

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41597

MARK BONCZ,) 2015 Unpublished Opinion No. 392
)
Petitioner-Appellant,) Filed: March 4, 2015
)
v.) Stephen W. Kenyon, Clerk
)
STATE OF IDAHO,) THIS IS AN UNPUBLISHED
) OPINION AND SHALL NOT
Respondent.) BE CITED AS AUTHORITY
)

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Jeff M. Brudie, District Judge.

Judgment summarily dismissing post-conviction action, reversed, and case remanded.

Sara B. Thomas, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant. Eric D. Fredericksen argued.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent. Russell J. Spencer argued.

LANSING, Judge

Mark Boncz was convicted of lewd conduct with a minor. He filed a petition for post-conviction relief asserting, *inter alia*, that his lawyer wrongfully prevented him from testifying at his criminal trial. The post-conviction court agreed that there was a question of material fact regarding whether Boncz had been prevented from testifying, but held that any exclusion of his testimony was not prejudicial. Boncz appeals.

I.

BACKGROUND

After a bench trial, Boncz was convicted of lewd conduct with a minor under sixteen years of age, in violation of Idaho Code § 18-508.¹ Thereafter, Boncz filed a post-conviction action raising forty-one claims. Boncz twice amended his petition with the assistance of counsel. His second amended petition asserts the two claims that are at issue in this appeal. Boncz alleges that he had discussed with his defense attorney the possibility of testifying at trial and that he had planned to testify. However, his attorney did not call him to testify. Boncz alleged that this amounted to ineffective assistance of counsel and a deprivation of his constitutional right to testify.

The State filed a motion for summary disposition, and the district court granted the motion. In its memorandum decision, the court appears not to have distinguished the two claims at issue in this appeal, summarizing the issue as “Petitioner contends that trial counsel did not allow him to testify in his own defense at trial.” It then cited the standard applicable to an ineffective assistance of counsel claim. Applying that standard, and noting that the trial court had not questioned Boncz to determine if he wished to testify, the district court held that Boncz raised a genuine issue of material fact as to whether his defense attorney had been deficient. However, the claim was summarily dismissed because the district court concluded that Boncz had not shown prejudice. In the court’s view, “Boncz provided the court with no exculpatory facts or evidence not already presented at trial.”²

On appeal, Boncz raises two claims of error. First, as to his ineffective assistance of counsel claim, Boncz argues that the court erred by concluding that he failed to show prejudice. He argues that the alleged victim was not credible because her trial testimony was inconsistent with her prior reports to her parents and investigators. Boncz, asserts that his own testimony

¹ In a prior appeal, Boncz challenged only his sentence. *See State v. Boncz*, Docket No. 37642 (Ct. App. Sept. 7, 2011) (unpublished). This Court affirmed the judgment of conviction. *Id.*

² The State argues that the post-conviction court was well situated to make this determination as it was also the trier of fact in the criminal case. This contention is factually mistaken. District Judge Verby presided over the trial, whereas Judge Brudie presided over the post-conviction action. That case was subject to reassignment pursuant to a general order issued by the Idaho Supreme Court, permitting the reassignment of cases from the First Judicial District to judges in the Second Judicial District.

would have helped show that each version of her story lacked credibility or was implausible. Second, he argues that the district court improperly analyzed his constitutional claim. He contends that the district court properly found that he had been deprived of the right to testify, but then improperly applied the burden of proof with regard to prejudice. He contends that the State was required to prove harmlessness and because the State did not present any evidence regarding Boncz's right to testify, it did not meet its burden.

II.

ANALYSIS

Idaho Code section 19-4906 authorizes summary dismissal of a petition for post-conviction relief, either pursuant to a motion by a party or upon the court's own initiative, if "it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). When considering summary dismissal, the district court must construe disputed facts in the petitioner's favor, but the court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123, 136 (2008); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Moreover, because the district court rather than a jury will be the trier of fact in the event of an evidentiary hearing, the district court is not constrained to draw inferences in the petitioner's favor, but is free to arrive at the most probable inferences to be drawn from the evidence. *State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008); *Wolf v. State*, 152 Idaho 64, 67, 266 P.3d 1169, 1172 (Ct. App. 2011); *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). Such inferences will not be disturbed on appeal if the uncontested evidence is sufficient to justify them. *Chavez v. Barrus*, 146 Idaho 212, 218, 192 P.3d 1036, 1042 (2008); *Hayes*, 146 Idaho at 355, 195 P.2d at 714; *Farnsworth v. Dairymen's Creamery Ass'n*, 125 Idaho 866, 868, 876 P.2d 148, 150 (Ct. App. 1994).

Claims may be summarily dismissed if the petitioner's allegations are clearly disproven by the record of the criminal proceedings, if the petitioner has not presented evidence making a prima facie case as to each essential element of the claims, or if the petitioner's allegations do not justify relief as a matter of law. *Kelly v. State*, 149 Idaho 517, 521, 236 P.3d 1277, 1281 (2010); *McKay v. State*, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010); *DeRushé v. State*, 146

Idaho 599, 603, 200 P.3d 1148, 1152 (2009); *Charboneau v. State*, 144 Idaho 900, 903, 174 P.3d 870, 873 (2007); *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Murphy v. State*, 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006); *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct. App. 1996). Thus, summary dismissal of a claim for post-conviction relief is appropriate when the court can conclude, as a matter of law, that the petitioner is not entitled to relief even with all disputed facts construed in the petitioner's favor. For this reason, summary dismissal of a post-conviction petition may be appropriate even when the State does not controvert the petitioner's evidence. *See Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman*, 125 Idaho at 647, 873 P.2d at 901.

Conversely, if the petition, affidavits, and other evidence supporting the petition allege facts that, if true, would entitle the petitioner to relief, the post-conviction claim may not be summarily dismissed. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Stuart v. State*, 118 Idaho 932, 934, 801 P.2d 1283, 1285 (1990); *Sheahan v. State*, 146 Idaho 101, 104, 190 P.3d 920, 923 (Ct. App. 2008); *Roman*, 125 Idaho at 647, 873 P.2d at 901. If a genuine issue of material fact is presented, an evidentiary hearing must be conducted to resolve the factual issues. *Kelly*, 149 Idaho at 521, 236 P.3d at 1281; *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629.

On appeal from an order of summary dismissal, we apply the same standards utilized by the trial courts and examine whether the petitioner's admissible evidence asserts facts which, if true, would entitle the petitioner to relief. *Ridgley v. State*, 148 Idaho 671, 675, 227 P.3d 925, 929 (2010); *Berg*, 131 Idaho at 519, 960 P.2d at 740; *Sheahan*, 146 Idaho at 104, 190 P.3d at 923; *Roman*, 125 Idaho at 647, 873 P.2d at 901. Over questions of law, we exercise free review. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Downing v. State*, 136 Idaho 367, 370, 33 P.3d 841, 844 (Ct. App. 2001); *Martinez v. State*, 130 Idaho 530, 532, 944 P.2d 127, 129 (Ct. App. 1997).

A. The Court Erred by Summarily Dismissing the Ineffective Assistance of Counsel Claim

To prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney's performance was deficient and that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). Because the parties do not contend that the district court

erred by finding that there was a genuine issue of material fact as to whether Boncz's counsel performed deficiently by preventing Boncz from testifying, we address only the prejudice prong.

To establish prejudice, the petitioner must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 694; *Aragon v. State*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988). The significance of Boncz's proposed testimony can be evaluated only within the context of the testimony of several prosecution witnesses, including the child, both of her parents, and a pediatrician. Accordingly, we briefly review the relevant testimony.

It was undisputed that the child lived in a two-story home with her parents and siblings. It is also undisputed that Boncz lived for several months in a camp trailer that was situated in the home's backyard. At the time of the alleged offense, the child was approximately five or six years old, but ten at the time of trial. At trial, she testified to a single incident of touching wherein Boncz rubbed his penis on her vaginal area, and she said that she resisted by trying to push him off with her arms. She said that this occurred inside the trailer.

The child's father testified that the child had reported to him a single episode of manual-genital touching. The child's mother testified at trial that the child reported sexual touching to her, but the mother did not specify where the touching occurred until cross-examination. There, mother was confronted with her grand jury testimony, where she, like the child's father, had specified that the child told her parents that she had been molested "in her room."³ At trial, the mother equivocated and testified that the child "had said something about the trailer and her room so I was not positive."

Dr. Gilbert, a pediatrician who has substantial experience with child abuse victims, opined that the child had probably been sexually assaulted. She interviewed and physically examined the child after the investigation began, approximately four years after the alleged molestation. The child told Dr. Gilbert that Boncz restrained her using bungee cords, pulling her arms above her head and spreading her legs, then hooked the bungee cords to the ends of the bed.

³ The father's trial testimony did not contain the detail that his previous grand jury testimony included. There, the child's father testified the child reported manual-genital touching in the child's home. The alleged touching occurred "upstairs," when Boncz was tucking the child into bed. Consistent with these reports, Father described the home as a two-story home where the child's room was upstairs. He said that the child had given no reports of any additional sexual touching by Boncz.

She said Boncz then put his penis in her vaginal area for a few minutes, then left the child alone in the trailer while he went into the child's home. Thereafter, Boncz allegedly came back to the trailer, put a condom on, and assaulted the child a second time. Dr. Gilbert examined the child and found no evidence of trauma to the child's genitals and opined that significant trauma would have resulted from actual penetration. Finally, she opined that young girls experience significant pain from vaginal touching and that the child might have mistaken that pain for insertion. Dr. Gilbert also testified that certain types of inconsistencies in a child's reports of sexual assault are indicative that the child's report is inaccurate:

[I]f she said it happened in different rooms or if she, you know, again one time it happened with a bungee cord and the next time it didn't, those would be things that lead me to believe that maybe this episode didn't happen or it happened in different ways than she's telling me. The major parts of the story should remain the same when she is telling each separate entity, when she tells Health and Welfare, when she tells law enforcement and when she tells me.

There are at least four major inconsistencies in the child's testimony in this case.⁴ First, she inconsistently reported the place of the molestation. She told her parents that she was molested in the upstairs portion of her home and told everyone else that she was molested in the trailer. The child was also inconsistent regarding the use of restraints. She told Dr. Gilbert that the defendant had strapped her to the bed using bungee cords. At trial, the child testified that she used her arms to attempt to push Boncz off of her, which would have been impossible if her arms had been restrained above her head by bungee cords. Those two inconsistencies are of the types that Dr. Gilbert identified as indications of unreliability. They are not the only major inconsistencies, however. The child also inconsistently reported the number of molestations. In her report to Dr. Gilbert, the child said that she had been molested on two occasions, close in time. In every other instance, including at trial, she reported a single act. The child also inconsistently reported the way she was touched. She told her father that Boncz had touched her with his hand, but reported genital-genital conduct to other witnesses.

⁴ We do not need to address inconsistencies that we deem minor and that experts in this case deemed minor. For example, although the child was inconsistent regarding the time of day when the alleged touching took place, that inconsistency is not especially concerning, especially given the passage of five years from the time of the report until the time of trial.

According to Boncz's affidavit in support of his post-conviction petition, if permitted to testify at trial, he would have contradicted the child's testimony on every point. His affidavit summarized the testimony he would have given as follows:

- a. I did not commit this crime.
- b. I did not bungey [sic] cord [the alleged victim] to the bed. This bed was not even made out. All my stuff was on it. No handles to tie her down.
- c. I did not leave her there, walk to the house to go to the bathroom, and then return only to molest her again.
- d. I did not do any of the things Dr. Gilbert testified [the alleged victim] said happened. She only went by what [the alleged victim] said, no proof.
- e. The area of my trailer where [the alleged victim] described where my bed was is not true. My bed was in the front.
- f. The area of the trailer where [the alleged victim] described the bed's location was for a different renter, not me.
- g. I started locking the door three months after I moved in there when [the alleged victim's brother] had a sleepover and he and his buddies came out to put shaving cream in my hand and then tickle my nose.

In our view, Boncz raised a genuine issue of material fact as to prejudice from not being allowed to testify. Boncz's proposed testimony would have not only rebutted the child's testimony but also would have highlighted the inconsistencies in her reports concerning the use of bungee cords and the number of sexual acts.

This is not a case where the State's evidence was overwhelming. Two statements by the district court, made while sitting as the trier of fact, are telling. First, the court stated that it was deciding the case based largely upon the credibility of the child and corroborating testimony that the parents observed some irritation of the child's genitals. As shown above, the child's reports were inconsistent over time. The evidence also shows that there were other explanations for the irritation, e.g., the child still wore diapers at night--even at the time of trial. Second, the court noted deficiencies in the evidence. Immediately after the trial court rendered its decision, it expressed puzzlement, saying, "I don't know why neither side presented . . . statements that were made by the child victim to law enforcement to Ms. Boden. That could have assisted this Court in its decision."⁵

⁵ At the trial, defense counsel did not adduce two additional versions of the child's story. The first alternative version was reported to Janet Boden, an investigator for the Idaho Department of Health and welfare, which was overseen by the Priest River Police Chief. That interview occurred after the report to the parents, but before the child's interview with Dr. Gilbert. There, the child reported that she was molested after being restrained with bungee

Boncz's proposed testimony was relevant to the critical issue in the case: the credibility of the child as reflected in her various reports and her testimony at trial. Because this was a close case and because the proposed testimony would have highlighted significant inconsistencies in the child's reports, we conclude that the district court erred by holding Boncz had not presented evidence sufficient to make a *prima facie* showing of prejudice from defense counsel's failure to call Boncz as a witness.

B. Boncz's Constitutional Claim

"[A] defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). This right is constitutionally protected and flows from the Fourteen Amendment's guarantee of due process of law, from the Sixth Amendment right to call witnesses in one's favor and, by implication, from the Fifth Amendment protection against compelled testimony. *Id.* at 51-53; *Aragon*, 114 Idaho at 762, 760 P.2d at 1178; *see also Kuehl v. State*, 145 Idaho 607, 611, 181 P.3d 533, 537 (Ct. App. 2008) ("Every criminal defendant has a fundamental right to testify on his or her own behalf."). As the State recognizes, a post-conviction claim alleging a violation of the right to testify is distinct from a claim of ineffective assistance of counsel alleging that an attorney erred by failing to call

cords. She also reported that the defendant ejaculated and placed the ejaculate into a clear cup. He then proceeded to walk into the child's home, where her family was eating breakfast, carrying the cup of ejaculate, while wearing solely his shirt and underpants. Thereafter, she said Boncz returned from her family's home to the trailer, and molested her again.

The second alternate version that was not presented at trial was the child's grand jury testimony. There, the child reported that she was sexually touched in the trailer. She testified that she attempted to run away, but could not. However, she specifically denied being restrained by bungee cords. She also denied any other instances of sexual touching.

Boncz's Second Amended Petition does not allege a claim of ineffective assistance of counsel for counsel's failure to present these versions. We make note of them, however, because the judge who was the trier of fact in the criminal case expressed concern about the absence of that evidence and because these reports contain additional inconsistencies and create further questions regarding the child's credibility. The child told Boden that she was restrained by bungee cords and then specifically denied being restrained by bungee cords in her grand jury testimony. Likewise, these additional reports highlight the child's inconsistency regarding the number of sexual acts. The child told Boden she had been molested twice but did not describe a second molestation in her grand jury testimony.

Perhaps even more importantly, the Boden report contains apparently implausible events. The child's claim that Boncz carried a cup containing semen through an occupied home while partially undressed, is exceedingly strange. No other witness testified that Boncz did so, and given the strangeness and public nature of the alleged act, it would have been hard to overlook.

the defendant as a witness. *See Rossignol v. State*, 152 Idaho 700, 706, 274 P.3d 1, 7 (Ct. App. 2012); *see also DeRushé*, 146 Idaho at 603, 200 P.3d at 1152 (an Idaho Supreme Court similarly distinguishing between those two types of claims). As we said in *Rossignol*:

[T]he issue of the failure of a defendant to testify may be viewed in post-conviction proceedings both as a claim of ineffective assistance of counsel and as a claim of a deprivation of a constitutional right when both are presented to the district court [T]he appropriate inquiry depends upon on how the claim is pled and argued before the district court.

Rossignol, 152 Idaho at 706, 274 P.3d at 7. The State recognizes the import of this holding; the distinction between the two types of claims “is significant because it determines which party bears the *burden of persuasion* on appeal to show whether the alleged deprivation was prejudicial or harmless.” *Id.* at 703, 274 P.3d at 4 (emphasis added). Finally, it appears that the State properly concedes that Boncz raised both an ineffective assistance of counsel claim and a separate constitutional claim.

The parties dispute whether the post-conviction court recognized that Boncz raised two separate claims, and whether the district court ruled on the constitutional claim. We need not reach this question, for our reason for reversing the summary dismissal of Boncz’s ineffective assistance of counsel claim applies equally to the constitutional claim.⁶ Boncz’s *prima facie* showing that he was prevented from testifying and that he was prejudiced thereby raises genuine issues of material fact as to his claim of a direct violation of his constitutional right to testify.

⁶ Boncz argues that the post-conviction court’s failure to recognize his constitutional claim would require automatic reversal. He contends that the State would have borne the burden of proving harmlessness and because “the State presented no evidence of any kind,” it could not have met this burden. This argument fails both factually and legally. Factually, the State filed a motion requesting that the post-conviction court take judicial notice of the entire criminal case file, and it appears that motion was granted. Accordingly, the State presented a great deal of evidence relevant to harmlessness. Legally, as *Rossignol* clarified, Idaho law distinguishes between ineffective assistance of counsel claims and constitutional claims primarily because the difference matters when applying the “burden of *persuasion*.” *Rossignol v. State*, 152 Idaho 700, 703, 274 P.3d 1, 4 (Ct. App. 2012) (emphasis added). The “burden of persuasion” is distinct from the “burden of producing evidence.” *See Cowan v. Bd. of Comm’rs of Fremont Cnty.*, 143 Idaho 501, 515, 148 P.3d 1247, 1261 (2006) (distinguishing the “burden of proof” from the “burden of persuasion” and the “burden of producing evidence”). Therefore, even if the State had failed to adduce any evidence, that failure would not result in an automatic determination that the State failed to meet its burden of persuasion if evidence produced by the petitioner disproved his claim.

Accordingly, because Boncz will prevail in this appeal irrespective of the allocation of the burden of persuasion, the district court's alleged failure to rule on the constitutional issue is immaterial.

III.

CONCLUSION

The district court erred in holding that Boncz had not presented *prima facie* evidence of prejudice from his attorney preventing Boncz from testifying at trial. Accordingly, the judgment of dismissal is reversed and the case is remanded for further proceedings consistent with this opinion.

Judge GUTIERREZ and Judge GRATTON **CONCUR**.