

5-27-2014

Severson v. State Appellant's Reply Brief Dckt. 40769

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IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY SEVERSON,)	
)	
Petitioner-Appellant,)	S.Ct. No. 40769
)	D.Ct. No. CV-2009-1408
vs.)	(Elmore County)
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Elmore

HONORABLE LYNN NORTON
Presiding Judge

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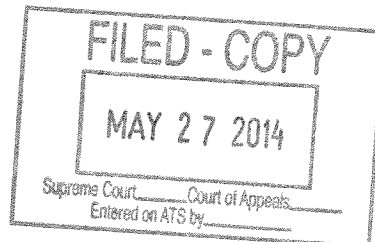


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II. ARGUMENT IN REPLY

A. The District Court Erred in Summarily Dismissing Mr. Severson's Ineffective Assistance of Counsel Claim on the Basis of Res Judicata

Mr. Severson has set out why the district court erred in summarily dismissing his ineffective assistance of counsel claim on the basis of *res judicata* at pages 6-7 of his Opening Brief. Specifically, the district court erred because the issue decided in the direct appeal (whether the prosecutorial misconduct at trial rose to the level of fundamental error) was different from the claim in post-conviction before the court (whether trial counsel was constitutionally ineffective). Therefore, neither issue nor claim preclusion can apply and dismissal on the basis of *res judicata* was erroneous. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007).

The state concedes that claim preclusion cannot apply because a substantive prosecutorial misconduct claim, as raised in the direct appeal, is a different claim than a claim that counsel was ineffective in failing to object to prosecutorial misconduct in closing. Respondent's Brief at page 11.

However, the state appears to assert that issue preclusion should be applied because the prejudice analysis for a substantive claim of prosecutorial misconduct is "more stringent" than the prejudice standard applied to post-conviction claims of ineffective assistance of counsel. Respondent's Brief at pages 11-12, comparing harmless beyond a reasonable doubt to a reasonable probability of a different outcome. From this the state concludes that Mr. Severson cannot meet his burden of proving prejudice for his claim of ineffective assistance of counsel. *Id.*

However, the state's conclusion is wrong because the Supreme Court never reached the

question of whether the prosecutorial misconduct was harmless beyond a reasonable doubt in the direct appeal.

In the direct appeal, the Supreme Court analyzed the issue of prosecutorial misconduct under the fundamental error standard:

. . . Misconduct will be regarded as fundamental error when it goes to the foundation or basis of a defendant's rights or . . . to the foundation of the case or takes from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. However, even when prosecutorial misconduct has resulted in fundamental error, the conviction will not be reversed when that error is harmless. Under the harmless error doctrine, a conviction will stand if the Court is convinced beyond a reasonable doubt that the same result would have been reached by the jury had the prosecutorial misconduct not occurred.

State v. Severson, 147 Idaho 694, 716, 215 P.3d 414, 436 (2009) (internal quotation marks and citations omitted).

Without ever reaching the harmless error analysis, the Supreme Court denied appellate relief because it found that none of the prosecutorial misconduct amounted to fundamental error - that none of the misconduct went to the foundation or basis of Mr. Severson's rights or to the foundation of the case or took from him a right which was essential to his defense and which no court could or ought to permit him to waive. In particular, with regard to the misconduct during closing, the Supreme Court held that the prosecutor's statements that nobody that has testified knows what happened in the Severson house "did not deprive Severson of due process or render his trial fundamentally unfair." 147 Idaho at 719, 215 P.3d at 439. With regard to the comments about Mary speaking from her grave, the Court found the comments inflammatory, but held that "because the statements did not result in an unfair trial or deprive Severson of due process, they were not fundamental error." 147 Idaho at 720, 215 P.3d at 440. With regard to the prosecutor's

reference's to Mary's family, the Supreme Court held that the statements were "arguably improper" but did not rise to the level of fundamental error because "[t]he statements did not impact the fairness of Severson's trial or deprive him of due process and, therefore, were not fundamental error." *Id.* The Court concluded its analysis of the unobjected to prosecutorial misconduct:

In sum, because none of the prosecutor's statements during closing argument rose to the level of fundamental error, they do not justify reversing Severson's conviction.

Id.

The Supreme Court never applied the harmless error standard. Therefore, the state's argument that issue preclusion should apply is incorrect and should be rejected by this Court.

The district court erred in dismissing based upon *res judicata*.

B. Mr. Severson Did Raise a Genuine Issue of Material Fact Regarding Ineffective Assistance of Counsel

Mr. Severson has set out how his petition raised a genuine issue of material fact as to ineffective assistance of counsel thus precluding summary dismissal. Appellant's Opening Brief at pages 5-18. The state has countered that Mr. Severson is incorrect for two reasons: 1) that Mr. Severson failed to raise a genuine question of material fact as to prejudice, and 2) that Mr. Severson failed to allege facts sufficient to overcome a presumption that the failure to object was a reasonable tactical decision. Respondent's Brief at pages 13-16.

Addressing the state's second argument first - Mr. Severson did raise a genuine issue of material fact as to deficient performance.

'To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the claims upon

which the applicant bears the burden of proof.’ *State v. Lovelace*, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003). A ‘*prima facie* case’ means the ‘production of enough evidence to allow the fact-finder to infer the fact at issue and rule in the party’s favor.’ *Black’s Law Dictionary* 1209 (Bryan A. Garner ed., 7th ed., West 1999). . . .

Pizzuto v. State, 146 Idaho 720, 728, 202 P.3d 642, 650 (2007).

In determining whether a *prima facie* case has been pled, the courts are required to accept the petitioner’s un rebutted allegations as true and shall liberally construe the facts and reasonable inferences in favor of the nonmoving party on a motion for summary dismissal. *Hauschulz v. State*, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007). This standard is applied in order to “avoid dismissal of an inartfully drawn complaint that gives adequate notice of the claims sought to be asserted.” *Id.*, at 834-35, 172 P.3d at 1113-1114, quoting *Amco Ins. Co. v. Tri-Spur Inv. Co.*, 140 Idaho 733, 738-39, 101 P.3d 226, 231-232 (2004).

The state has argued that Mr. Severson did not plead a *prima facie* case of deficient performance in failing to object to its misconduct in closing, examining each instance of misconduct individually. Respondent’s Brief pages 14-16.

The state begins with what it refers to as the “Fifth Amendment statement.” *Id.*, page 14. The state asserts that the Supreme Court held that its comment that nobody was present in the house except for Mr. Severson and his wife and neither had testified was not a comment on the right to remain silent. *Id.* However, that is not what the Supreme Court held. Rather, the Supreme Court held that “Severson has failed to prove that the prosecutor’s statement was an impermissible comment on his silence *that constituted fundamental error.*” *State v. Severson*, 147 Idaho at 439, 215 P.3d at 719 (emphasis added). Again, the Court was applying the fundamental error analysis which required it to find that the error violated due process or

rendered the trial fundamentally unfair. The Court did not hold that the statement was proper - rather it held that the statement could be given more than one interpretation and that it was one statement in a 17-day trial so it did not result in a due process violation or a fundamentally unfair trial. *Id.* This is not a *res judicata* holding that the statement was not an objectionable instance of prosecutorial misconduct.

The state next turns to its argument to the jury that Mary was speaking to us from the grave. While the state acknowledges that the Supreme Court held that the argument was inflammatory because it was likely designed to appeal to the sympathies and passions of the jury, 147 Idaho at 439-440, 215 P.3d at 719-720, the state continues that the inflammatory comments were simply referring to Mary's body providing evidence and, "viewed this way" it was not unreasonable for counsel to not object. Respondent's Brief at page 15. Ignoring for a moment that the Supreme Court did find that the state's argument before the jury was misconduct (appeals to emotion, passion or prejudice of the jury through the use of inflammatory tactics are impermissible, *State v. Phillips*, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007)), when the claim must be "viewed this way" to reach a decision against the petitioner, the petitioner has pled a *prima facie* case and summary dismissal is not appropriate. *Hauschulz v. State, supra*, requiring pleadings to be liberally construed in favor of the non-moving party.

The state lastly argues that the failure to object to clear misconduct in its argument referencing Mary's family could have been a strategic choice and therefore summary dismissal was appropriate. The state asserts that counsel may not have objected in order to avoid alienating the jury by appearing to marginalize Mary. Respondent's Brief at page 15. Again, the state is arguing that summary dismissal was appropriate because construing Mr. Severson's allegations

in the light most favorable to the state, the state would prevail after an evidentiary hearing. But, that is not the standard for summary dismissal. In summary dismissal, the court is required to accept the petitioner's un rebutted allegations as true and liberally construe the facts and reasonable inferences in favor of the petitioner. *Hauschulz v. State, supra*. In cases where the record does not establish a strategic purpose for counsel's actions or where there cannot be a strategic purpose or where the error is so great even if counsel believed it was a strategic decision, the strategy itself is deficient performance, summary dismissal is not appropriate. *Milburn v. State*, 130 Idaho 649, 658, 946 P.2d 71, 80 (Ct. App. 1997), holding that errors in strategy can be so grave that they represent circumstances in which an issue of ineffective assistance exists; *Vick v. State*, 131 Idaho 121, 952 P.2d 1257 (Ct. App. 1998), holding that summary disposition was inappropriate where counsel failed to request or provide a report satisfying the requirements of I.C. § 19-2522, did not object to the imposition of sentence without the benefit of such a report, and did not submit other readily available psychological information without undertaking an analysis of whether the decision to not act could have been strategic; *Knutsen v. State*, 144 Idaho 433, 443, 163 P.3d 222, 232 (Ct. App. 2007), holding that summary dismissal was inappropriate when the record contained no explanation of why counsel failed to pursue potentially exculpatory and obtainable information; *McKay v. State*, 148 Idaho 567, 225 P.3d 700 (2009), holding that petitioner had set out a *prima facie* claim of ineffective assistance when the record did not show a strategic purpose for the failure to object to incorrect jury instruction.

In this case, summary disposition was also not appropriate. Counsel did object to other instances of misconduct - therefore the state's theory that counsel strategically chose not to object

to this particular piece of misconduct is at best highly speculative and requires drawing inferences not liberally in favor of Mr. Severson, but rather liberally in favor of the state. As in *Milburn, Vick, Knutsen, and McKay*, summary disposition was not appropriate.

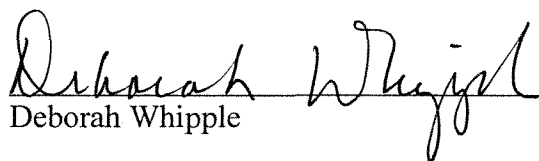
The state also argues that Mr. Severson did not plead a *prima facie* case of prejudice from the deficient performance. Respondent's Brief at page 12-13. The state's argument is that because the Supreme Court in the direct appeal found the errors harmless beyond a reasonable doubt, Mr. Severson cannot plead a *prima facie* case of prejudice. However, as discussed above, the Supreme Court did not find that the prosecutorial misconduct was harmless beyond a reasonable doubt. Rather, the Supreme Court never reached the harmless error analysis. Thus, the state's argument fails. Moreover, as discussed in the Opening Brief, Mr. Severson did plead a *prima facie* case of prejudice.

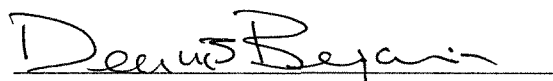
Because Mr. Severson did plead a *prima facie* claim of ineffective assistance of counsel, raising a genuine issue of material fact as to both deficient performance and prejudice resulting in a denial of his state and federal constitutional rights to counsel, Idaho Const. Art. I, § 13, U.S. Const. Amends. 6 and 14, this Court should reverse the order of partial summary dismissal.

III. CONCLUSION

For the reasons set forth in the Opening Brief and above, Mr. Severson respectfully requests that this Court reverse the order of partial summary dismissal and remand for further proceedings.

DATED this 27th day of May, 2014.


Deborah Whipple


Dennis Benjamin
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CERTIFICATE OF SERVICE

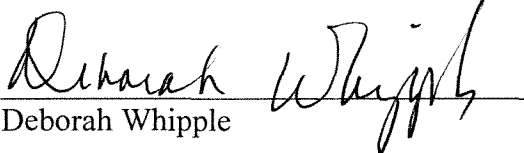
I HEREBY CERTIFY that on this 27th day of May, 2014, I caused two true and correct copies of the foregoing document to be:

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