2015

Jack Daniel Brown, Appellant/Petitioner vs. State of Utah, Appellee/Respondent

Utah Court of Appeals

Jack Daniel Brown #129334
Atty. Pro Se
U.S.P.
P.O. Box 250
Draper UT. 84020

In the Utah Court of Appeals

Jack Daniel Brown Appellant / Petitioner VS. State of Utah Appellee / Respondent	Appellant's Brief Appeal from Fifth district courts denial of Post conviction relief. dist. ct. ~~case~~ case no: 130500433 Appellate case no: 20150266-CA Dist. Judge: ~~Barrett~~ G. Michael Westfall Judge:

The Utah Court of Appeals has jurisdiction pursuant to U.C.A. 78A-4-103.

Opening Statement

The appellant would first like to bring this courts attention to the fact that he is not trained in the law and has access to very little legal materials and authorities, as provided in the accompanying motion for appointment of Counsel.

Issues

I: The Fifth District Court erred in dismissing petition for Post conviction relief for timeliness when the egregious injustice exception brought to light in Gardner v. State 2010 UT 46, 234 P.3d 1115 could have been applied as an exception to P.C.R.A. U.C.A. 78B-9-101 et seq.

On February 18th 2015, Judge G. Michael

Table of contents

1) List of all parties

1) Jack Daniel Brown
2) State of Utah
3) fifth district court Judge G. Michael westfall
4) Michael Esplin, appellants previons counsel

2) Table of contents

3) Table of Authorities

a) Cases listend alphabetically with parallel citations

Santabello V. New york 404. US. 257 Supra at 262;
State V. Benevento, 1999 Ut. 60 983, P.2d 556 (ot 1999);
State V. Forsyth 560 P.2d 337 (UT 1997);
State V Hoff, 814 P.2d 1119 (Ot 1991);
State V. Maguire 184 at Adv. rep 39 (UT 1992);
State V. Mills 898, P.2d 819 at Ct OF app. 1993);
Strickland V. Washington, 466 US. at 688-89,
Strong V Turner, 22 at P.2d 323 (at 1969);
US. V. Bunner 134 F. 3d 1000 Supra at 1003;
U.S. V. Marcusi, 275 F Supp 512, 516;
Willett V. Barnes, 842 P.2d 860 (at 1992);
Windward V. State at 2012, 85, 293 P.3d 259 2-4.

b) rules

No corresponding rules cited

C) Statutes

P.C.R.A	p.g. 1, 4;
U.C.A 78-B-9-101, et seq	p. 1
U.C.A 78-B-9-107 (3)	pg 2-3
Due process	Pg 2

b) Determmative Constitutional provisions

U.S. Constitution	8th amendment p.g 6
U.S. Constitution	14th amendment p.g-6

Westfall ~~a~~ issued a final order dismissing appellants petition for post conviction relief on the ground of timeliness. Judge Westfall alleges that he did not address the issue of timeliness as Judge James L. Shumate of the Fifth District Court instructed him to do. As can be seen in the memorandum; case no: 130500433, appellant, then petitioner, addressed the issue of timeliness.

Applying the one year statute of limitations to ~~the~~ appellants petition violates the Utah Constitution under the "egregious injustice" exception that the Utah Supreme Court announced in Gardner v. State, 2010 UT 46, 234 P.3d 1115.

Counsel Michael Esplin's (Esplin) conduct was nothing short of egregious ~~mis~~ misconduct when he agreed to pay for an out of state transfer if he, appellant, were to accept a plea.

Because appellant discovered that this was not legal and against the rules of conduct more than a year later he should not be without ~~remedie~~ remedy and the raising of the time bar being raised so his ~~my~~ petition can be heard and decided on its ~~merit~~ merits where it appears that there is strong likelihood that there was such unfairness, or failure to accord due process of law, it would be wholly unconscionable not to re examine and have the petition decided on its merits especially in the instant case where petitioners counsel's actions and inactions are nothing short of an egregious injustice.

Brown v Turner, 440 P.2d 968, 969 (UT 1968), (Never the less, however so desirable it may be to adhere to the rules, the law should not be so blind and ~~unreason~~ unreasoning that where an injustice has resulted the victim should be without remedy.)

Winward v. State of Utah, 2012 UT 85, 293 P.3d 259 (Mr. Winward may have a newly recognized claim for ineffective assistance of counsel claim during the plea bargaining process under the recent U.S Supreme Court decision, Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed 398 (2012), which ~~may~~ may extend the statute of limitations on his claim under section 78 B-9-107(2) of the Utah code.)

in Winward, the state does not challange the existance of such an exception but argues that any such exception would not apply to Mr. Winward.

"Egregious Injustice" exception

To satisfy the threshold question appellant must demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense.

1) Apellant is mentally ill and has not been on antipsychotic medication until 2013. Since being on anti psychotic medication he has been able to comprehend that his counsels actions were illegal and has been able to discuss these legal matters with the contract attorneys and other inmates who have legal knowledge.

U.C.A. 78-9-107 (3) The limitations period is tolled ~~for any period is tolled~~ for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity.

Appellant filed his petition for post conviction relief within one year of being medicated, he only became aware of this statute in U.C.A. 78-9-107 (3) recently ~~[redacted]~~. in the ~~[redacted]~~ Fifth District's Courts decision to dismiss his petition in which Judge Westfall quotes the statute.

Apellant argues that he is reasonably justified in failing to meet the one-year statute of limitations because he recieved ineffective assistance of counsel and because the legal resources available to him as an incarcerated defendant are insufficient.

Threshold Question

First as a threshold matter a petitioner must prove that his case presents the type of issue that would rise to the level that would warrent consideration of whether there is an exception to the PCRA's procedural bars. To satisfy this threshold

question, he must demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense.

a) Appellant recieved ineffective assistance of counsel as can be seen by subsequent issues,

b) ~~Ape~~ Appellant is mentally ill and was not on medication until 2013, which is when he filed his petition for post conviction

c) Appellants plea was obtained in an illegal manner

Perameters

As sgid in Winward v. State, 2012 UT 85, 293 P.3d 259 (our decision in Adams does not define the parameters of a new "egregious injustice" exception). ~~Adams~~

This leaves the perameters unable to be briefed since it is not in the PCRA or in any case law.

II: Appellants counsel agreed to pay for him to transfer to another prison so that he may be by his family if he were to accept a plea. (see Exhibit A).

There is no question that Esplins actions under these circumstances constitute ineffective assistance of counsel. While counsels actions are normally entitled to a presumption of reasonableness, Esplins willful disregard for defendants case cannot possibly construed as sound strategy. See Strickland v. Washington, 466 U.S. at 689.

Esplins representation falls "far" below an objective standard of reasonableness"; Strickland 466 U.S. at 688, and therefore defendant has satisfied the first prong of the Strickland test.

Esplins conduct rendered the defendants plea bargaining proceedings unreliable, therefore prejudicing appellant. This portion of the Strickland test is to see whether Esplin's actions, or inactions, prejudiced appellants case. Under this portion a litigant is required to "show that there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different.

Turrentine v. Mullin, 390 F.3d 1181, 1208, (10th Cir. 2004). in Turrentine, the Tenth Circuit stated this occurs "(w)here the evidence ~~@~~ overwhelmingly establishe(s) that [the] attorney abandoned the required duty of loyalty to his client, and where counsel acted with reckless disregard for his clients best interests and at times, apparently with the intention to weaken his clients case.) 390 F.3d at 1208 (Citation and internal quotation marks omitted.)

Constructive denial of counsel has also been found where, due to counsels defecient performance, a proceeding itself is forfitted. see Flores-Ortega, 528 U.S. at 483-84, (a "denial of the entire judicial proceeding itself, which a [litigant] wanted at the time and which he had a right,... demands a presumption of prejudice".)

A plea of guilty pursuant to a plea bargain is only admissable if it was made freely and voluntarily without undue compulsion or undue inducement. Franklin v. State, 610 P.2d 732, 734-35 (NV 1980); Strong v. Turner, 22 UT P.2d. 323 (UT 1969); State v. Forsyth, 560 P.2d 337 (UT 1977); State v. Maguire, 184 UT. Adv. Rep 39 (UT 1992); State v. Hoff, 814 P.2d 1119 (UT 1991); Willett v. Barnes, 842 P.2d 860 (UT. 1992); State v. Mills, 898 P.2d 819 (UT Ct. App. 1993); State v. Benvento, 1999 UT 60 983 P.2d ~~556~~ 556 (UT 1999).

In order for a court to accept a negotiated plea, it ~~must be~~ not only must have been voluntary, it must be proven to be the product of a "natural intellect", and of "free will". Blackburn v. Alabama, 361 U.S. 199 (1960).

When a plea agreement rests in any significant degree on a promise or representation of the experts involved (I.E. the prosecuting attorney, Judges, defense counsel), then it can be said to be part of the inducement or consideration by the defendant, such a promise must be fulfilled. Santobello v. New York, 404 U.S. 257, supra at 262; Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978); U.S. v. Mancusi, 275 F. Supp. 512, 516; U.S. v. Bunner, 134 F.3d 1000, supra at pg. 1003.

III.

Was there ineffective assistance of counsel during trial proceedings?

The appellants conviction and sentence was obtained through the ineffective assistance of counsel in violation of his due process and equal protection rights under the Utah const. Art. I sec. 7 and 12, and the 6th ~~amendment~~ and 14th amendments of the U.S. const. The appellant's claim that trial counsel provided their client with ineffective assistance of counsel are based on the following as well as previously mentioned issues:

a) He was never informed that under U.C.A. 76-3-207 he was entitled to proceed with sentencing by a jury upon pleading guilty to a capital felony;

b) Inadequate investigation of appellants life history;

c) Counsels failure to raise affirmative defense;

d) essential element of to raise the charge was dismissed leaving it unproven;

e) Counsel failed to make a reasonable investigation into contradictory witness statements in an attempt to disqualify them.

Conclusion

Appellant was constructivly denied the effective assistance of counsel ~~on~~ in violation of the Sixth amendment of the U.S. constitution, and the fourteenth amendment of the U.S. constitution right to due process, in which he is clearly entitled to.

Relief Sought

Appellant is requesting that he be able to withdraw his plea and be remanded back to the Fifth district court for disposition, so that he may get the rights that he is constitutionally entitled to.

Wherefore Appellant respectively submits this appellate ~~brief~~ brief.

Dated this 27th day of August, 2015

Jack Brown
Att. Pro se

EXHIBIT A

ESPLIN | WEIGHT
ATTORNEYS AT LAW

Michael D. Esplin
Gary H. Weight
Laura H. Cabanilla
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Grant C. Nagamatsu*
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Nyal C. Bodily
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DELIVERY VIA U.S. MAIL

May 28, 2009

Jack Brown
Inmate Number #27939
Inmate Housing U2-214
Utah State Prison
P.O. box 250
Draper, Utah 84020-0250

Re: Transfer

Dear Jack,

I certainly remember our conversation about your wanting a transfer. I also remember that both Mary and I advised you that being able to be transferred was not a condition of your plea, and that you should make the decision based upon the other considerations such as strength of the state's case, likelihood of being able to get a better result from a jury, and being able to be assured of getting the death penalty off the table. I recall that your decision was based on those factors, not the possibility of getting a transfer.

However, I do know that getting a transfer was important to you. I did indicate that I would be willing to assist you financially in paying the transfer fee. I am still willing to do that (although the amount you initially indicated was supposed to be around $2,000.00 as opposed the $3,800.00 it apparently now will cost). I have been in touch with the transportation division to arrange the payment. I wanted to talk with Anne Hobbs, who is the person in charge of transfers and who was the person I talked with initially to see if an LWOP prisoner could be eligible for a compassionate transfer. I was not able to talk with her and the information I received caused me some concern. The reason is that the money needs to be in place before the transfer people even send the request to Nevada. If for some reason Nevada declines to accept the transfer, the funds are not returned to the person who posted them. Also, the reason the cost is so high to transfer a prisoner from here to Nevada is that the cost includes a return trip so that if the prisoner gets to Nevada and then decides he doesn't like it there, there are funds there to finance the return trip,

so that's where the difference between the approx. $2,000.00 you originally thought the cost to be and the approx. $4,000.00 that they want up front. Since you are on an LWOP sentence, if you stay in Nevada for the duration of the sentence, the money for the transfer back is never used or returned.

So this is where I have a problem. I am certainly willing to put up the whole amount if in fact your transfer goes through. However, I have reservations about paying the funds in and then having Nevada refuse to accept your transfer. In that case, I would be out the money and you would still be at the USP.

I was able to contact Anne Hobbs recently to see if there is a way I can post the money and then if the transfer doesn't go through get the money refunded. She has indicated to me that she has discussed this situation with the new deputy warden because she has concerns about the current system since it results in those who would finance transfers (in most cases family members) being reluctant to do so. The deputy warden has been out of town but will be back next Monday. She has promised to bring the issue up to see if there is a way to either change the procedure or to arrange for me to guarantee payment upon acceptance by Nevada. Hopefully, the issue will be resolved and you can be on your way. I have the funds ready as soon as there is a procedure in place.

Sincerely,

ESPLIN | WEIGHT,
Attorneys at Law

MICHAEL D. ESPLIN

Cc:

EXHIBIT A

ESPLIN | WEIGHT

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Delivery Via U.S. Mail

July 6, 2012

Jack Brown
Inmate # 129334
P.O. Box 250
Draper, Utah 84020

Re: Transfer funds

Dear Jack:

First let me respond to the claims you have made to me and to the Utah State Bar Association regarding my agreement to assist you with payment of funds for a transfer. The question of whether or not you received aid from me to assist you was not part of your plea bargain and both Mary and I remember that we made that very clear to you. That was also made clear to you again at the time you entered your plea in St. George. The offer to assist was a humanitarian offer made by me that was completely independent of your decision to plead guilty and accept the LWOP.

Second. I did indicate to you that I would be willing to help with the costs of a transfer if you qualified for a transfer. Of course that was after being informed by you that the cost would be around $2,000.00. You did not inform me that the money for the transfer would need to be paid before you could qualify for the transfer. I was under the impression that if you were accepted for a transfer, then I would provide the funds to the prison for the costs of the transfer.

You did not inform me that in fact $2,000.00 was only half the money that would be required and that the full amount of $4,000.00 would need to be paid up front before it was determined that you were even eligible for a transfer. I was still willing to put up the money if I was assured by the prison that it would be refunded directly to me. I made efforts to accomplish that. However, when I contacted the warden's office and talked with Anne Hobbs, I was told that there was no procedure in place that would allow me to make a deposit with the prison to fund the transfer without the money going directly into your inmate account. She indicated that she had raised the concern that I and others had

raised about that procedure, but that the warden had not changed the deposit conditions to avoid having to deposit the funds in your inmate account. I communicated that information to you in the letter dated May 28, 2009. I indicated that if the procedure were changed I was still prepared to deposit the money.

Third. As I read the current policy apparently there have been some changes that creates a transportation account in the inmate's name to fund the costs of the transfer which must be fully funded before the transfer can be pursued. However, as I read the information, the concerns I originally expressed have not been resolved. The prison does not keep track of the person or persons who donate the funds and is not part of the process of seeing that the funds are returned to the person or persons who provided them. The amount required to cover the return trip is still held in the transportation account to assure the costs of transportation back to Utah are covered in the event it is necessary for orders to show cause or for a return trip if things don't work out in the other state. In the case where the inmate is not accepted for transfer, the money remains in the transportation account and the inmate may request transfers to other states or he can request the account be closed. The money is then transferred to the inmate's account and he is responsible to direct that a "check be cut to return the money to the individual who deposited" the funds.

That means that there is no requirement or assurance to the provider of the funds that if the transfer does not occur, the funds will be returned to the person who provided them. This arrangement does not meet the concerns that I had with protecting the funds from misuse or use other than for a transfer. The procedure does not ensure that if the transfer did not take place I would receive the return of the funds. Of further concern is the fact that the information indicates that if you have any fines or restitution owed to the Department, those items would be deducted from the funds in the transportation account.

You have provided an affidavit to assure me that you would return the funds if the transfer did not go through. Of course under the circumstances your affidavit provides nothing other than your word that my money would be returned. In short, it is not worth the paper it is written on. I am left to wonder what would Jack Brown do in the event that the $4,000.00 was deposited but the transfer did not go through? Would he return the full funds as promised in his letter and affidavit? Or would he simply keep the money?

Fourth. Because of some additional events that have transpired since I last looked into the matter, I don't need to determine what Jack Brown would do, because your conduct indicates what you would do. Somehow I just don't think you would be motivated to return the funds. I think that Jack Brown would do exactly what he has done in the past. He would look out for Jack Brown without much thought at all of any obligation, written or otherwise, to return the money.

Even if I felt compelled to trust you to return the funds, I doubt you would be in a position to do so. You referred to the fact that you just completed some civil litigation. You did not mention that the civil litigation resulted in a judgment against you in $182,515,865.32. I looked up that civil litigation and determined that $158,820,440.00 of that judgment is for punitive damages. Currently, the State of Utah by statute has an interest in any punitive damages in excess of $250,000.00. What are the chances that if a person were to go against his better judgment and make $4,000.00 available to Jack

Brown, that the State of Utah would simply ignore the fact that Jack Brown had that amount in his inmate account and not attempt to seize it? In my opinion those chances are not good.

Fifth. At this point, the concerns expressed above don't really matter. Your actions in this matter speak much more loudly and convincingly than your hollow promises. You have filed a bar complaint seeking to have the bar take action against me for failing to simply hand over $4,000.00 to you with no guarantee of return. Your conduct in threatening me and filing the bar complaint have created a conflict of interest. The allegation that I somehow have either a legal or ethical obligated to assist in the transfer has created a conflict. I have never had any legal obligation to assist you. Any ethical or moral obligation went out the window when there was no procedure to meet the concerns expressed above. I don't understand how you can attempt to get the bar to sanction me and then have any belief that I would still have any desire to assist you in any way. Although my willingness to help was initially genuine, by your conduct, you have extinguished any desire or other motivation I had for helping you.

To answer your question, I do not intend to assist you in any manner or provide any funds for any purpose to you.

Sincerely yours,

ESPLIN | WEIGHT

Michael D. Esplin
Attorney at Law

MDE/ja

Mailing Certificate

I do attest that a true and correct copy of the foregoing was mailed to:

Atty. Gen. office
P.O. Box 140854
S.L.C. UT
84114-0854

Jack Brown