

applicable legal standard, articulated in I.R.E. 201(d), *requires* the district court to take judicial notice of documents from the court's file when a party requests it do so.[1] The district court did not follow that legal standard because it made the clearly-erroneous determination that it had not been requested to take judicial notice in the first place. Therefore, the district court's decision to not take judicial notice was an abuse of its discretion because it was not consistent with the applicable standards, nor was it reached through an exercise of reason. As a result, this Court should vacate the decisions tainted by that error (the district court's rulings on the claims presented in Mr. Rome's petition) and remand this case so that the district court can properly weigh those facts from the underlying criminal case in regard to Mr. Rome's claims for post-conviction relief in the first instance.

II.

The District Court's Decision To Deny Mr. Rome's Lesser-Included Instruction Claim Fails To Apply The Proper Standards For Evaluating A Claim Of Ineffective Assistance Of Counsel At An Evidentiary Hearing

Mr. Rome contends that the evidence he presented in regard to trial counsel's failure to request an instruction on the lesser-included offense of accessory-after-the-fact was sufficient to meet his burden to show ineffective assistance of counsel under *Strickland*.[2] The State asserts, for the first time on appeal, that issue was not properly raised below because it was not in

[1] There are other situations in which the decision to take judicial notice is more discretionary. *See* I.R.E. 201(c). In either case, its weighing of the evidence is discretionary, and that is ultimately why the failure to take judicial notice, the failure to consider facts which should have been included in its weighing of the evidence, is an abuse of the district court's discretion. *See Newman*, 149 Idaho at 227.

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Rome's petition for relief. (Resp. Br., p.8.) The State's argument is unfounded because Mr. Rome did raise that issue in his verified amended petition.[3]

Mr. Rome's sixth claim of ineffective assistance of counsel claimed relief because trial counsel failed to request the correct jury instruction for aiding and abetting and did not arguing that alternative theory to the jury. (R., p.31.) Specifically, he alleged that "[m]y attorney failed to obtain a proper jury instruction for 'aiding and abetting'" and that, had trial counsel made that argument, "[t]he jury probably would not have convicted me of aiding and abetting a burglary." (R., pp.31-32; *see* R., p.37 (Mr. Rome verifying the allegations in the amended petition).)

He expounded on that claim in his response to the State's motion for summary dismissal, arguing: "the defense attorney did not argue that, with a receipt from the woman who entered the store, and the circumstances preceding that, that [Mr.] Rome was an accessory after the fact, not a pre-crime aider and abettor." (R., p.62; *see also* R., p.6 (Mr. Rome alleging in the initial *pro se* petition that trial counsel failed to present evidence that the woman had shown him a receipt allegedly for the stolen item).) He also argued that "Idaho requires more than mere knowledge, assent or acquiescence to be guilty of aiding and abetting." (R., p.63 (quoting *State v. Randles*, 117 Idaho 344 (1990).) Finally, he explained that counsel's failure to make that argument was prejudicial because "a conviction for aiding and abetting would not have occurred

[3] That the issue was specifically articulated in the amended petition with the assistance of counsel, rather than the initial *pro se* petition, is of no issue. The point of appointing post-conviction counsel is to assist the *pro se* petitioner in properly framing the issues, so as to present the meritorious claims for the district court's consideration. *See, e.g., Charboneau v. State*, 140 Idaho 789, 793-94 (2004) (reiterating that a *pro se* petitioner may not know what elements he must prove to make out a valid claim for relief, and because of that, appointed post-conviction counsel is allowed to file an amended petition or additional affidavit which present claims and facts in a manner sufficient to prevent summary dismissal of otherwise-valid claims for relief). Therefore, the effect of the amended petition and the initial petition in terms of framing the issues being raised for the district court's consideration is the same.

if [Mr.] Rome's attorney would have properly argued that there was insufficient evidence of aiding and abetting the burglary." (R., p.63.)

As such, Mr. Rome raised the issue – that trial counsel should have argued an accessory-after-the-fact theory to the jury and that he should have requested a proper instruction as part of that argument – in his petition and consistently argued that position below. *Compare Ada County Highway Dist. v. Brooke View, Inc.*, 162 Idaho 138, 142 n.2 (2017) (explaining that an issue had been sufficiently raised below because, though the specific arguments in regard to that issue had evolved, the position taken on the actual issue remained the same throughout the proceedings).

On the merits of this issue, the State reminds the Court that the standard for reviewing a motion to dismiss is one of free review. (Resp. Br., p.9.) However, the State's recitation and application of the standard ignores fully half of the actual standard (*see generally* Resp. Br.):

> In reviewing a decision to grant or deny . . . a directed verdict, the appellate court applies the same standard that is applied by the trial court when originally hearing the motion. This Court must review the record and draw all inferences *in favor of the non-moving party*. Any conflicting evidence must be construed *in favor of the non-moving party*, without deference to the decision of the trial court.

Polk v. Larrabee, 135 Idaho 303, 312 (2000) (emphasis added).[4] In this case, Mr. Rome is the non-moving party because the State moved for the directed verdict. (*See* Tr., p.47, Ls.16-17.)

[4] The standard articulated in *Polk* is applicable in this case because of the particular procedural stance in which this case has arrived before this Court. Specifically, the prosecutor represented that she had evidence to present at the hearing, but did not do so because she chose to move for the directed verdict first. (*See* Tr., p.47, Ls.8-17.) Mr. Rome recognizes that the usual standard when a petition for post-conviction relief proceeds to an evidentiary hearing is: "an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. We exercise free review of the district court's application of the relevant law to the facts." *Thomas v. State*, 145 Idaho 765, 768 (Ct. App. 2008). If that is the standard properly applied in this case, the State's call for free review of the facts without deference (Resp. Br., p.9) would be

Therefore, properly applying the standard, every factual inference should be construed in *Mr. Rome's* favor. When the full standard is properly applied, the State's contention about the sufficiency of Mr. Rome's evidence is revealed to be meritless.[5]

For example, the State contends there was insufficient evidence of deficient performance because trial counsel only testified about what arguments were available in hindsight. (Resp. Br., p.8.) However, applying the proper standard and construing every factual inference in *Mr. Rome*'s favor, trial counsel's uncontradicted testimony indicates (if not directly asserts) that, because there was a reasonable basis for the accessory argument and because trial counsel did not see it at the time, trial counsel was admitting his performance was objectively unreasonable – that an attorney acting reasonably in that situation would have recognized and raised the accessory argument in the district court. (*See* Tr., p.21, L.20 - p.22, L.3.)

Trial counsel's testimony also expressly mentioned the possibility of requesting an instruction on the lesser-included offense:

Q. You did not request an accessory after the fact instruction however, correct?

A. That is correct.

(Tr., p.22, Ls.1-3.) In combination with trial counsel's testimony that he could have argued the accessory theory (Tr., p.21, Ls.21-25), trial counsel's testimony about not requesting an accessory instruction infers that, in making the accessory argument, trial counsel would have requested the applicable lesser-included instruction. (*See also* R., pp.31, 37 (Mr. Rome alleging,

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improper. Furthermore, for the reasons discussed *infra*, even if this Court applies that standard, Mr. Rome met his burden of proof through the uncontradicted testimony of trial counsel and the evidence provided with Mr. Rome's petition.

[5] To be sufficient, Mr. Rome's evidence need only meet a preponderance of the evidence standard. *State v. Yakovac*, 145 Idaho 437, 443 (2008).

under penalty of perjury, that "[m]y attorney failed to obtain a proper jury instruction for 'aiding and abetting'").)[6]

Finally, the inference that the district court would have given that instruction had trial counsel requested it is clear because the district court is statutorily-obligated to give requested instructions when they are proper statements of the law which are not covered by the other instructions. *See* I.C. § 19-2132; *State v. Macias*, 142 Idaho 509, 510 (Ct. App. 2005). It does not appear that the accessory-after-the-fact lesser-included instruction was covered by the other instructions.[7] Again, the standard calls for this Court to construe all factual inferences in Mr. Rome's favor, which means, there is certainly an inference that, had trial counsel requested the lesser-included instruction, it would have been given consistent with the trial court's obligation under I.C. § 19-2132. As such, the uncontradicted evidence Mr. Rome presented was sufficient to show, by a preponderance of the evidence, that trial counsel's performance was objectively unreasonable.

The other question under *Strickland* is whether that deficient performance was prejudicial. The State does not challenge the merits of Mr. Rome's analysis – that the applicable legal precedent reveals there is a reasonable possibility of a different verdict if trial counsel had

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[6] The evidence presented in affidavits in support of the petition can, by itself, carry the petitioner's burden during an evidentiary hearing. *Marr v. State*, 163 Idaho 33, ___, 408 P.3d 31, 36-37 (2017); I.C. § 19-4907. A petitioner's verified allegations have the force of affidavits. *Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993). Therefore, Mr. Rome's verified allegations need to be considered in this Court's review the sufficiency of the evidence.

[7] This actually highlights the impact of the district court's failure to take judicial notice. (*See* Section I, *supra*.) Because the district court refused to take judicial notice of documents from the underlying criminal case, it does not appear that the jury instructions were actually before the district court, and so, would not be before this Court for evaluation. All it has is trial counsel's testimony and Mr. Rome's verified allegation that trial counsel could have, but did not, request such an instruction. Nevertheless, the inference from that evidence is that the lesser-included instruction was needed because it was not covered by the other instructions, and, of course, under the proper standard, all such inferences are to be drawn in Mr. Rome's favor in this case.

requested the lesser-included instruction despite Idaho's acquit-first doctrine. (*See generally* Resp. Br.) Rather, the State simply asserts that there was no evidence of prejudice, and so, the State believes, whether "the district court employed incorrect legal standards, even if true, [is] irrelevant." (Resp. Br., p.9.) The State's argument is meritless under the proper standard.

As the Court of Appeals has explained, "[t]o establish prejudice, the petitioner must show a reasonable possibility that, but for the attorney's deficient performance, the outcome of the proceeding would have been different." *Stevens v. State*, 156 Idaho 396, 409 (Ct. App. 2013). That is a mixed question of fact and law. *Young v. State*, 115 Idaho 52, 54 (Ct. App. 1988). Therefore, when evaluating whether the evidence presented could satisfy the prejudice element, this Court accepts the facts as found by the district court and freely reviews the application of the law to those facts. *See id*. Since the proper standard calls for this Court to review the application of the law to the facts of Mr. Rome's case, his analysis of the applicable law – that several other courts have actually found that there is a reasonable possibility, according to the United States Supreme Court's decision in *Keeble v. United States*, 412 U.S. 205 (1973), of a different result if counsel had requested a viable lesser-included instruction – is not irrelevant to this Court's review of this issue.

At any rate, the State's claim that there is no evidence of prejudice is disproved by the record. Through his verified petition, Mr. Rome attested, under penalty of perjury, that had trial counsel made the accessory-after-the-fact argument, "the outcome of the trial probably would have been different. The jury probably would not have convicted me of aiding and abetting a burglary." (R., pp.31-32, 37.) Affidavits attached to a petition can, by themselves, be sufficient to carry the defendant's burden of proof at an evidentiary hearing. *Marr*, 408 P.3d at 36-37; I.C. § 19-4907. Because Mr. Rome verified the allegations in the amended petition, those

allegations have the same force as an affidavit. *Mata*, 124 Idaho at 593. Furthermore, trial counsel's testimony – that a reasonable attorney would have made that argument – includes an inference that making such an argument could have persuaded the jury to a different verdict. Therefore, construing the facts in the light most favorable to Mr. Rome, they would establish a possibility of a different result if trial counsel had requested the lesser-included instruction. The applicable law recognizes that possibility as a reasonable one.

Therefore, Mr. Rome presented sufficient evidence to show, by a preponderance of the evidence, that trial counsel's deficient performance was prejudicial. As such, this Court should reverse the order denying post-conviction relief on that claim of ineffective assistance of counsel.

CONCLUSION

Mr. Rome respectfully requests that this Court vacate the district court's order dismissing his post-conviction petition and remand this case with instructions for the district court to grant the appropriate relief.

DATED this 16th day of April, 2018.

_____/s/_____
BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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